Book Reviews

Edited by

Wendy Lacey

Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union

Heli Askola
(Hart Publishing, Oxford, Portland Oregon, Modern Studies in European Law, Volume 14, 2007 pp xix +218)

Trafficking in human beings (THB) is a hot political topic and it has become an even hotter legal issue since the adoption in 2000 of the United Nations Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted in Palermo, the choice of location for an instrument purporting to tackle organised crime proving, finally, that at least one person at the United Nations has a sense of irony).

THB is a worldwide phenomenon, and it goes well beyond the sex trade. People are trafficked for (forced) marriage, for adoption, for begging, to work in sweat shops and in the fields, to work as cheap or even unpaid domestic labour. There are even stories of people being trafficked for their organs – a possibility expressly recognised in the Protocol. THB, then, is not just about enforced prostitution. Nor is it just about human rights (in fact it is arguably not about human rights at all, an issue to which I shall return below); first and foremost it is a serious criminal practice with major consequences for its victims. But it may also involve (apparent) breaches of labour law, immigration law and, sometimes, anti-prostitution laws by the trafficked person, a fact not lost on traffickers, who may use their victims' apparent criminality to maintain control over them by threatening to report them to the authorities. That said, there is little doubt that an awful lot of THB is for the sex trade, and an awful lot of the victims are women and children.

If THB is a worldwide phenomenon, what is so special about the European Union? The EU matters because, in Europe, the law on trafficking is coming as much out of Brussels as anywhere else. The EU has adopted several important instruments relating to THB, most notably its Framework Decision on Combating Trafficking in Human Beings (2002) and its Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004). The Qualification Directive (2004), which is at the heart of EU law on international protection, is also relevant here. So Brussels has been busy, and remains so.

Heli Askola's book focuses on one aspect of THB in the EU – the legal response to women who are trafficked for the sex trade. While it does not address all aspects of THB, it does address the most notorious element of the whole sordid business, a business that has substantially entered the public consciousness in most parts of Europe, particularly the perception of a more or less constant 'supply' of young women from east-central Europe being moved west to satisfy the demand. Just take a walk down Oranienburgerstrasse in Berlin if you want to see it for yourself. THB is now so established as a fact of modern life (often globalisation gets the blame) that it appears increasingly in crime fiction, rather notably, for instance, in Stieg Larsson's *The Girl Who Played With Fire* (Norstedts Förlag, 2006; Quercus, 2009).

Askola's book is based on the author's doctoral thesis, submitted in 2005. There is no doubt that she identified a most topical subject and, furthermore, a difficult one in that she was dealing with a perpetually moving target. EU asylum and immigration policy was in a state of flux owing to a series of parallel developments and initiatives ordained by the Amsterdam Treaty, which in principle were supposed to be completed by 2005 (a time to which those trying to teach the subject looked forward like waifs in the desert eyeing a distant oasis), when the flood of initiatives and drafts emanating from the European Commission would hopefully cease – of course it never did – and we could get on with trying to get to grips with the law, for better or worse. So the book's timing is actually rather good, although there continue to emerge from Brussels new initiatives on the matter such as the Commission's proposal (March 2009) for a new Framework Decision on preventing and combating THB, which will eventually repeal the 2002 Framework Decision.

THB is often referred to as a violation of human rights – for instance in the Preamble to the Council of Europe Convention on Action against Trafficking in Human Beings (2005) and the Background Note prepared by the Swedish Ministry of Justice in the context of the Swedish EU Presidency project 'Towards Global EU Action against Trafficking in Human Beings' (May 2009). But this can be misleading: THB is fundamentally a private criminal enterprise, just like theft, reckless driving and murder. In the absence of State involvement or complicity there is arguably no human rights issue until the victim is actually in the hands of the State, when human rights obligations with regard to the victim's treatment, as well as international protection obligations, will clearly be relevant. The suggestion that THB is not a human rights issue tends to cause a certain amount of excitement amongst some human rights lawyers and NGOs. Askola addresses this matter in Chapter 6. She makes a forceful case for the inadequacy of existing human rights instruments in protecting victims of trafficking. I would agree with that, once the victim is in some way under the State's protection. But the best thing about this chapter is that Askola does not *assume* that THB is a human rights violation; rather she looks very carefully at the arguments for the notion, concluding (p 141): 'The real problem is thus not so much whether or not trafficking can be read implicitly to fall within existing human rights provisions, but that there seems to be little consensus, capacity, political will and pressure behind doing so with any consistency.' There is much truth in this, but I would argue that the classification of

THB as a human rights issue, without qualification, is also a problem: it is conceptually wrong and can have important practical ramifications.

There is a problem with much of the discourse on THB: one does not have to treat it as *either* a criminal law matter *or* a human rights one, when there are clearly elements of both. The act of trafficking is criminal. In addressing that crime, the State must take account of its own human rights obligations towards victims (and, indeed, traffickers). It in no way diminishes the concern we should rightly have for victims of trafficking if we accept that THB is a crime rather than a breach of human rights. In fact, one of the strengths of Askola's book, apart from the rigorous analysis, is that she highlights some of the different facets of THB – not only the human rights and criminal law dimensions, but also the links with migration (or rather, irregular migration). She is well aware of the complexity of THB and is not critical of anti-trafficking measures, like the Palermo Protocol, *simply* because they focus more on crime rather than human rights.

But there is much more to the book. Askola looks at the impact feminist writing has had on the response to THB and prostitution, and not only with regard to the law. Indeed, she highlights (p 40) the risk of confining analysis to the legal issues only – that we end up looking only for legal solutions. This is particularly apt with regard to THB and, indeed, other forms of irregular migration. THB occurs because a market exists; furthermore the victims, vulnerable through poverty, ignorance and lack of family or local support, are more readily tricked into believing in a good life in western and central Europe (or Australia, or North America). The point is that the best criminal laws will not stop THB, and the most effective application of human rights law will not stop it either. Education, increased living standards, equal (and better – there is no point in equal opportunities that are in themselves negligible) opportunities may all contribute to reducing vulnerability.

Askola deliberately confined her analysis to trafficking of women for sexual exploitation in the EU. That practice easily entails enough legal issues to justify her study. But much of what she writes is relevant also to trafficking of children and men, and not only for the sex trade, and not only in the EU: the men trafficked to work in sweat shops, the children trafficked for begging and the boys trafficked to work as camel jockeys in the Middle East.

This is an excellent book. It is well-researched, coherent and highly readable.

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Law, War and Crime

Gerry Simpson

(Polity Press, Cