Book Reviews

Edited by

Ryszard Piotrowicz

The Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order

Gerry Simpson

(Cambridge University Press, Cambridge, 2004, xix + 391 pp)

The idea of sovereign equality has always been understood as a doctrine rooted in legal status, not in state capacity, as otherwise it too easily succumbs to the political objection that some states are evidently more equal than others. Simpson's book does not deal with this simplistic tension, but with the much more interesting thesis that 'unequal sovereignty', far from being some extra-legal condition, has long been an accepted part of the international legal order itself: this condition of inequality has been legalised into existence over the last two centuries. In a rich book that authoritatively encompasses legal, historical, international relations and political theory scholarship, Simpson elegantly demonstrates how and why this has come to pass, and with what implications for the contemporary legal order.

The book is interested in two dimensions of juridical sovereignty. These are termed, respectively, 'legalised hegemony' and 'liberal anti-pluralism'. The first of these has functioned to give legal sanction to the special rights and responsibilities of the great powers, for instance in the United Nations (UN) Security Council, and thus has embellished sovereign equality by making those additional entitlements an essential part of its functioning. The latter refers to the degree of (in)tolerance within international society of specific regime types, and amounts to a practical elaboration of sovereign equality whereby some states have come to enjoy less legal protection than others, and in effect have become 'outlaws'. This latter process is traced particularly with regard to the 'criminalisation' of former enemy states during the twentieth century, in contrast to the practice of the early nineteenth. It has culminated in the rampant anti-pluralism of the post-cold war period, expressly through the attempted justifications for compulsory regime change. Be it noted, however, that France's 'non-criminalisation' after 1815 was itself dependent upon the regime change represented by the Bourbon restoration. These various issues are explored historically, with reference to the cases of the post-Vienna order, the Hague Conference of 1907, the framing of the UN Charter at San Francisco in 1945, and the development of the post-cold war order, epitomised by the Kosovo intervention.

Simpson's historical argument takes 1815 as a major milestone, and this works better with regard to the 'legalised hegemony' than it does with 'anti-pluralism'. While individual great powers had long existed as a matter of fact, the great powers collectively, as a distinct legal category, assuredly did emerge towards the close of the Napoleonic War. Historians commonly point to meetings held in the second half of September 1814 as formalising the status of the great powers, and the subsequent Paris and Vienna instruments gave 'constitutional validation' (p 75, 106-7) to this differentiation. On anti-pluralism, it is a pity that Simpson's study does not start earlier. It does make passing references to Westphalia, and the post-Westphalian order, and suggests that 1815 is of greater import than 1648 (p 35). However, Simpson reads 1648 in a largely conventional way. This does less than full justice to the extent to which both historians and political theorists have now challenged the so-called 'myths' of Westphalia. In any case, the plurality or otherwise of international society had been debated as intensely in the sixteenth and seventeenth centuries after the 'discoveries' – by the Spanish school and Grotius amongst many others – and again during the eighteenth century around the continuing notion of Christendom. For this reason, the post-1815 development of the 'standard of civilisation' as the test of legal standing tapped into a theme that had characterised European international society since its very inception. This is not to challenge Simpson's thesis, merely to question the salience of 1815 with regard to this particular development.

The historical tale becomes somewhat fuzzy again in the choice of the Hague Conference as one of the case studies. The problem arises when the reader discovers that this chapter includes also a discussion of the Versailles settlement and the drafting of the League Covenant. Both of these, to be sure, were landmark events in the history of legalised hegemony and liberal anti-pluralism (*vide* the provisions for the League Council, and the preclusion of Germany and the Soviet Union from membership), but they can scarcely be understood as some kind of footnote to the Hague meeting. These outcomes were driven by the momentous impacts of the Great War, not by the working out of some prior Hague logic.

Elsewhere, the historical comparisons work to much greater effect. Simpson's schema allows him to bring the post-1815 interventions into dialogue with that in Kosovo in 1999. Most memorably, in drawing attention to the 'idiosyncratic mysticism among some of the major players' in both episodes (p 202), he invokes a striking comparison between Tony Blair and Tsar Alexander 1. While largely inexact in detail, this yet has just enough substance to be rather scarily revealing.

The author's ambitious and persuasive analysis might fruitfully have been pushed just one step further by exploring the ways in which his two themes have increasingly interacted with each other. Simpson treats the Kosovo case as an attempt to 'regionalise' the legalised hegemony for dealing with it, by consigning it within the aegis of the North Atlantic Treaty Organization (NATO). There is no reason to doubt that this was so, and at the time this was perhaps the dominant perspective. There was, however, another agenda at

work, and this is now more visible retrospectively, in the light of events surrounding Iraq: the operative legalised hegemony should be informed by the democratic governance criteria that underpinned liberal anti-pluralism. In diplomatic and legal practice, what this amounted to was an attempt to vindicate the NATO action, in the absence of UN Security Council authorisation, not simply by appeal to the humanitarian ends, but additionally to the democratic credentials of the NATO members, against which the credentials of those states likely to veto any authorising UN Security Council resolution were deemed wanting. The suggestion was that the scope of the legalised hegemony could reasonably be restricted for that reason. In short, this should be understood as a critical moment when an attempt was made to redefine the scope of the legalised hegemony in the light of the doctrine of liberal anti-pluralism: it is the point at which Simpson's two strands intersect. The attempt largely failed, and the Iraq imbroglio saw it collapse altogether. The connection remains highly revealing for all that, and if anything adds yet further weight to Simpson's impressive thesis.

The argument of the book serves two main purposes. First, it demonstrates with great assurance that what some might otherwise consider as current departures from the strict principle of sovereign equality – legalised hegemony and anti-pluralism – are instead historically deeply embedded in that principle. If anything, it is the period of putative universalism during 1960-89 that represents the exception, not the rule. Second, despite this historical perspective, we have no reason to be complacent. The emerging tensions in the international legal order give rise to a 'present crisis' that is 'particularly acute' (p 353). This valuable sense of perspective, no less than the timely admonition, commands our respectful attention.

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Tampering with Asylum: A Universal Humanitarian Problem

Frank Brennan
(University of Queensland Press, 2003, xvii + 201 pp)

Frank Brennan's comparative analysis of Australia's refugee policies and practices with those in the United States of America, the United Kingdom and Germany, is a solid non-academic, non-legal read. As refugee policies continue to occupy the minds of both politicians and society, *Tampering with Asylum: A Universal Humanitarian Problem* makes a timely contribution to the debate. It provides a thorough introduction to the phenomenon of 'boat people' in Australia and the responses of the Australian government from the so-called 'first wave' between 1976 and 1981, when 2,077 Indochinese came to Australia in 54 boats, to the latest, so-called 'fourth wave', when in late 1999 people began arriving from Afghanistan, Iran and Iraq via Indonesia (chapter 2).[1]

1 Referring to these arrivals as 'waves', while notably in common parlance, still seems to me to be an exaggeration. Perhaps four 'ripples' might have been a more

Thereafter the book tackles some of the most controversial aspects of the Australian approach to asylum, namely border control, reception and detention of asylum-seekers, courts and adjudication of claims, and refugee and humanitarian status. Each chapter begins with an historical overview of policy developments, setting the scene for a range of proposed changes. Brennan's approach tends to question the policy platform of the Australian government amid a mixture of factual accounts, statistics and moral reasoning, rather than through the use of legal arguments.

As a starting point, while not wishing to assess the book word-by-word or paragraph-by-paragraph, one has to question why the United States, the United Kingdom and Germany were selected as the countries 'most useful' for a comparative analysis (p 13). Is Brennan suggesting that they are Australia's equivalents? Apart from being western countries with similar Gross Domestic Products per capita, their population sizes far exceed Australia's, as do the number of refugees they receive. According to Brennan, these three countries received between 6.7 to 7.4 times the number of refugees as Australia in 2001 (p 13). While the UK shares a similar geography with Australia in being an island nation, it is far closer to continental Europe, with superior transport links, than Australia is to Indonesia. The US, the UK and Australia each have a long history of voluntary and structured immigration programs, but Germany is the odd one out. The choice of countries is by far the greatest mystery of the book and no explanation is provided. Brennan refers in passing to Canada and Sweden (p 14), but unfortunately does not go on to deal with them in detail. These countries could have provided enlightening comparisons as they tend to be viewed as refugee-friendly countries, rather than the three chosen that are increasingly adopting restrictive asylum policies. I fear that this may have made Brennan's analysis a comparison with the lowest common denominator, rather than the highest.

Chapters 4 and 6 are the most comprehensive in the book. The chapter on the 'reception and detention of unauthorised asylum-seekers' successfully provides a lengthy and detailed account of Australia's policies, including their effects on individual asylum-seekers and on Australia's international reputation. Here the comparative analysis is highly beneficial in so far as it is noted that countries receiving far greater numbers of asylum-seekers do not resort to mandatory detention, but have introduced a range of alternative measures. The author also points out the unequal treatment of asylum-seekers arriving illegally with those arriving legally and the implications this poses for article 31 of the 1951 Refugee Convention. He further effectively questions why in 1992, at the start of the detention policy, we were so preoccupied with asylum-seekers entering in an unauthorised manner and not the 81,000 over-stayers entering through legal channels (p 88). Brennan's question remains valid after more than ten years of mandatory detention.

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appropriate description in light of the comparative analysis with countries receiving far greater numbers of refugees than Australia.

The chapter on courts and adjudication is similarly thorough. Not only does Brennan present statistics on the performance of the asylum adjudication system at the primary and review stages, he also provides an accurate and straightforward account of the historical attempts at removing judicial review rights by successive governments, including the latest effort of applying a 'privative' clause that was declared unconstitutional by the High Court in February 2003 (p 151).[2]

In addition to a comparative overview of Australia's policies, Brennan proposes a range of alternatives to the current approach. Brennan's tactic is pragmatic in engaging directly with current Australian thinking (and moreover, with the Australian government), rather than being idealistic and taking the moral high ground. This approach may appeal to many readers as well as the government, but I found some of his proposals to be worrisome, not least for their lack of consideration for the framework of international law. Furthermore, his proposals rarely draw upon the practice of the US, the UK or Germany, and rasing the question of their relevance. For the international lawyer, some of Brennan's proposals appear problematic; for the local policy-maker, they may help bridge the political impasse. Whatever one's viewpoint, they at least place new ideas on the table. I shall highlight a few examples.

While almost scathing in relation to Australia's recent efforts at border control (pp 81-82), Brennan proposes to:

> escort[-] [asylum-seekers] to a place such as Christmas Island where there might be an initial determination as to whether any persons on board have a credible fear of persecution. If they do, they should be transported safely to the Australian mainland and processed for a protection claim. If they do not, they could properly be made to reboard their vessel and return to Indonesia. Should they refuse to do so, only then should they be taken forcibly by safe means back to Indonesia or to their own country (p 83).

This proposal is not dissimilar to the Pacific Solution itself and raises many similar questions, including who would carry out the 'initial determinations', access to review, and the applicability of Australian law. The book does not explain whether Christmas Island would remain an 'excised offshore place' for the purposes of the Migration Act. In some ways, the proposal appears akin to 'accelerated procedures' that have been introduced in a number of other jurisdictions amid heavy criticism from the United Nations High Commissioner for Refugees (UNHCR). The chapter on border control also fails to take into account the Protocol on Smuggling that imposes various obligations upon states parties. Australia signed the Protocol on 21 December 2001, and ratified it on 27 May 2004.

In relation to judicial review, Brennan suggests, *inter alia*, that '[t]here should be an automatic right to appeal questions of law to the Federal Magistrates' Court', in addition to which '[t]he government could be given the option of applying to the court that any further appeal proceed only once the applicant has been removed from Australia' (p 173). In relation to the latter, the

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2 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24.

comparative analysis serves to lower the bar, by the author's nonchalant observation that, 'In Europe it is now common to permit the removal of failed asylum seekers while their appeals to the higher courts are being processed' (p 172). In many cases, it is frequently questions of law that impinge upon whether or not an asylum-seeker will be granted status. The idea of returning an asylum-seeker to their country of origin while they await the final confirmation of their status would inevitably lead to returning some asylum-seekers to places of persecution and thereby directly infringing important safeguards against *non-refoulement*, the cornerstone of the refugee protection regime.

While efficiency in asylum processing is an important procedural question that demands careful consideration, it ought not be promoted above significant rules of law. What might reduce the demand for judicial review and pressure on higher courts is, Brennan argues, improved professionalism and independence and increased public accountability and scrutiny of the Refugee Review Tribunal (RRT) (p 160). This is a view shared by some members of the legal profession, who claim that disgruntlement with the RRT causes asylum-seekers to seek review of their rejected decisions automatically. He also recommends various administrative improvements that could be easily implemented and increase the effectiveness of the Tribunal, including, for example, that appeals 'be put in writing without the need for an oral hearing' (p 162).

While the author's lack of recourse to legal arguments, including to the relevant provisions of the 1951 Refugee Convention, was at times frustrating to me as an international lawyer with a background in international refugee law, the book is an important contribution to educating the Australian public to the peculiarities of our system. Overall, it is a good healthy read that equips the reader with plenty of information to be able to participate in one of the hottest debates in Australian political and social circles in recent years.

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The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries

James Crawford
(Cambridge University Press, Cambridge, 2002, xxxii + 387 pp)

The General Assembly of the United Nations (UN) has the responsibility under article 13(1) (a) of the Charter to 'encourag[e] the progressive development of international law and its codification'. In 1948 it took a major step to meet that responsibility by establishing the International Law Commission (ILC). The Commission, on the basis of a review of international law carried out by Professor Hersch Lauterpacht, included state responsibility in its initial program of 14 topics.

In its first decade the Commission was very busy with other major issues, including the law of the sea, the law of treaties, the rights and duties of states, the Nuremberg principles and diplomatic and consular relations. Accordingly, it

was not until 1957 that it had its first general debate on reports submitted by F V García Amador of Cuba. He emphasised state responsibility for injuries to aliens and their property, matters also at the centre of a draft convention prepared by Professors Louis B Sohn and Richard R Baxter of Harvard Law School, at the request of the Director of the Codification Division of the Office of Legal Affairs of the UN Secretariat. García Amador's emphasis and his substantive proposals (for instance requiring prompt, adequate and effective compensation to the alien owners of property which has been nationalised) were criticised, in effect, for their political bias, a failing that some members of the Commission saw as exacerbated by the Secretariat's action. Others defended that action, which they said had been approved by the Commission.[1]

Given that strong division of opinion, it is hardly surprising that the Commission had made no progress on the García Amador reports when he left the Commission at the end of 1961. What it then did, under the firm guidance of Professor Roberto Ago, who was to be rapporteur from 1963 to 1979, was to change the topic in a fundamental way, while maintaining the same title. One of the important opportunities available to a law commission, particularly one that may itself fix its agenda in whole or in part, is to reshape the topics on its agenda. This particular reshaping led, after almost another 30 years, to the draft articles which, as Professor James Crawford says in his preface to this valuable collection:

> are a contribution to the codification and progressive development of a fundamental chapter in international law. In that respect, potentially at least, they rank alongside the Draft Articles on the Law of Treaties 1966 which became, with limited changes, the Vienna Convention on the Law of Treaties of 1969 (p ix).

This volume, in addition to reproducing the final draft articles of 2001, their commentaries, their drafting history, the previous draft articles of 1996 and a table of equivalent articles, includes a most interesting introduction by Professor Crawford, who was the fifth and final rapporteur on the topic. While, as he acknowledges, the final text owes much to many members of the Commission and to the continuing stream of comments by states and others, there can be no doubt that the range of talents and commitment which he, the first common law rapporteur on the topic, brought to the task was essential.

This 'fundamental chapter of international law like the Vienna Convention on Treaties, concerns not the substantive obligations of states under international law (in respect of the use of force, aliens, human rights, trade, environment etc) but rather, the basics of the international legal order. These elements are the internationally wrongful act, the content of the international responsibility of a state, and the implementation of that responsibility, to refer to the titles of parts one to three of the Draft. (The remaining part, headed General, includes savings provisions.) Those fundamentals are expressed in just 59 articles, which take only 12 pages of the present volume.

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1 *Yearbook of the International Law Commission* (vol II, 1969) 125, 136, [67]-[68].

Confusingly (for this reviewer at least) the articles which, to quote from the first sentence of the Commission's commentary to the draft articles, 'seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibilities of States for their internationally wrongful acts' are called 'secondary rules'. H L A Hart had drawn a similar distinction in *The Concept of Law* in 1961, using the same adjectives, and the usage can be sensed in the Hague lectures given by the 32-year-old Professor Ago in 1939. The lectures foreshadow the approach he took 25 years later.[2] He begins with the concept of the international unlawful act; discusses the objective element – the breach of an international obligation of the state – and the subjective – the need to impute that breach to a subject of international law; turns to different types of international unlawful acts (conduct and outcome, acts and omissions, simple and complex, instantaneous and continuing, civil and criminal – the forerunner to international crimes, the subject of a draft article 19, which was finally removed); and circumstances excluding unlawfulness (consent, lawful sanctions against unlawful acts, legitimate defence and necessity).[3] My point about the words is, I think, not simply semantic. The 'framework' (a term also used by the Commission) and the 'fundamentals' may be seen as diminished by being categorised as secondary, and this underlying durable structure, this time to use Professor Crawford's words (p 15), is surely not to be seen as inferior to a bilateral visa fees abolition agreement even if that is considered to set out 'primary' obligations. Fortunately, the adjectives attached to the distinction do not appear in the draft articles themselves, but only in the commentary. I do not of course deny the essential value of the distinction in getting the present articles completed. The process was plainly very difficult (as appears for instance from the dramatic and unique resignation of an earlier special rapporteur), even when the topic was defined and limited in the way it was.

One notable feature of the lengthy process of preparation of the text was the range of sources and influences that bore on it. Governments of course have the opportunity, recognised in the Statute of the ILC, to make written comments on drafts and also contribute in the annual debates in the Sixth Committee of the UN General Assembly. Many states took advantage of those opportunities. So, too, did many in the scholarly community, as appears from the 22-page select bibliography included in this volume; their influence appears in the many references included in the commentaries to the Draft Articles. The Commission's inclusion of those references contrasts with the decision taken by the Commission in 1966 to exclude any references to legal literature in the commentaries on its draft articles on the law of treaties. In the words of the special rapporteur, Sir Humphrey Waldock (of the UK), the final report should not give any indication of being based on one legal system more than another; it

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2 R Ago, 'Le Délit International' (1939) 68 *Recueil des Cours* 419.

3 This framework originated in the Memoranda submitted by members of the Sub-Committee on State Responsibility, which are reproduced as Appendix II to Annex I to *Yearbook of the International Law Commission* (vol II 1963) 237.

should constitute a purely international work.[4] At the end of the process Grigori Tunkin (of the USSR) regretted that, although the Commentaries were in general excellent, they did not adequately reflect the practice of states and placed undue emphasis on pronouncements of the International Court of Justice (ICJ).[5] The response might have been made that some of the legal literature, which had been excluded, had as its principal purpose the gathering of state practice.

A further striking feature of the process followed by the Commission and the sources on which it drew was the interaction between international courts and tribunals and the Commission. This has of course been seen before, for instance in the dramatic reversal of the Commission's position on reservations to treaties between 1951 and 1966, but the length of the present process, the scope of the project, and the increased volume of litigation makes the extent and effect of the interaction markedly different. Notable examples relate to the articles on 'Circumstances Precluding Wrongfulness' particularly those concerned with *force majeure*, distress and necessity (articles 23-25) (pp 170-186), where the Commission in its commentaries discusses and responds to discussions of earlier drafts by the ICJ in the *Gabčikovo–Nagymaros Project Case*,[6] and by the tribunal in the *Rainbow Warrior Case*.[7] Others appear in the commentaries to the provisions relating to countermeasures (articles 49-54) (pp 281-305), where again the *Gabčikovo–Nagymaros Case* is prominent.

These elements of the process bear on the question: what authority does the text have at the present stage? The Commission itself says that the text includes elements of progressive development as well as codification, but, as is its habit, it does not say which provisions come under which heading. Moreover, it has not proposed, as it did with the treaties text, that a diplomatic conference be called to give the text the extra authority that arises from a treaty-making and acceptance process. Whether such action is taken remains before the UN General Assembly. The Commission recommended that the Assembly take note of the draft articles and that it consider at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of pleniplentaries to examine the draft articles with a view to concluding a convention on the topic. The Assembly resolution is less specific. After noting the major importance of the topic and annexing the articles it:

> 3. [Took] note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, … and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

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4 *Yearbook of the International Law Commission* (vol 1 part II, 1966) 296, 888th Mtg, [12].

5 Ibid 348, 894th Mtg, [188].

6 (*Hungary v Slovakia*), [1997] ICJ Rep 7.

7 *Rainbow Warrior (New Zealand v France)* (1990) RIAA, vol XX, 217.

4. Decide[d] to include in the provisional agenda of its fifty-ninth [2004] session an item entitled "Responsibility of States for internationally wrongful acts".[8]

But is the contrast with the treaties convention as clear as it first appears? I do not think so. Texts generated by the ILC may be recognised as authoritative even when they do not have treaty force. That appears from the ICJ and tribunal decisions on the present articles mentioned earlier and from decisions invoking the Vienna Convention on Treaties. It has been frequently applied as a statement of customary international law, rather than as a treaty binding on the particular parties, first over the ten years before it came into force, second, for states not parties to it and, third, because of its bar on retrospective application even for states that are parties to it. And while it is true that the diplomatic conference process does give states further opportunities to alter the final text prepared by the Commission, and means that they have the power collectively to endorse the text as amended, the process actually followed by the ILC in this case has given states as well as others unusual opportunities of participation.

I now turn from matters of definition, process and binding force to the substance of the draft articles. The fundamental and comprehensive character of the rules stated in the draft articles is demonstrated by the final phrase of article 12:

> Article 12: Existence of a breach of an international obligation
>
> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character* [emphasis added].

The articles are about the law of obligations, whether the obligation arises under a treaty, a rule of customary international law, a unilateral undertaking or any other source. That comprehensiveness was emphasised in the course of the ILC process in the *Gabčikovo–Nagymaros Case* and the *Rainbow Warrior Case* (para (4) of the commentary to article 12, pp 126-127). But as those cases themselves show, and as Professor Ago, consistently with extensive civil law doctrine, had recognised, obligations and breaches of them do have varying characteristics and those characteristics may well have consequences for state responsibility. So the *Rainbow Warrior* tribunal drew on the distinction included in the earlier draft (now in article 14) between breaches of obligations by acts that have a continuing character and those that do not. To quote the Commission (p 137):

> (8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *Rainbow Warrior* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The Arbitral Tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said: "Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to

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8 GA Res 63, 58 UN GAOR (71st plen mtg), UN Doc A/Res/58/63 (2004).

> Hao the two agents has been not only material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.".

The Tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.

A second distinction, included in article 33(1), is made by reference to different categories of right holders:

> Article 33(1)
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> 1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

The text goes on to draw a consequence in terms of those who may invoke the responsibility (article 48, pp 276-280; see also article 54, pp 302-305).

Next, in a provision that reflects, if indirectly, Ago's 1939 distinction between civil and criminal obligations, first contained in the controversial article 19, which was omitted from the final text, article 40 singles out a category of serious breaches and article 41 draws consequences. The category consists of a gross or systematic failure by the responsible state to fulfil an obligation arising under a peremptory norm of general international law. Under article 41 states are to cooperate to bring to an end through lawful means any such serious breach, and they are not to recognise as lawful a situation created by a serious breach as defined, nor render aid in maintaining that situation.

A fourth recognition of different types of obligations appears in the limits on the right to resort to countermeasures. Under article 50 countermeasures are not to affect:

> (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
>
> (b) obligations for the protection of fundamental human rights;
>
> (c) obligations of a humanitarian character prohibiting reprisals;
>
> (d) other obligations under peremptory norms of general international law.

Further, a state taking counter-measures is not relieved from fulfilling the obligations:

> (a) under any dispute settlement procedure applicable between it an the responsible State;
>
> (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

And to mention another indication of varying obligations any state consent precluding wrongfulness must be 'valid'. One limit on such consent, coming within article 50(1), has long been found in the bar in the Geneva Conventions on the renunciation of rights by the state (or by the beneficiary of the right) common articles 6, 7[6], 7[7] and 8.

One distinction elaborated by Ago in his 1939 lectures and included in the earlier drafts, but deleted from the final version, was between obligations of conduct and obligations of result. According to James Crawford:

> including them in the text raised serious difficulties. First, they had no consequences in the rest of the Draft Articles (unlike the distinction between completed and continuing wrongful acts). Secondly, articles [20] and [21] effectively reversed the distinction as known to some European legal systems (especially the French). It is not unusual for domestic analogies to be modified in the course of transplantation to international law. Indeed it is unusual for them not to be. But it is hard to think of any examples where the effect of a national law analogy has been *reversed* in the course of transplantation (p 21).

But are those reasons persuasive? On the first, the earlier draft articles did draw consequences, within themselves, in much the same way as article 14 does:

> Article 20: Breach of an international obligation requiring the adoption of a particular course of conduct
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> There is a breach of a State of an international obligation requiring it *to adopt a particular course of conduct when the conduct* of that State is not in conformity with that required of it by *that* obligation [emphasis added].
>
> Article 21: Breach of an international obligation requiring the achievement of a specified result
>
> 1. There is a breach by a State of an international obligation requiring it to achieve, *by means of its own choice*, a specified result if, by the conduct adopted, the State *does not achieve the result required of it by that obligation*.
> 2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, *but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct* of the State, there is a breach of the obligation only if the State *also fails by its subsequent conduct to achieve the result required of it* by that obligation [emphasis added].

On the second reason, whatever the position may be under national law, the distinction may be found in international practice. As Professor Crawford had said earlier in his introduction:

> it was sometimes said that the enactment of an internal law could not give rise *per se* to responsibility, since only the application of the law in a given case would be actually inconsistent with the international obligations of the State concerned and the amount to a breach.
>
> That view, appropriate as it might be in some contexts where actual harm or injury, for example, to individuals, is of the essence of the wrong, was quite inappropriate to other contexts, for example, uniform law conventions where a State undertook that certain provisions be made part of its law, irrespective of their application to particular cases (pp 12-13).

A concrete example is provided by the International Covenant on Civil and Political Rights, which among other things requires each state party to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant; each also undertakes to take the

necessary steps, in accordance with its constitutional processes and the provisions of the Covenant, to adopt such legislation and other measures as may be necessary to give effect to the rights, and to ensure effective remedies (article 2). This set of obligations is about outcomes and does not require any particular steps. It does not for instance require, as the Human Rights Committee has urged, that states parties have an entrenched bill of rights empowering courts to strike down primary legislation or indeed to have a document called a bill of rights.

The variations in obligations in these provisions – and also in that on acts and omissions and composite acts (article 15) – may be related to the recognition in articles 3, 5, 20(2), 20(3), 30(1), 40, 41, 53, 56(1)(b), 58, 60 (especially [5]), 64 and 71 of the Vienna Convention on the Law of Treaties of the varying functions and types of treaties. Arnold McNair made that point brilliantly over 70 years ago.[9]

I conclude by returning to the impact of different legal systems on one another. We have seen that the process leading to the final set of articles was influenced in major ways by national law especially the civil law system. The process is capable of operating in reverse. In the first place, lawyers working primarily in national legal systems must be alert to the basic principle that national law cannot provide an excuse for failing to comply with international law (articles 3 and 32). Whatever the power of national legislatures and courts may be under their national constitutions, and however the old arguments about parliamentary sovereignty and supremacy may be resolved in national systems, the international legal position is clear beyond any question. Some national debates about these issues would have a greater reality if this larger context were kept in mind.

Second, the text indicates to public lawyers a possible way to avoid the complexities about the 'state' as a legal person, as the holder of rights and duties, and as party to litigation. Article 4 states the principle of the unity of the state (p 94):

> Article 4: Conduct of organs of a State
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

That attribution cannot be avoided by the state conferring 'governmental authority' on a person or entity which is not an organ of the state (p 100):

> Article 5: Conduct of persons or entities exercising elements of governmental authority
>
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international

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9 A McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 *British Yearbook of International Law* 100.

> law, provided the person or entity is acting in that capacity in the particular instance.

The commentary says this about 'governmental authority' (p 101):

> (6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

Much the same approach may also be found in national law.[10] Nor may attribution be avoided by an organ of a foreign state carrying out a governmental function for the responsible state.

> Article 6: Conduct of organs placed at the disposal of a State by another State.
>
> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.
>
> The Commission gives as instances the role of the Judicial Committee of the Privy Council and the appellate role of the High Court of Australia for Nauru established under an agreement between the two governments. In the former case the question may perhaps be asked whether the Judicial Committee was ever "placed at the disposal" of the various Commonwealth States which simply continued to use it after they became independent without, for instance, an agreement being reached to continue the role as was the case with States which had heads of State other than the Queen and which maintained the appeal. Those responsible for the provision of the time of the members of the Judicial Committee and of the facilities in Downing Street would however have no doubt that the Judicial Committee was being "placed at the disposal" of New Zealand and the other remaining Realms. Similarly, there can be no doubt that New Zealand would have been and would be responsible for actions of the Judicial Committee in a New Zealand appeal were they to be held in breach of the New Zealand's international obligations for instance to give a fair hearing however unlikely that may be.

The broader point is captured in Matthew Arnold's direction that we should aim to see things steadily and to see them whole. The whole ILC process, the product in terms of the articles and their commentaries, and Professor Crawford's excellent introduction require us to see the larger patterns in the law and warn us against the danger of tunnel vision. We must be grateful to Professor Crawford and the Cambridge University Press for making that material more accessible.

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10 See eg P W Hogg and P Monahan, *Liability of the Crown* (3rd ed, 2000) 332-37; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297, 326-31.

The Competing Jurisdictions of International Courts and Tribunals

Yuval Shany

(Oxford University Press, Oxford, 2003, lxix + 348 pp)

We are witnessing a significant shift in the approach to the delivery of international justice. The preceding decade, with its extraordinary expansion in the justiciable scope of international disputes, has sparked broad theoretical interest among those convinced of the twilight of state sovereignty and consent, and the development of the international rule of law.

Undoubtedly there has been some degree of intensification of international interdependence and the consequent attachment to international dispute settlement has been striking. The institutionalisation of dispute settlement mechanisms has been uncoordinated and haphazard, although it has been aided by the relatively recent preference for permanence over impermanence, and the submission by a broad range of states to compulsory jurisdiction. It is increasingly probable that in a dispute concerning important areas of international law between two or more states that one, or possibly more, dispute resolution procedures resulting in a binding decision will be unilaterally available.

The possibility of incompatible decisions and the promotion of a rush to justice could tarnish the positive aspects of the proliferation of international courts and tribunals. The proliferation also poses difficulties for the administration of international justice. Unlike municipal law, public international law has not grappled with these issues for the simple fact that until recently they had not presented themselves.

The Project on International Courts and Tribunals (PICT) has for some years been attempting to shed light on these developments by addressing the interrelationship between all existing international courts and tribunals in a comprehensive and coordinated way. Some of the issues PICT focuses on include: the relationship between the various fora; the actual or potential problems arising from the lack of institutional and substantive coordination; the consequences for overlaps in jurisdiction; and the normative and realistic reforms necessary to improve the administration of international justice. A significant initiative between PICT and Oxford University Press has been the creation of the International Courts and Tribunals Series, of which Yuval Shany's new book is the first instalment. The book encompasses an updated and revised doctoral thesis submitted by the author to the University of London in early 2001.

The author lists several aims of the work, the first of which is to examine the jurisdictional ambit of the main international courts, tribunals and quasi-judicial procedures and to determine their areas of overlap. The second and third aims are to discuss the potential consequences of the current dispute settlement regimes and to identify positive and normative rules of international law that might govern competition between different jurisdictions. These three aims form the core structure of the book.

In part I of the book Shany surveys the phenomenon of jurisdictional competition and the three traditional jurisdiction regulating rules, namely, *lis alibi pendens*, *res judicata*, and *electa una via*. These rules will only be relevant when jurisdictional competition arises, which occurs when the disputes and parties are sufficiently and respectively related. Shany goes on to separate international courts and tribunals into four categories: those with universal jurisdiction and general competence; those with universal jurisdiction but specialised competence; regional courts with general competence; and regional courts with specialised competence.

Chapter 2 maps theoretical and practical overlaps in jurisdiction between these four types of courts, for instance between the International Court of Justice (ICJ), the World Trade Organisation dispute settlement bodies, the International Tribunal for the Law of the Sea, the International Criminal Court, the United Nations (UN) human rights treaty bodies, the International Centre for the Settlement of Investment Disputes, the European Court of Justice and so on. That is, disputes capable of being heard before specialised courts can also fall within the jurisdiction of courts of general competence *ratione materiae*, and the jurisdiction of regional courts is often a subset of more global dispute settlement mechanisms. Of course, each mechanism differs in its scope of jurisdiction over states, individuals and international organisations.

Direct competition may not always occur even where the proceedings are closely related. Shany uses the example of the events that took place in the Former Yugoslavia in the early 1990s to illustrate the complexities. Some of the protagonists from this conflict are currently being tried at the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICJ is hearing inter-state claims on the question of state responsibility for genocide and also use of force questions involving the North Atlantic Treaty Organization (NATO) campaign in Kosovo, the European Court of Human Rights has heard matters brought by individual victims of the NATO bombings, and the ICTY Prosecutor considered bringing charges against certain leaders of NATO. One complex set of facts can lead to the involvement of different bodies and many different areas of international law. Shany also notes that jurisdictional overlaps are not all hypothetical, with the most prolific multiplicity of proceedings regarding related facts occurring in the human rights and trade liberalisation fields.

In the second part of the book the author explores the legal and policy issues surrounding the competitions between the jurisdictions of international courts and tribunals. Shany considers that while international law can be viewed as a system on the normative level, it only enjoys a limited degree of coherence, particularly with respect to its institutions. The linkage between the coherence of a legal system, jurisdiction regulating norms and jurisprudential co-operation is explored in some depth and forms some of the most interesting reading of the entire work. The author suggests a relatively practical approach in promoting the adoption of jurisdiction-regulating rules that would attempt to attain elementary co-ordination and also reach moderate levels of harmonisation.

Shany argues that some degree of competition between adjudicatory institutions might lead to beneficial incentives to do better and attract new business.

The other aspect of part II is a short comparative discussion of the jurisdiction-regulating norms used in private international law in the principal domestic legal systems, and how they might be implemented or expanded in international law. The leading Australian private international law cases on jurisdiction are cited and some are briefly discussed.

The third part of the book makes a broad inquiry into the jurisdiction-regulating norms found both in the instruments governing international courts and tribunals, and from other sources as applied by these courts and tribunals. It is a highly informative and reasonably comprehensive discussion that brings together the relatively limited practice and law in this area for the first time. Among other things, the author discusses and neatly critiques the award of the Annex VII Arbitral Tribunal in the *Southern Bluefin Tuna Case*,[1] involving Australia, New Zealand and Japan. The award has been expansively examined by many writers, and Shany argues that an extension of its reasoning would lead to the denial of jurisdiction in cases where parallel, but not identical, specific legal regimes are available. Further, the parties should not have readily been presumed to waive significant procedural guarantees available to them under the UN Convention on the Law of the Sea. If any criticism of chapters 5 and 6 can be levelled, and it is minor, it is that they are at times repetitive of material discussed elsewhere in the book and many of the leading cases may have deserved a more detailed analysis. One important omission from these chapters, due to the release of the awards in March 2003, was the *CME Czech Republic BV* arbitrations involving highly related and two separate proceedings based on two bilateral investment treaties.[2]

The final chapter of the book briefly and somewhat disappointingly discusses options for future improvement, including structural reform, increased judicial co-operation and better strategic planning on the part of states. The greatest hope for enhanced coherence and the avoidance of the negative aspects of jurisdictional competition advocated by Shany appears to be the fostering of a culture of mutuality and comity between the various adjudicatory bodies. Given that much of the book is normative in tone, a more thorough analysis of the options for reform and development was warranted.

The book is particularly relevant for Australian practitioners of international law due to the acceptance by Australia of many compulsory forms of jurisdiction in a wide variety of international courts and tribunals. It successfully demonstrates that jurisdictional competition in international law has become a problem of principle that has the potential of undermining the credibility and legitimacy of international law. As Philippe Sands notes in the General Editor's Preface, this is certainly a time of transformation and

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1 (2000) 119 ILR 508.

2 An outline of the proceedings is provided in an introductory note in (2003) 42 ILM 915 to the Svea Court of Appeals decision concerning the Stockholm arbitration appearing ibid 920.

challenge for global governance. The book is well researched (it is perhaps informative that the table of authorities stretches over 42 pages) and is written in an accessible and lucid style. It is a valuable contribution to international legal scholarship that will lay the foundation for further research in the area.

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Human Rights

Edited by Robert McCorquodale

(Ashgate, Aldershot, 2003, 632 pp)

This book, edited by Robert McCorquodale, has been published as part of the second series of 'The International Library of Essays in Law and Legal Theory'. It includes a wide range of human rights essays on a variety of theoretical subjects relevant in terms of human rights law, including the conceptual bases of human rights theory, human rights and cultural relativism, interaction between human rights and humanitarian law, the nature of economic, social and cultural rights, human rights and group rights, and challenges posed to the idea and concept of human rights by the realities of the global market. The book reproduces essays on these subjects, which have appeared before in journals related to law and political theory. The idea behind bringing these essays together seems to be to establish a few basic issues, problems and ideas faced by modern human rights theory and to illustrate how this theory responds to them.

A special emphasis is necessary on Audrey Chapman's article on 'Violations Approach' for monitoring violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (449ff). This essay analyses the traditional 'progressive realisation' approach to the ICESCR's implementation and proposes an alternative 'violations approach' in order to ensure effective operation of the Covenant and assist states in the process of its implementation. Different types of violation of the Covenant are examined to test the viability of the 'violations approach'. David Beetham's essay on the future of economic and cultural rights is also interesting. This essay defends the concept of economic and social rights as human rights against a number of objections. Both essays are very significant in terms of a 'dominant' approach that economic and social rights are rights of progressive realisation, which might perhaps weaken their legal character.

The book includes some emphasis on regional developments, such as Makau Wa Mutua's essay on the Banjul Charter and human rights in Africa. The author tries to explain the approaches to human rights in Africa bearing in mind multiple factors such as the differences in development of statehood in Africa and Europe, including the unnatural character of colonial statehood. At the same time, the views advanced by this author are not relativist, and indeed emphasise the presence of the concept of equality of human beings in African tradition. Also, for those interested in understanding the African perspective of human rights, the essay of J Oloka-Onyango will be useful.

Some essays reproduced in the book are on specific aspects of human rights theory. The essay of Peter Jones examines the relationship between the concepts of human rights, group rights and peoples' rights (277ff). Frank Garcia's essay analyses the relationship between human rights and international trade (359ff), especially the issues related to the World Trade Organization and international financial institutions. The essay by Louise Doswald-Beck and Sylvain Vite on the relationship between international human rights law and international humanitarian law examines the parallel and interlocking evolution of these two branches of international law. The essay by Sigrun Skogly is about poverty and human rights and examines specific aspects of the problem, such as the right to adequate food, the right to physical and mental health, the right to education, the right to housing.

One should note that Michael Ignatieff's footnoteless essay also deals with the relationship of the concept of human rights with social institutions such as family, state, church or other groups and institutions. Ignatieff correctly points out that the essence of rights is to confer entitlements and immunities on individuals. However, he proceeds to identify the idea of human rights as something inherently antagonistic to, and challenging, social traditions and institutions. This statement seems to be exaggerated because it is too categorical and unqualified. The idea of human rights does not necessarily contradict the idea of social institutions such as the family and it is not the purpose of human rights to challenge family institutions and traditions. In fact, the opposite is true. International human rights instruments, such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights contain a number of guarantees for family life. Moreover, the UDHR (art 16) and ICCPR (art 23) contain explicit clauses that the family is the basic unit of society and its protection is among the state's basic responsibilities. Given such normative reality, 'Ignatieff's paradox' seems really exaggerated.

These and other essays reproduced in the book edited by Professor McCorquodale form a useful collection for those interested in human rights theory. This book is quite helpful, but a reader must not think that it is a complete expression of what legal and political scientists may think about the idea of human rights. The essays can and ought to be read with interest and attention, but at the same time it should be borne in mind that there are also other, different, conceptual approaches no less popular than those expressed by the contributors' writings, and also that there are other issues of human rights theory at least as important as those mirrored in this book.

It would also be better if this collection of articles had maintained a stronger link to normative reality whose sources can be found in human rights instruments, customary law, jurisprudence, and the work of UN organs and special rapporteurs. One could build up a theory of any kind on any subject. But if one wants to have a viable theory of human rights, then it is necessary not to lose the connection with the subject-matter of that theory and the underlying normative reality. Human rights theory is not only a theory on human rights ideas and conceptions, but also about human rights norms as

developed in conventions or customary law. Now, this relative lack with normative reality should not necessarily be held against the book or the quality of the contributions it includes, but this factor is no doubt relevant in affirming the limited profile of this book. There are also some major issues that have suited the profile of this book. Among the most significant of them that is hardly mentioned in these extracts is the relationship between human rights and foreign policy.

In sum, the collection edited by Professor McCorquodale is a useful compilation of theoretical contributions. It could help people interested in human rights theory by presenting them with such a systemic compilation. The works selected are interesting and thought-provoking. The only caveat is that the book reflects just one part of human rights theory.

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Non-Flag State Enforcement in High Seas Fisheries

Rosemary Rayfuse

(Martinus Nijhoff Publishers, Leiden/Boston, 2004, 376 pp)

This very substantial work is published by the leading Netherlands publishing house of Martinus Nijhoff in the series on Ocean Development under the general editorship of Professor Vaughan Lowe, Chichele Professor of International Law at Oxford. It will evidently assume first place in the current literature of the subject. Dr Rayfuse rightly claims it to be the only full-length treatment of the subject to have appeared so far. And she has succeeded brilliantly.

To those who are not familiar with the topic area of the book, it should be explained that the author deals not with some niche problems in a wider subject but goes to the very heart of the challenge facing contemporary international fisheries law: how to enforce regulatory schemes for the conservation of high-seas fisheries against the vessels of those states that choose not to be bound by the applicable international regulations. Australian readers in particular will be familiar with the problems of maintaining the integrity of the 1980 Convention on Conservation of Antarctic Marine Living Resources in remote and inhospitable waters where rapacious and unprincipled fishers, flying flags of non-party states, have been exploiting the Patagonian toothfish to the edge of extinction. This is but one example of the world-wide problem of illegal, unreported and unregulated (IUU) fishing.

With the conclusion of the Third United Nations (UN) Conference on the Law of the Sea and the adoption of the UN Convention on the Law of the Sea in 1982, it was thought that the conservation and preservation of the living resources of the oceans was largely assured. This was because some 90 per cent of commercial fisheries were conducted in the exclusive economic zones (EEZs) of coastal nations, whose powers of management and enforcement were clearly set out in the Convention. The institution of the EEZ has rapidly assumed the status of customary international law and the enforcement of fisheries laws

enacted in conformity with the Convention by coastal states is not subject to legal doubt. However, the ink was hardly dry on the Convention before it was realised that over-exploitation of the relatively unregulated high seas was having a markedly deleterious effect on the populations of straddling stocks and highly migratory species (such as tuna).

A belated attempt to redress the problem of conservation of fisheries in the high seas was made in the Agreement for the Implementation of the Provisions of the 1982 UN Convention on the Law of the Sea, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995. This instrument, however, suffers from an inadequate extent of adherence by states and from the inability of the international community to embrace for the present a directly enforceable regulatory regime outside areas covered by national EEZs. Indeed, the author regards claims by some writers for the status of this agreement as an objective regime under international law, binding on all states, as 'a case of wishful thinking'.

A report by the Food and Agriculture Organization (FAO) of the UN in 2002 states that 47 per cent of world fishery resources are fully exploited, 18 per cent overexploited, and 10 per cent in varying degrees depleted. These figures are likely to be underestimates in view of the difficulty of quantifying IUU fishing.

The difficulty with which Dr Rayfuse wrestles in relation to high seas fisheries is the central difficulty of the enforcement of international law in general: how to overcome the obstacle of state sovereignty in the absence of a universally binding legal system. By virtue of long-standing customary international law, reaffirmed in the 1982 Convention, vessels on the high seas are immune to interference by the vessels of other states except in certain defined cases, such as piracy; their flags protect them from any exercise of jurisdiction over them other than by their own flag states. The author has therefore had to come to terms with the various ways in which this problem may be resolved, or at least circumvented, through a discussion of regime theory and the evolution of binding norms of customary law through state practice and the concomitant belief by states that certain rules are binding on them. In concluding that none of these lines of inquiry yield conclusive results for the regulation of high-seas fisheries, she does convincingly demonstrate that international law has come very close to a general acknowledgment of the right of third party (ie 'non-flag') enforcement of fisheries laws, particularly in areas covered by voluntary regional fisheries organisations (RFOs):

> since both nature and the law abhor a vacuum, it seems likely that the development of a customary secondary right of non-flag sanction to be exercised by member states of an RFO in situations where any flag state fails or refuses to exercise its primary jurisdiction to ensure its vessels comply with conservation and management measures adopted by that RFO is not far off (p 375).

Her conclusions, and the patient and detailed exploration of the route to those conclusions, with extensive analysis of state practice, are compelling.

There are two possible omissions from the final chapter 'The Future of Non-Flag Enforcement in High Seas Fisheries'. This reviewer shares the author's caution regarding the prospects of a directly enforceable high-seas fisheries

regime: a caution which is evident also in the statement of interdiction principles of the Proliferation Security Initiative announced by President George W Bush in 2003. One should therefore be inclined to 'think laterally' and seek solutions elsewhere. One such inquiry might be to explore the extent to which the doctrine of necessity might be invoked by a coastal state faced with a catastrophic decline of its fishery resources caused by overexploitation of straddling stocks in the high seas. Such was the case of Canada when it took action on the high seas against Spanish fishing vessels in 1995. The subsequent proceedings by Spain in the International Court of Justice (ICJ) failed for want of jurisdiction. Thus the opportunity was missed for the ICJ to rule on the possible applicability of the doctrine of necessity in such circumstances.[1] The other might be the use of trade sanctions against recalcitrant states whose flag vessels ignore international regulations or general principles of responsible fishing. Although Dr Rayfuse makes several references to the World Trade Organization it could fairly be said that to explore this avenue further would be beyond the stated scope of the book.

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Individual Duty within a Human Rights Discourse

Douglas Hodgson
(Ashgate, Aldershot, 2003, xiii + 277 pp)

This work by Douglas Hodgson tackles an intriguing subject within the wider field of legal philosophy and within the more specific context of cultural relativism and human rights: the extent to which individual duty (and we should note that the discussion is concerned with the duty of individuals) should play a role in the doctrine and practice of human rights protection. There is a clearly directed line of argument – almost, it may be said – of polemic within the book: that greater attention should be paid to the notion of individual duty, especially within the very individualistic western concept of rights protection. Indeed, the book stands as a critique of what may be seen as the western approach to rights protection; as the author claims towards the end of the discussion (at p 256):

> If the human rights movement is to enjoy a more universal appeal in both theory and practice, it must attribute more weight to the role of individual duty in meeting basic human needs and upholding human dignity.

The argument in the book therefore serves as a prospectus for improving upon what is perceived as a flawed model of legal protection. In effect, Hodgson asserts that the emphasis ought to shift from 'human rights' to 'human needs' and individual duty is the legal instrument for achieving such a reconfiguration. Is this, then, the end of human rights law and the beginning of human duty law?

Hodgson presents his material clearly and purposefully and the book provides accessible reading: the argument is clear and well-signposted. It provides a very useful account for those seeking an overview of this kind of critique of human rights law. The discussion takes the reader helpfully through the main lines of

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1 *Fisheries Jurisdiction Case (Spain v Canada)* [1995] ICJ Rep 87.

philosophical and juridical argument and indicates its historical and cultural sources. In fact, a main plank in the argument is to point to a pervasive and long-standing commitment to the idea of individual duty (chapters 2 and 4), over a long period of time in a number of cultures, but one which appears to have been lost sight of in the wake of western enlightenment preoccupation with individual self-determination (this is fondly referred to by the author in Benjamin Constant's contrast between the 'liberty of the ancients' and the 'liberty of the moderns'). There is a full account of the reference to individual duty in recent and contemporary legal ideology: in the context of human-rights protection systems, at both national and international levels (chapters 6 and 7), and in the context of developing international criminal law (chapter 5), and in that of socialist legal orders (chapter 8). The main theme of discussion is brought together in chapter 8 ('Impoverished "Rights Talk") and then chapter 9 picks up on the crucial issue of enforcement of such duties.

The ground is covered, then, but how persuasive is the argument? Does Hodgson show convincingly that the emphasis on individual rights, as typically enshrined in the western approach to legal protection, is impoverished and that the values of human need and human dignity can more effectively be realised through a stronger commitment to individual duty?

Further reflection on the subject, and how it is presented in this and similar works, does suggest a number of problems with this 'duties directed' argument. The first problem that comes to mind concerns the basic assumption regarding the impoverished character of individual rights-based protection. There is a tendency in much of the critical argument – whether it be communitarian, socialist, Marxist or simply non-western – to lay the responsibility for a range of social ills, such as the high level of crime, social alienation, prejudice and discrimination, at the door of individualistic human rights protection. Hodgson tends to adopt such critique as part of his argument. Thus, at page 212 he refers to social critiques of the west by Asian leaders 'which have attributed the moral decline of the West to such factors as the breakdown of the family unit, drug abuse, increasing levels of crime, juvenile delinquency and promiscuity, and the promotion of tolerance of excessive individualism'. At page 232, referring to 'Communitarian discontent', the author continues: 'It is also claimed that the social costs of the rights-based American system – increased litigiousness, moral conflict, family breakdown, and so forth – have become unacceptably high'. Granted that such social ills exist within western society, but where is the established connection between the ideology of the human rights system and these problems, or where is the evidence that cultures that emphasise more the role of individual duty, such as those in Africa or China, are for that reason less prone to such social malaise? In short, not much of a sociological case is made out for the moral demolition of western-based rights ideology, or the achievement of non-western duties ideology.

A second misgiving relates to the assumption that an emphasis on rights means that duties are thereby necessarily demoted in schemes of legal protection. The author of course concedes that many rights necessarily involve correlative duties and in fact many of the examples of legal duty referred to in his discussion,

within much of the existing legal protection regimes and the whole of international criminal law arises as a consequence of rights protection. Similarly, much of the talk about individual duties can itself be recast as rights discourse, as soon as we turn our attention to those who stand to benefit from the performance of duty, whether they do so individually or collectively. The response to this point might be that it is really a question of emphasis, and specifically more emphasis on duty in order to achieve a better balance. Thus Hodgson, drawing upon the leading communitarian publicist Amitai Etzioni, quotes the latter in saying:

> When Communitarians argue that the pendulum has swung too far toward the radical individualistic pole … We do not seek to push it to the opposite extreme, of encouraging a community that suppresses individuality. We aim for a judicious mix of self-interest, self-expression, and commitment to the commons, of rights and responsibilities, of I and we … (p 230, quoting Etzioni from *The Spirit of Community* (1993)).

This statement in itself appears as an unexceptional and reasonable ideology of 'balance' – but is it true to say that western human rights protection neither strives for nor achieves some success in gaining such balance? After all, very few western individualistic rights are guaranteed as absolute: many are qualified in the interest of a wider community or public interest. And often, the operation of such systems has been criticised for preferring the latter kind of interest at the expense of the individual.[1] Again, we need further evidence to evaluate some of these arguments. Thus, while it may appear on paper that western legal systems prioritise the guarantee of individual rights, to what extent is that rhetoric matched in the practice of the law, within which the qualifications and reservations may in fact predominate. Indeed, that is the standard libertarian complaint: that, in the end, the general (often cast as the 'public') interest prevails.

But the discussion in Hodgson's book extends beyond the field of correlative rights and duties, to encompass the idea of 'freestanding' or 'imperfect' duties that address human need in a more radical fashion. The classic examples are the duties to rescue and to provide charity (see chapter 2 on the taxonomy of duties). Yet these broader, less specific and more dispersed duties are clearly problematic in legal terms. It is difficult to specify for legal purposes the parameters of such obligation, although western legal systems do attempt this to some extent, for instance under the heading of 'standards of care' and 'proximity' in relation to civil claims. The legal enforcement of such duties is problematical, as Hodgson concedes and addresses as an issue in chapter 10. Attempts to explore the enforcement of duty provisions seem to end rather lamely, as is the case in Hodgson's discussion of the African Charter on Human and Peoples' Rights (pp 247-49). What do we know about the effective enforcement of such provisions? Not very much, it would seem, since the African Commission 'has not taken any steps towards interpreting or elaborating upon the duty provisions of the African Charter'. Is that not in itself a significant fact, requiring much more critical

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1 J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) *Legal Studies* 227, in relation to European human rights law.

discussion? And finally, at the end of the day, for all their proclaimed freestanding character, can these broader duties be practically taken out of a rights-based discourse? Take, for example, the duty to protect the natural environment, listed in chapter 7 as a particular duty explicitly recognised by law. There is no discussion of how such a duty might be enforced, although commonsense would suggest that one method might be through the invocation of some form of environmental rights. Yet elsewhere, there is reference to Rosemont's scoffing assertion: '… isn't there a hint of desperation in having to claim that trees have rights?'[2] Well, is there really, in analytical terms, very much difference between saying that there is a general duty to protect the natural environment and in saying that trees have rights?

At the close of reading this book, therefore, there seemed to be lurking around some important unanswered questions about the whole issue of individual duty: about the extent to which it really is disregarded in either the doctrine or practice of individual rights-oriented systems, about the practical enforceability of individual duties, and about the linkage between right and duty on the one hand and social well-being or malaise on the other hand. And there is the temptation to add right at the end: so – we have been talking about individual duties, but what about the duties of the significant range of organisational actors, both traditional and of more recent appearance, whose actions now impact so considerably on human welfare – how do they fit into the debate on how best to serve human need?

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International Law in World Politics: An Introduction

Shirley V Scott
(Lynne Rienner, Boulder, London, 2004, viii + 325 pp)

Dr Scott has produced an excellent text that I think will be widely used in the United States – the market with which I am most familiar – and elsewhere. Overall I would describe the book as compact and efficient; the writing style is clear, certainly comprehensible by virtually all undergraduates who deserve to be at university. Scott explains the rationale for the text this way:

> There is now no aspect of world politics that can be fully understood without some knowledge of international law and an awareness of how it operates as an integral component of global affairs (p 1).

Organising a brief text (in this case about 300 pages) is difficult; decisions – especially about omissions – can appear arbitrary. Not every topic can be covered and none can be covered to the satisfaction of many experts in a particular subfield. Scott has 13 chapters:

1. International Law and World Politics Entwined
2. States in International Law

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2 H Rosemont Jr, 'Human Rights: A Bill of Worries' in T De Bary and T Weiming (eds), *Confucianism and Human Rights* (1998) 215.

3. Intergovernmental Organisations in International Law
4. Non-state Actors in International Law
5. The Logical Structure of International Law
6. Legal Argument as Political Manoeuvring
7. Reading a Multilateral Treaty
8. The Evolution of a Multilateral Treaty Regime
9. International Law and Arms Control
10. International Human Rights Law
11. International Humanitarian Law
12. International Law and the Environment
13. The Future of International Law in World Politics

At first blush, this organisation might seem unusual, but it is clear and functional. In chapter 1, the usual broad contextual topics are addressed. International law is defined, treaty and custom are explained and the differences between international law and municipal law are introduced along with article 38 of the International Court of Justice (ICJ) statute.

Chapters 2 to 4 deal with the subjects of international law including states, intergovernmental organisations (IGOs) and nongovernmental organisations (NGOs). These are presented cogently with logical detours to explain related concepts. For example, '(j)urisdiction is legal authority and can relate to legislative, executive, and judicial action' (p 27). Scott elaborates, describing the various principles of jurisdiction. Chapter 3 spends considerable time on the United Nations (UN), emphasising early in the discussion that the UN 'actually is a family of IGOs' (p 35). UN materials are skewed towards those that play the most direct role in the creation of international law, most notably the ICJ (pp 49-63). Chapter 4 examines non-state actors. The discussion is informative and balanced, acknowledging that NGOs are so numerous and qualitatively so diverse that generalisations are dangerous. Scott provides several detailed examples, including the huge contribution NGOs made to the Ottawa Landmines Convention (p 75) and the way multinational corporations were successful in persuading the Bush administration to oppose the Kyoto Protocol (p 75).

Scott realises states will continue to be the dominant players for decades to come:

> Perhaps the most obvious implication of the dominance of states in international law is that all issues to be addressed by international law have to be transformed into issues between states, whether or not states are the key political player in the issue area under consideration. International law has thus responded to the acts of nonstate terrorist groups in terms of the legality of forceful responses by states to terrorist acts and the responsibility of a state to arrest and prosecute or extradite those who commit terrorist acts (p 82).

Chapters 5 to 8 deal with what Dr Scott calls the functioning of international law including how to understand international law. Chapter 5, 'The Logical Structure of International Law', presents a three-levelled view of international law (p 88), somewhat analogous to Professor Oscar Schachter's famous system.[1]

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1 O Schachter, 'The UN Legal Order: An Overview' in O Schachter and C Joyner

Chapter 6, 'Legal Argument as Political Manoeuvring', points out that 'because legal analysis appears apolitical … it can be brought into service in the pursuit of political objectives' (p 117). Scott makes the point, so essential to understanding international law, that, even though the law is immersed in a political context, it 'has a considerable degree of autonomy as a set of interrelated principles, rules and concepts' (p 134).

Chapter 7 and 8 explore the functioning of international law by using treaties. Scott illustrates the major elements of a treaty along with a variety of examples. The international political environment that produces treaties is illustrated by the Antarctic Treaty (pp 153-57). Chapter 8 deals in more depth with the entire geopolitical process that created the Antarctic treaty regime. While concentrating on one regime, Dr Scott stresses how this is but one among many interrelated regimes.

Chapters 9-12 encompass the principal subject areas or subfields of international law. Inevitably an introductory text must make compromises to stay within reasonable length, for example, there certainly is not space enough for a separate chapter on air law or even the law of the sea. Scott's scheme works quite well. First she deals with arms control (chapter 9), next human rights (chapter 10) and humanitarian law (chapter 11). Finally, chapter 12 addresses environmental law, subsuming what might have been placed in a separate chapter on territory. The discussion is thorough and balanced. Many major treaties are discussed, albeit often briefly, including the Chemical Weapons Convention (pp 201-02), the Genocide Convention (pp 217-20), The Rome Statute of the International Criminal Court (pp 254-60), and the 1982 UN Convention on the Law of the Sea (pp 280-83). All in all Scott does an admirable job of dealing quite thoroughly with many important instruments.

Unlike many brief texts, Dr Scott includes a summary, 'tie things together' chapter. First she reviews five major themes from the book (pp 293-96). Then she poses five questions about the future of international law, vital and, of course, unanswerable questions. For example, question two asks 'Are we likely to witness the "triumph" of international human rights law over national sovereignty?' (p 298). Question three reads 'Should international law require states to be democratic?' (p 299).

This is an excellent introductory book and should be appropriate for a wide range of survey/introductory courses in international law. There is considerable overlap in approaches taken in law school and political science courses.[2]

I believe the book might well be used in law school courses provided there is a hard-copy supplement or good Internet source for cases and, to a lesser extent, treaties. Scott does provide quite a complete discussion both of the genre of treaties and important instruments. However, teachers who rely extensively on cases will need to supplement the coverage in the book. Dr Scott includes a number of well-crafted excerpts, for example, UN Peacekeeping Operations (pp 41-44), but none

(eds), *United Nations Legal Order* (1995) 1.

2 See discussion in J K Gamble and C C Joyner, *Teaching International Law: Approaches and Perspectives* (1997).

that focuses on a particular case. Obtaining coverage of cases is easier than ever with resources such as the ICJ's own site and the American Society of International Law's new electronic information system for international law (EISIL).

I believe the book will pass that sternest of tests: being an effective mode for introducing students to international law. I have adopted the book for the course I teach beginning January 2005 and expect to be pleased.

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Oceans Management in the 21st Century: Institutional Frameworks and Responses

Edited by Alex G Oude Elferink and Donald R Rothwell
(Martinus Nijhoff Publishers, Leiden, 2004, xxxv + 391 pp)

This book was born from a collaborative research project between the Netherlands Institute for the Law of the Sea (NILOS) of the Faculty of Law of Utrecht University, and the Faculty of Law of the University of Sydney. The book is volume 44 in the series *Publications on Ocean Development*, a series to which both editors of this volume have contributed significantly in recent years.

As the preface notes, the choice of theme for the book is explained by the creation and operation for some years now of the institutions established under the 1982 United Nations (UN) Convention on the Law of the Sea (UNCLOS). Given that the UNCLOS has now been in force for over ten years, it is an opportune time to reflect on the way the institutions are fulfilling their tasks, how they have been involved in implementing the Convention and how they interact. The book's approach to institutional frameworks is deliberately broad, not only including arrangements and organisations with a treaty basis, but also including direct negotiations between states as a type of framework capable of contributing to the implementation of the Convention.

Other than an introductory and two concluding chapters the book is loosely divided into sectoral issues, including chapters on navigation, fisheries, continental shelf, maritime boundary delimitation, environmental issues, regional cooperation, dispute settlement and the procedures for the review of the Convention. The contributors include academics and government practitioners, many of whom are Australians or who have teaching or study connections with Australia.

Ivan Shearer opens the book with a thought-provoking essay that discusses some of the achievements made in the Convention and the challenges that lie ahead. The essay draws the reader's attention to the unifying forces of the institutions created by the UNCLOS, but points to ample evidence to show that the law of the sea is still very much a work in progress. Shearer highlights a significant achievement of the Convention as establishing limits for various maritime zones, but notes that controversies continue with the adoption by some states of excessive baselines, irregular practice of transit passage,

ambiguous archipelagic waters rights and obligations, while the juridical nature of the exclusive economic zone (EEZ) is under constant expansionary pressure by coastal states.

Chapters 2 and 3 deal with aspects of navigation that have proven problematic in the implementation of UNCLOS. Mary George examines the law on straits used for international navigation under part III of the Convention, specifically referring to the Straits of Malacca and Singapore as an example. George is critical of the regime provided for in Part III of the Convention and argues that it requires clarification in order to achieve an appropriate balance between coastal states and user states, as well as to elaborate environmental obligations and state responsibility. The essay also suggests a wholesale revision of part III may be advantageous and goes so far as to include some remarkably ambitious draft text for a new provision, including an obligation on parties to 'adopt a proactive attitude towards the maintenance of a pollution free marine environment' and detailing situations where transit passage may be suspended by straits and user states. The second navigation themed contribution is from Jay Batongbacal and concerns the challenges the International Maritime Organization (IMO) faces in the vexed area of archipelagic sea lanes. The divergent interests of archipelagic and user states in these sea lanes forms the background to an area that is likely, in the author's opinion, to involve 'constant discord'. The essay succinctly discusses the major issues arising from the acceptance by the IMO of the Indonesian partial archipelagic sea lane designation and goes on to consider critically potential future issues, including axis locations assuring safety of navigation, width of the lanes and the 10 per cent rule, maritime security concerns, environmental concerns, and the inherently limited role of the IMO itself. In this respect, the IMO as the relevant institution has not been able to respond adequately to all the challenges posed by the implementation of Part IV of the UNCLOS.

The following two chapters, 4 and 5, deal with fisheries management and regulation. The first essay, by Erik Jaap Molenaar, discusses the three interrelated concepts of participation, allocation and illegal fishing in the context of the 1995 Fish Stocks Agreement, and offers a brief analysis of regional fisheries management organisations (RFMO) practice. RFMOs have not been entirely successful in resolving the often dual interests of their members, in having to allocate decreasing fishing opportunities between an increasing number of states that have domestic industries to cultivate and protect. The RFMO concept has been almost universally applied to the world's highly migratory, straddling and shared fisheries, but has yet to prove that it can effectively ensure the sustainable development of these resources. Overcoming issues of participation, allocation and unregulated fishing will be essential steps on the way. In chapter 5 Marcus Haward explores in greater depth the difficulties for ocean management posed by illegal, unreported and unregulated (IUU) fishing. Haward briefly discusses the existing soft and hard law instruments touching on IUU fishing, including the Fish Stocks Agreement, Compliance Agreement, and the voluntary International Plan of Action on IUU fishing. The essay also offers some insight into the recent practice of states,

RFMOs and other organisations in pursuing other 'tools', including enforcement through monitoring and surveillance, trade-related measures like certification and labelling, port state control and environmental instruments. The creative responses by states and organisations to IUU fishing has shown international law continues to offer some flexibility and continued relevance to battling such a threat to the environment and sovereign interests.

Chapter 6, by Alex Oude Elferink, delves into the relationship between the Commission on the Limits of the Continental Shelf (CLCS) and third-party dispute settlement. Despite an extension in the time limits for submitting information on the limits of states' continental shelves, an assessment of the role of the CLCS is timely given several submissions having been made, including Australia's, or shortly to be made. Oude Elferink astutely examines the technical role of this institution in an area of the law of the sea that is potentially a legal minefield with significant sovereign and commercial interests at stake. The relationship between the CLCS and third-party dispute settlement may well prove to be controversial, with recommendations from the former and decisions from the latter concerning article 76 of the UNCLOS likely to have significant impacts. Practitioners may well find themselves scurrying back to this essay to consider Oude Elferink's thoughts if, or when, a dispute emerges.

Maritime boundary delimitation is the theme for the following two chapters of the book. In chapter 7 Robin Churchill offers a short essay outlining some of the options available to states for third-party dispute settlement for maritime boundaries, with a particular focus on the contributions of the International Court of Justice (ICJ). Churchill reinforces the point that while the ICJ has been integral to the development of the complex law surrounding maritime delimitation, its jurisprudence has not been consistent. The essay also examines in some useful detail the UNCLOS's procedural framework as it relates to boundary delimitation. In an example of the book's broad definition of institutional frameworks, chapter 7 provides an interesting analysis of the Australian-Indonesian maritime boundaries as a negotiating and dispute-resolution case study. Stuart Kaye explores the history and context of the boundaries, and draws attention to the creative methods used by the parties to settle their considerable differences. A central argument through the essay is the advantages available to the parties to a maritime boundary delimitation through negotiation over the uncertainty and perhaps inflexibility of an adjudicated outcome. Of course, where one party in a delimitation is inflexible, an adjudicated outcome may be the only course that offers a semblance of reasonableness.

In Chapter 9, Jon van Dyke assesses the implementation of the environmental obligations in the UNCLOS. The essay provides a review of judicial and arbitral decisions, treaties and some state practice in the elaboration of and implementation of international environmental norms. The centrality of the precautionary principle is assessed by citing examples in fishing agreements, the London Convention, actions of the International Whaling Commission and some recent domestic developments in the United States of America. Although not a comprehensive study, van Dyke demonstrates

effectively that the international community has built upon the general environmental obligations in the UNCLOS, filled in gaps and created monitoring and enforcement mechanisms to create a more comprehensive regime with 'teeth'.

The focus of chapter 10, by Martin Tsamenyi and Lara Manarangi-Trott, is the role of regional organisations in meeting UNCLOS' challenges, with the western and central Pacific forming the case study. Their essay provides an insight into Pacific regional cooperation experience within the law of the sea and environmental fields and argues that the institutions established have been largely effective in meeting the challenges thrown up by the unique area. Further analysis of this case study will certainly be warranted after the Western and Central Pacific Fisheries Commission has been in operation for some years. The cooperation engendered by the various regional institutions has certainly been a significant accomplishment and may serve as a model more widely.

Dispute resolution under the UNCLOS forms the common theme within chapters 11 to 14. Donald Rothwell's and Tim Stephen's essay concerning the interaction between the UNCLOS and other environmental instruments provides a good summary of the provisions of Part XV of the Convention. It critically analyses the role of the jurisprudence that has emerged from Part XV in furthering, or otherwise, the environmental norms within the Convention. The essay points to the *Southern Bluefin Tuna*[1] and *MOX Plant*[2] cases as evidence of the ongoing problems of resolving the interaction between marine environmental and other instruments in the sense of dispute resolution jurisdiction and substantive legal relationships. Clive Schofield and Chris Carleton explore in a readily accessible fashion some of the principal technical considerations in law of the sea dispute resolution. This contribution was particularly illuminating for a lawyer without a strong scientific background to read and well made the case for scientists and technicians to be included in maritime boundary negotiations or litigation. Among other decisions considered by the authors, the essay uses the Cameroon/Nigeria decision rendered by the ICJ in 2002[3] as an example of the difficulties lawyers and judges can find themselves in when scientific evidence is not presented well or properly understood.

In the third chapter in this section, Bill Mansfield provides a useful and original analysis of the *Southern Bluefin Tuna* decisions by the International Tribunal for the Law of the Sea (ITLOS) and the annex VII Arbitral Tribunal. The essay avoids the temptation of following earlier critical commentary on the cases and focuses on the positives for Australia, New Zealand and Japan that arose from the experience. Mansfield points out that notwithstanding the loss on jurisdiction for Australia and New Zealand, the litigation had significant impacts on the cooperation between the parties, rejuvenated the Southern Bluefin Tuna Commission, heightened awareness politically of the issues facing

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1 (2000) 119 ILR 508.

2 Request for provisional measures, 3 December 2001, (2002) 41 ILM 405.

3 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, [2002] ICJ Rep 303.

the stock, and highlighted the importance of provisional measures applications. The last chapter dealing with dispute settlement directly is an essay by Andrew Serdy and Michael Bliss concerning state practice on prompt release of fishing vessels in light of decisions by ITLOS. The essay provides a summary of Australian practice in bonding vessels, as well as succinct and interesting analyses on the *Monte Confurco*,[4] *Grand Prince*[5] and *Volga*[6]decisions of ITLOS. Serdy and Bliss argue in favour of increased deference to domestic courts and that, with the *Volga* decision, a more appropriate balance has been struck by the Tribunal between the right of the flag state to ensure prompt release of its vessels and the right of the coastal state in managing its EEZ and enforcing its laws.

In chapter 15, Oude Elferink assesses the institutions and mechanisms that review the implementation of the UNCLOS. The essay looks at the roles, strengths and limitations of each of the Convention's processes for review, including the meeting of states parties (SPLOS), the Informal Consultative Process (UNICPOLOS) and the UN General Assembly debate and resolutions on the agenda item oceans and the law of the sea. Institutional arrangements play important roles in the administration and review of significant multilateral treaties, but with the UNCLOS these have grown in a rather *ad hoc* and organic fashion with imprecise mandates. Each institution has formed its own role and continues to evolve, and Oude Elferink argues they are to a large extent complementary. For instance, discussion of the Convention in the UN General Assembly maintains a global perspective on law of the sea, but it would not be an appropriate institution to provide specific guidance on the Convention's interpretation.

The two chapters forming the conclusion of the book, 16 and 17, examine in a more general way the institutional frameworks for the implementation of the law of the sea; the former from a political science perspective and the latter from a legal one. Shirley Scott concentrates on the effectiveness of Part XV and the CLCS as dispute settlement systems. The essay argues that the *Southern Bluefin Tuna Cases* will not jeopardise the proper utilisation of Part XV, partly in recognition that it was not a comprehensive third-party dispute settlement mechanism in any case. The CLCS, in Scott's opinion, is an institution aimed at avoiding disputes, but which may in fact be a cause of them due to the vague language in the Convention. The essay may have been more appropriately placed with the other dispute settlement-focused chapters and does not offer a great deal by way of conclusions on the work as a whole. Rothwell completes the book with a chapter, similar to Shearer's introduction, which summarises the achievements made by the UNCLOS and the challenges that lie ahead for oceans management in the coming years. The essay touches on areas of the Convention that other contributions had perhaps neglected, including a discussion on the International Sea-Bed Authority, the evolution of the law of the sea, national interest and security, the marine environment and an

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4 (*Seychelles v France*), Judgment of 18 December 2000, ITLOS.

5 (*Belize v France*), Judgment of 20 April 2001, ITLOS.

6 (*Russian Fed. v Australia*), Judgment of 23 December 2002, ITLOS.

assessment of the current state of the law of the sea. As Rothwell points out, notwithstanding the evolutionary nature of law of the sea and the Convention's weaknesses, there is no serious international agenda for radical reform.

This volume on Publications on Ocean Development provides a good coverage of the topical areas of the law of the sea and situates them well as challenges that states and the world community face in the coming years. The contributions are of a high quality, written in a stimulating and lucid style. I list only two relatively minor quibbles: the book as a whole may have benefited from a more consistent approach to its theme of institutional frameworks and responses; and, though not entirely relevant given the audience of this journal, the perhaps heavy reliance on the Australian experience. I had set out on the book hoping for a more comparative or international approach than it ultimately offered, but as the preface understates, 'Australia can be said to have been at the forefront in a number of issues concerning the institutional frameworks related to the Convention'. Overall, it will be a useful text for students, practitioners and academics alike to reflect on the remarkable successes made over the last few decades, and contemplate and be motivated by the challenges that lie ahead in this evolving and interesting area of international law and policy. The editors are to be congratulated for gathering within one volume such a diverse range of thoughtful contributions. One can hope that the NILOS and Sydney University in the not too distant future again cooperatively employ their considerable experiences in law of the sea.

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Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law

Anne Orford
(Cambridge University Press, Cambridge, 2003, ix + 243 pp)

There has been such a torrent of writing about humanitarian intervention that there is not much left to say. In the absence of substantial new state practice, all that lawyers can say has been said. The chance for the International Court of Justice to have a go at the question in the *Serbia/NATO* cases has gone with the Court's finding that it has no jurisdiction.[1] The positive law clearly inclines against any such right. Any moral dissatisfaction with this position should be tempered by the practical difficulties that would attend the execution of a right of intervention against the will of the local government and with the necessary

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1 Legality of Use of Force (*Serbia and Montenegro v Belgium*), 15 December 2004; Legality of Use of Force (*Serbia and Montenegro v Canada*), 15 December 2004; Legality of Use of Force (*Serbia and Montenegro v France*), 15 December 2004; Legality of Use of Force (*Serbia and Montenegro v Germany*), 15 December 2004; Legality of Use of Force (*Serbia and Montenegro v Italy*), 15 December 2004; Legality of Use of Force (*Serbia and Montenegro v Netherlands*), 15 December 2004; Legality of Use of Force (*Serbia and Montenegro v United Kingdom*), 15 December 2004.

object of displacing it. This is not to say that intervention can never be successful. Dreadful regimes have been expunged by foreign military forces and better conditions then established: the defeat of Germany, the elimination of the Nazi regime and the establishing of a democratic regime; the overthrow of Pol Pot in Cambodia; the ejection of Amin in Uganda. But in these cases, the intervening states did not invoke humanitarian intervention as the justification for their military actions, and in some instances the reaction of other states was not unequivocally to accept that what had been done was lawful or even a good thing. As telling are the many cases where there has been no intervention, even if prudence and indifference have been as much the explanations as fidelity to international law. And most telling of all is Iraq. Nor can the law accommodate a rule that determines legality by success.

Self-determination might have something to do with it too. The intervener has to pay the costs but the law and politics of self-determination require that the people of the state where the intervention takes place determine the disposition of any new government, which might not always be to the intervener's taste. Professor Orford does not seem to like a law that protects tyrants but would not like much one that endorsed a right of intervention either. She is tough on the causes of humanitarian intervention and tough on humanitarian intervention itself. Her difficulty is that, either way, violence gets the nod – that of the despot or that of the intervening state – and she is against it. This little book sets out the usual dilemmas about humanitarian intervention, bookended by accounts of how troubling she finds them. Lawyers, I think, will not find much to help them here but, then, perhaps that is not Professor Orford's aim.

The Cambridge Studies in International and Comparative Law contains some distinguished law books. It is not clear why Professor Orford's book has been added to the list. Others must speak to its distinction but it is not a law book. We know this because Professor Orford tells us so. She writes:

> My aim … is to explain why I have chosen in this book to read legal texts about intervention "in ways that such texts were generically and institutionally never meant to be read". The kind of productive misreading that I hope to develop here involves breaching some of the protocols that govern international legal scholarship … (p 38).

And so we get, for example:

> the discipline of international law authorises feminists to design rules that contribute to the protecting or saving of other women within the realms of international human rights law or international criminal law (p 61).

The 'discipline' of international law (I'll say that again: 'the discipline of international law') 'authorises' non-state actors? I think not. Or, 'I see the invitation to participate in the humanitarian mission of international law as one that carries with it old dangers' (pp 63-64). Academics are not 'invited': we ask ourselves to the party and accordingly face the chance of indifference or rejection by those whose activities we report and sometimes try to influence.

This is a short book. Essentially, it says only one thing, though it says it several times. Its message is that humanitarian intervention never addresses the

real cause of human rights violations, cannot be humanitarian in its methods, and, even if it appears to bring excesses to an end, because it is an exercise of neo-colonial exploitation, cannot genuinely be directed to the alleviation of the causes cited as justification for 'muscular intervention'. Rather, while humanitarian intervention is really designed to preserve the economic interests of the intervening powers, it is presented in such a way to allow them to appear as knights in shining armour, intent only on the indifferent protection of community values (eg, pp 11, 20, 37, 53, 166). This conclusion, hardly original, is supposed to be derived from an informed reading of the 'texts' of international law – but it is never vouchsafed to us what these texts are; one hardly needs to say that there are no tables of treaties, Security Council Resolutions, cases, where legal texts might be expected to be located.

In one circle of academic hell, international lawyers would be condemned to engage in Nick Tsagourias's infinite Habermasian debate ('Jurisprudence of International Law'[2]) with moralists like Professor Orford under the misapprehension that what was going on was something to do with law. (In the true centre of hell, they would be required to mark lower second-class honours essays on the sources of international law forever.) I make no claim for legal imperialism in this fraught area, just for the identity of international law, a project with a limited ordering function in a world where some of those whose conduct the law seeks to condition are not very nice and do not take kindly to being reminded of what the law requires of them. Doing something decisive about such nastiness is a job for Politics, the true imperial endeavour, which may or may not enlist international law for the little support it can give. Anguish may be a moving force in Politics but it neither makes nor unmakes international law.

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Corporations and Transnational Human Rights Litigation

Sarah Joseph
(Hart Publishing, Oxford, 2004, xii + 177 pp)

This book by Sarah Joseph, the fourth volume in Hart Publishing's 'Human Rights Law in Perspective' series, deals with a specific legal strategy within the broader context of international human rights protection – the use of civil litigation against corporate actors in their home jurisdictions as a response to certain kinds of human rights violation committed abroad. Indeed the main focus of discussion is really one jurisdiction and within that system one statute as a basis for litigation: the Alien Tort Claims Act (ATCA) under United States law. The title, with its more general reference to 'transnational human rights litigation', may give the impression of a rather wider study. Nonetheless, the book is an informative, well-informed and usable account of the subject matter

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2 Nikolaos K Tsagourias, *Jurisprudence of International Law: the Humanitarian Dimension* (2000).

covered, and the choice of subject and some of its concluding argument is thought-provoking in relation to the general issue of human rights protection.

The starting point for the book's discussion is the activity of large transnational corporate actors, for the most part taking place in developing countries. This leads to an exploration of how such companies may be legally accountable for damage arising out of these activities via litigation in their home jurisdictions in developed countries, and for the most part at present in the United States. As the author clearly states in her context-setting first chapter, this is just one of a number of possible strategies to achieve legal accountability on the part of such transnational corporate actors, and it is also a strategy that is bounded by a number of limitations. But it is the fact that it is a strategy that has appeared on the scene in recent years, and up to a point has paid dividends, that seems to have engaged the author's interest in exploring the topic in more detail, with an aim also to speculate on its future prospects and further development. The problem being addressed is clearly important. Large corporations, by investing and setting up business in developing countries in collaboration with the governments of such countries, may act in an exploitative or abusive manner in relation to individuals within those countries. Such conduct may amount to a violation of internationally guaranteed rights, typically employment rights, rights to health and safety, environmental rights, or even civil and political rights in cases where corporate actors aid and abet repressive government. In the nature of things, it may be difficult for victims to obtain redress within their own jurisdictions, and international human rights law is only just beginning to grapple with the problem of dealing with violations attributable to non-state actors such as transnational corporations. Hence the interest in the possibility of the victims taking legal action against companies within the home jurisdiction of the latter, even though the offending conduct has been committed extra-territorially. In essence, this is an example of jurisdiction shopping, although it is of course necessary to find a provider that is willing to take an active legal interest in the conduct of its subjects abroad. Such a provider is the United States legal system, principally on the basis of the Alien Tort Claims Act, which thus provides the paradigm for this strategy.

The larger part of Joseph's book is a clearly presented, thoroughly researched and very readable account of how ATCA and a number of analogous legal instruments in the US legal order and some other common law jurisdictions (England, Australia and Canada) have been or may be used for this purpose. ATCA in itself is an interesting example of legal development, demonstrating the willingness of US courts to take up the cause of transnational human rights protection, by activating, in the ground-breaking *Filartiga Case*[1] in 1980, a long-standing but largely dormant statutory provision. Joseph demonstrates the way in which the *Filartiga* type of claim has been used against transnational corporations with some degree of success. Admittedly, there are limitations: there has to be some association with governmental action in the country of violation, procedural hurdles such as *forum non conveniens*

1 *Fibartiga v Pena-Irala* 630 F.2d 876 (1980).

need to be addressed, and in practice no litigation of this kind has proceeded to a judgment on the merits since cases have been settled out of court. Moreover, recently (and to the author's dismay at the time of publication) there was a challenge, though eventually not fatal, to the constitutionality of ATCA in the American Supreme Court. Nonetheless, the author points to the potential legal significance of this kind of strategy and argues that the ball has been set rolling:

> Regardless of the pros and cons of transnational human rights litigation, the truth is that it is unlikely to disappear. Litigants have proven resilient … the legal pressure is likely to increase. Legislation designed to impose extraterritorial human rights responsibilities on home corporations has been introduced in both the USA, UK and Australia [sic] (p 151).

In support of this argument the author surveys other potential bases of civil litigation-based strategies in the US (for instance the Torture Victims Protection Act (in chapter 2), the Racketeer Influenced and Corrupt Organizations (RICO) statute (in chapter 3), litigation against false and misleading statements in the Californian courts (the *Kasky v Nike Case*,[2] the whole of chapter 5), and some recent litigation of this kind in England, Australia and Canada (chapter 6). But the main basis for argument at present remains ATCA, the constitutional challenge to which, being heard after the book's publication, is conveniently reported by the author on the Hart Publishing web site.[3]

For the reader seeking fuller acquaintance with this legal development, this book will prove to be a valuable source. But a reading of the book does in the end leave a feeling that some broader and critical issues could have been explored further. While there is a detailed analysis of the more precise legal argument in such claims, there are some underlying political and jurisprudential issues that are important to any discussion of the value and potential of this kind of litigation. Some of these questions are identified by the author in the opening and concluding chapters, but dealt with only briefly. For instance, towards the end of the final chapter the author comments, enticingly but all too summarily:

> Of course, transnational human rights litigation against corporations is no panacea to the human rights problems arising from TNC activity. Most notably, there have not yet been any relevant merits decisions. It is obvious that such litigation is time-consuming, and there is no guarantee of eventual success. Not all TNCs are vulnerable to such litigation; vulnerability depends on their nationality and places of operation. Most human rights victims, particularly in the developing world, are unable to access legal remedies abroad. Moreover, the human rights abuses caught within this litigation represent only the tip of an iceberg (p 153).

There are some important questions referred to in this short critical summary, and others that could have been addressed in addition. Underlying much of the discussion in the book is an intriguing political, philosophical and juridical question, enquiring into the willingness of American courts to undertake such

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2 *Kasky v Nike Inc* 45 P.3d 243 (2002). See also *Nike Inc v Kasky* 539 US 654 (2002).

3 <http://www.hartpub.co.uk/>.

jurisdiction (a willingness that has moreover recently been subject to constitutional challenge). Some readers may have appreciated more reflection on this phenomenon in itself. Further questions suggest themselves. If, as the author notes, it is primarily the US and a few other common law legal systems that are accessible for such litigation, and there are legal reasons why it is unlikely to happen elsewhere, the result is selective and so problematical as a matter of both legal strategy and wider justice. As a more practical matter, exactly how is such litigation mobilised and who are the crucial actors in that process, especially if many victims are not in a position themselves to initiate legal action? Altogether, there appears to be something haphazard about the whole legal development under discussion here. In wider terms, there is therefore much to reflect upon regarding the location and role of this kind of litigation within the broader spectrum of international human rights protection, and again the author whets the reader's appetite but does not elaborate too much further. For instance, in the concluding pages, she considers the desirability of international minimum human rights standards for transnational companies, and speculates about civil litigation providing the catalyst for the political and commercial will to create such standards. Such linkage is an important aspect of the whole subject, especially in the context of a study within a series dedicated to the discussion of 'human rights in perspective', and could have been elaborated upon. There are also fascinating questions, but again touched upon incidentally in this work, on the relationship between civil and criminal liability as a basis for accountability for human rights violations at the national level. Indeed, some of this wider perspective is more fully explored in the author's earlier paper, 'Taming the Leviathans: Multinational Enterprises and Human Rights',[4] such as her comparison of the merits of home state liability for the off-shore activities of their transnational companies and a directly binding regulation of transnational companies. These approaches comprise alternative and admittedly prospective strategies, yet some comparison with the existing but haphazard opportunities for civil litigation would have been instructive.

Finally, it is worth noting the inclusion within this book of an appendix, comprising a tabulation of selected litigation of the kind under discussion. This again exemplifies the informative character of the work, providing for instance accessible information for a reader wishing to construct quickly a profile of defendants or alleged violation of rights. On the other hand a bibliography of other research work on the subject would have been welcome, especially since there is a body of periodical literature that may be further consulted.

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4 (1999) 46 *Netherlands International Law Review* 171.

Act of Creation: The Founding of the United Nations

Stephen C Schlesinger
(Westview Press, Boulder, Colorado, 2003, xviiii + 374 pp)

This is a book on how big and small powers joined their efforts to negotiate the Charter of the United Nations – under the leadership of the United States. The author, Stephen C Schlesinger, Director of the World Policy Institute in New York City, makes it clear that the creation of the UN was very much a US project. Today, at a time when the only remaining superpower is showing a certain aloofness to multilateral institutions and international law, it is refreshing to be reminded of how US governmental attitudes on these issues have fluctuated over time. The United States was in 1944 and 1945 the main driving force behind the negotiations in Dumbarton Oaks and San Francisco that led to the creation of the new global organization. Negotiations were difficult in the end, but when they were happily concluded President Truman flew to San Francisco to join the ceremonial signing of the Charter at the Herbst Theatre in the Veterans War Memorial Building on June 26, 1945. At that point he made some remarks in his speech which retain their relevance in the modern discourse on the UN and international law:

> This Charter, like our own constitution, will be expanded and approved as time goes on … Changing world conditions will require readjustments – but they will be the readjustments of peace and not of war.
>
> We all have to recognize – no matter how great our strength – that we must deny ourselves the license to do always as we please. …If any nation would keep security for itself, it must be ready and willing to share security with all. The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can obtain those objectives for all men and women everywhere…we cannot have permanent peace and security in the world.

A few days later, the Republican advisor to the negotiating team, John Foster Dulles, told the Foreign Policy Association in Philadelphia that

> Membership in the new organization will engage us to work with others to promote human rights and liberties; to eradicate intolerance; to clear away the obstacles to healthy trade; …to seek, for independent peoples, self-government and, meanwhile, to avoid exploitation. Such are the goals set before the members of the new organization.

These expressions of an idealistic credo (both quoted in Schlesinger´s book) were "balanced" throughout the negotiations by the demands of the future permanent members of the Security Council (the Big Five) for a privileged status in matters of voting, but this dimension of political realism could not conceal the genuine interest for progressive international cooperation on the part of the host government.

Schlesinger has written a much-needed work of diplomatic and political history that provides a context in which to view the UN issues of today. The narrative is focused on the members and contributions of the US delegation in San Francisco, but in doing so other key actors of other countries (the Soviet Union, the United Kingdom, France, the Latin American group, Australia) are identified and high-lighted. The main personality of the book is the long since forgotten US Secretary of State Edward Stettinius, appointed by Franklin D Roosevelt in

November 1944, after Roosevelt´s death made chairman of the US delegation in San Francisco, replaced by Truman as Secretary of State immediately after the conference, and thereafter appointed the first US ambassador to the United Nations. Stettinius was widely regarded as uninformed on foreign issues (he had a background in private industry), but he learned on the job and in the end contributed to the successful conclusion of the UN conference.

Another conspicuous role is played by Alger Hiss, the competent secretary-general of the conference. Hiss was an official of the State Department, had been present at the summit meeting at Yalta, and was a highly visible figure at San Francisco in his administrative role. He was later suspected of espionage back in 1938 as being linked to the Communist underground in Washington at the time. The new Secretary of State, James Byrnes, forced him out of the State Department in 1946. Hiss was in 1948 indicted for perjury in relation to congressional hearings and in 1950 found guilty of perjury and sentenced to five years in prison. But in San Francisco he served as a kind of ad interim Secretary-General of the United Nations.

From an international law point of view, Schlesinger offers an interesting background to the Charter provisions on the Security Council and the veto (Article 27), individual and collective self-defence (Article 51), and the role of regional arrangements (Chapter VIII). As to the veto, according to the formula agreed upon at Yalta in February 1945, the five permanent members of the Council (the P5) had an absolute veto over matters of substance. This was in contrast to the agreement on "procedural matters", eg the right to take up a matter on the agenda, where a majority vote would decide the issue. When a bilateral or regional dispute arose, to which one of the Big Five was a party, that permanent member had to abstain from voting, though the remaining P4 could wield their veto. Edward Stettinius´ view on this soon became his mantra, the Yalta formula was untouchable.

However, smaller states aimed at cutting back the veto in a number of situations, such as on amendments to the Charter, peaceful settlement procedures, international fact-finding, and regional action. For an Australian reader it must be interesting to note that this position developed into a campaign that was gradually gaining headway under the articulate and passionate leadership of the Australian minister for external affairs, Herbert Vere Evatt. Schlesinger writes that "Evatt was a formidable presence at San Francisco" and that he "riveted the conference with defiant gestures, laying down a road map for the smaller states to follow" (p 195). Evatt especially opposed the right of the P5 to veto military interventions by regional organizations. He also pushed to increase the role of the General Assembly by permitting it to make recommendations when the Security Council was not already seized by the matter. Of Evatt's some thirty-eight suggested amendments twenty-six were adopted or reflected in the final text of the Charter.

The Latin American Group joined the crusade against the Yalta veto formula and this issue now threatened the whole conference. At the same time Soviet Ambassador Gromyko indicated that the veto should apply not only with regard to matters of substance, but also in the determination of whether an issue brought before the Council was of a procedural or substantive character. The reaction among most delegations was one of shock. The Soviet interpretation of the Yalta

formula was a threat to free discussion of different topics in the Council. The Western Allies decided to make a private approach to Stalin in Moscow. The small states began to consider backing off on most of their demands, in order to save the conference which was on the verge of collapse. Then, on June 6, there was a telegram from Moscow. Stalin had surrendered the Soviet position on the absolute/extended veto. A joint US-Soviet statement the following day ended the veto crisis.

Over the next few days the group of smaller states became divided between those that wanted to fight on against certain aspects of the veto and those that, under the circumstances, were satisfied with the Soviet retreat. Herbert Evatt led the former group, but lost in the end. The agreement was that all matters of substance were subject to the veto, but the issue of what was substantial or procedural could only be decided by a majority vote. The net result was that through Article 27 on voting, the Big Five had secured their dominant role in the Charter system.

As to Article 51, small states and the Latin American regional group were successful in shielding "the inherent right of individual or collective self-defence" from early Security Council interference. If an armed attack against a UN member state occurred, it was first a matter of individual or regional decision-making under the principle of self-defence; only later did it become a matter of Security Council crisis management (if the Council so decided). In this way the Latin American republics legitimized the regional Act of Chapultepec, according to which an attack on one state in the region would be considered an attack on all and would demand immediate collective consultation, and possibly a collective military response. Thus, Article 51, in its final version, offered individual states and regional groups the right to act if the Security Council ducked its own responsibilities in removing threats to the peace.

British Foreign Minister Anthony Eden wanted to expand Article 51 to cover action not only against armed attack, but also against every sort of aggression short of an armed attack, be it direct or indirect. The US Secretary of State did not accept this (!), arguing that such a broad formula would open the way for preventive action, which after all was what had started World Wars I and II (p 185). The British finally backed down.

Schlesinger shows how the agreement on Article 51 (the last Article of Chapter VII) was linked to the agreements on Articles 52-54 on the recognition of regional arrangements (Chapter VIII). Only in cases of military enforcement action was there a need for a regional organization to get Security Council approval. The Latin American states were satisfied, since the overall solution exempted them from the veto in cases of immediate regional response to an armed attack.

The independent right of collective self-defence proved to be useful also to the Western Allies. John Foster Dulles later said, with reference to NATO, that "Thanks to Article 51, we were able to organize a defense within the Charter, but outside of the veto" (cf p 192).

Stephen C Schlesinger is not a lawyer, and his narrative is not basically a legal one, but he has written a book that offers a lot of food for thought for international lawyers.

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The Refugees Convention 50 Years On: Globalisation and International Law

Edited by Susan Kneebone
(Ashgate, Aldershot, 2003, xi + 338 pp)

Did Robert Illingworth draw the short straw? Or did he just offend his Minister? Who knows why he ended up participating in the workshop organized by Dr Kneebone at the Castan Centre for Human Rights Law at the University of Melbourne in June 2001. This book, to which he has contributed a chapter, is the outcome of that event.

Maybe it is all David Kinley's doing: certainly, in the acknowledgments, he is indicted for his support and guidance from inception to completion of the project. As for me, I like to be presented with both sides of the argument and allowed to make my mind up for myself. No such doubts here though; this work is presented with all the balance of a debate of the Central Committee of the Communist Party of the Soviet Union (guess what: the Americans are always to blame!). Regrettably of course, these days the USA is the international bogeyman, filling a role to which the USSR used to be so well-suited. Here Robert Illingworth, at the time Assistant Secretary to the Onshore Protection Branch of the Refugee and Humanitarian Division, Department of Immigration and Indigenous Affairs, is the baddie, not from Washington or Moscow but Belconnen, because in nearly every chapter in this book the Australian government is castigated, excoriated, accused and generally made out to be not very nice to asylum seekers.

The authors have a point: Australia's treatment of asylum seekers in recent times deserves criticism but not, I suggest, the one-sided treatment it gets here. There is merit in finding fault in Australia's detention of asylum seekers, as the UN Human Rights Committee did in *A v Australia* (except that the Committee only saw one side and its reasoning was – let's be charitable here – less than convincing). There is, furthermore, merit in criticizing the federal government's response (both at the time and afterwards) to the Tampa challenge. Australia has appeared mean, niggardly and unsympathetic. But these criticisms are just like this book: one sided and flawed just because they are so one-sided.

The smart human rights lawyers, like the smart environmental lawyers, are aware of their opposition and take it into account in constructing their arguments. Others become convinced that they are on the side of the angels and have nothing to prove. One consequence is that, sometimes, they prove nothing. My point is that this book to some extent falls into that trap. Just who is it

trying to convince apart from the converted? There are some excellent chapters in this multi-author work. But some of the contributions wear their hearts too much on their sleeves and, by their one-sidedness, by their utter denial that there may be another perspective – a perspective that, furthermore, may be legally defensible - simply fail to persuade.

I repeat – some of the chapters are very good indeed – but on balance I sense a missed opportunity; too many like-minded people talking to each other rather than to the world. I have the sense from this book of a kind of parallel universe where only states have duties and refugees have only rights. But it is not so and it should not be so. States have a right to control their frontiers and to control immigration. The asylum channel has never been recognized by any state as a back-door method of migration and Australia is entitled to treat applications for asylum with rigorous scrutiny. But no, that is not to say that Australia has entirely clean hands. And yet the refusal of so many who are involved in this debate, including some of the contributors to this book, to admit that there may be another side is to deny the state's own rights, and to render their contributions less analytical, more anal.

Australia has been targeted by people smugglers and is entitled to respond to that challenge, not in any way it chooses but within the boundaries of its obligations, including those under the Refugee Convention and the International Covenant on Civil and Political Rights. Generally it does so, and much better than most states I know. That does not exempt Australia from legitimate criticism but analyses of Australia's policies and behaviour should address the whole picture. Australia is entitled to defend its frontiers. Australia is entitled to control immigration. Australia is entitled to scrutinize applications for asylum with a view to excluding those who do not qualify. Asylum seekers, and I mean genuine ones, do not have an entitlement to insist on asylum in Australia if they have somewhere else to go. Asylum seekers do have an obligation to cooperate honestly with the destination state.

Perhaps the authors would respond that this is a book about human, not states', rights. They are right. But states have rights too, and human rights have to co-exist with them. This work would have benefited from a greater willingness to acknowledge and confront that reality. I single out Illingworth's chapter because it sticks out a mile. It is the only one in the book that presents the other side but it is mostly expository rather than analytical. The government's arguments would also benefit from an internal critical perspective. That said, the bias of the book is so blatant in this chapter: at footnote 1 the editor has added a note that we should contrast Illingworth's remark with the discussion by another author (whose views are, shall we say, not entirely in agreement). Just in case the more obtuse reader has missed the point that here is the work of the cuckoo in the nest (and there are so many ostriches, heads in the sand, that fail to spot the cuckoos in their nests), another warning is issued at footnote 2, that we should contrast a further remark of the invidious Mr Illingworth with that of yet another author (whose views are, shall we say, not entirely in agreement).

Fair enough. But when we look at the relevant discussions so as to do all the contrasting that we are advised to do, do we find cross-references to the Illingworth chapter? I give you one guess. It seems to me that, in the land of the fair go, somebody isn't getting a fair go.

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Law of International Business Transactions

Robin Burnett

(The Federation Press, Sydney, 2004, 3rd ed, xlix + 443 pp)

This is the third edition of *Law of International Business Transactions*, written by Robin Burnett, an author with expertise derived from her many years of teaching and working in this complex and extensive area of law. Burnett's particularly useful contribution has been to focus on international business transactions in the Australasian context, and the book provides a useful and comprehensive guide for Australasian lawyers and businesses looking for guidance in the international business sector. Although there are a number of publications that provide extensive guidance in this area, of which the foremost is *Schmitthof's Export Trade: The Law and Practice of International Trade,* for practitioners working with Australian and New Zealand exporters and businesses, the Burnett book, with its focus on the laws in force in Australia and New Zealand and their interaction with international rules and treaties, is of enormous assistance.

The book is divided into two main areas. The first deals with transactions relating to goods, and the second deals with issues related to the penetration of foreign markets. This second part constitutes an addition made by the author to the previous editions, in order to address such issues as market access and operations in foreign jurisdictions.

Part 1 of the book is divided into four sections: International Sale of Goods; International Carriage of Goods; Financing an International Transaction; and Government Regimes Impacting on International Sales of Goods. Burnett's discussion assumes that the reader of this book will already have a certain degree of knowledge relating to the operation of the domestic regime relating to sale of goods (or can obtain it elsewhere), and concentrates on discussing the application and operation of the Vienna Convention for International Sale of Goods 1980 in Australasia. Her coverage of the regime is thorough and addresses the basic issues in a clear and logical order. The layout of the chapters, with precise and well-formulated headings, is very clear, which is helpful to a reader who is looking for assistance on a particular point. Burnett's writing style is very succinct, however, and the chapters in Part 1 of the book are certainly not suitable for browsing – every word must be read with attention if the reader is to grasp the issues that Burnett outlines and her views on the appropriate resolution of the problem.

Chapter 2 deals with the International Carriage of Goods, and provides detailed information on the application of the relevant international conventions

under Australasian law, as well as a comprehensive and useful summary of the contents of, and the issues relating to, shipping documents of various kinds. A useful discussion of the various kinds of contractual relationships between shippers, carriers, ship-owners and consignees is included in this chapter. Insurance is also covered in this Chapter, although relatively briefly. A reader who wished to delve more into the terms and conditions of insurance relating to the carriage of goods would obtain an understanding of the legal regime to the extent to which specific legislation relating to carriage of goods impacts on general insurance law, but would have to look elsewhere for an overall dissertation on insurance law.

Chapter 3, Financing an International Transaction, focuses on letters of credit and related arrangements, as well as the international banking system. It provides a clear and well-structured summary of various possible financing arrangements for international trade and of the applicable law. As this chapter focuses on the Uniform Customs and Practice for Documentary Credits (UCP) 1993, it does not have a particularly Australasian flavour.

Chapter 4 deals with Government Regimes Impacting on International Sales of Goods. It provides a precise and well-laid-out description of the Australian and New Zealand systems of legislation and regulation relating to imports, exports, customs duties and other issues relevant to international business transactions, as well as a clear overview of the interaction between international and domestic rules and obligations that are relevant to these transactions. In view of the complexity of these issues, and the peculiarities of domestic legislation, this chapter is particularly valuable for an Australian or New Zealand practitioner or businessperson struggling with this area of regulation. The Chapter deals with multilateral and bilateral treaty regimes, as well as domestic rules, although as it was published in early 2004 it does not deal with the Australia-US Free Trade Agreement or the current (2005) discussions between the Australian and Chinese governments on a free trade agreement. As the aim of the chapter is to provide a general understanding of the applicable regime, however, the principles outlined here will also be of assistance to someone attempting to work out how these agreements will or would apply to an Australian business.

Part II of the book is entitled ‘Penetrating Foreign Markets’. Chapter 5 deals with the Framework of International Regulation, and deals with international and domestic agreements and controls on trade. Chapter 6, Strategies for Penetrating Foreign Markets, covers structures used for foreign engagement by businesses, including representative offices, agency arrangements, licensing agreements, franchising, joint ventures and branches, while Chapter 7 deals specifically with the impact of international agreements, including agreements entered into in relation to the World Trade Organisation, a discussion of international trade and competition policy and a brief section on dispute settlement. This Part constitutes a very useful addition to the more specific discussion in the first part of the book, although it does not purport to provide detailed coverage of the broad range of topics that are addressed. It does, however, provide a clear summary of the issues, with footnotes and

cross-references to sources that could be used in order to investigate these topics further. Chapter 7, which provides a summary of international agreements, is a particularly useful guide to understanding the diverse range of treaties and obligations to which Australia and other governments are committed. The section on dispute settlement, however, could usefully have been expanded to discuss in a little more detail Australian and New Zealand approaches to international arbitration and the issues that arise from international dispute settlement.

As mentioned above, a particularly useful aspect of the book is its clear cross-referencing and footnotes. Burnett's comprehensive bibliography also contains a list of useful websites for readers who wish to delve into the material in more detail.

This edition of the *Law of International Business Transactions* demonstrates Burnett's wealth of experience and knowledge in the area of international business law. The expansion of this edition to deal with the penetration of foreign markets is a useful addition that rounds out her discussion of law and the issues relating to international business law. Burnett's ability to communicate her own understanding of the relationship between the complex layers of international and domestic regulation and varying international business practices to readers is particularly impressive. Her focus on Australian and New Zealand law, combined with her clear writing style and precise analysis of the issues and the book's excellent lay-out, make this a valuable teaching and learning tool for Australasian students, teachers and business people studying or working in the area of international business transactions.

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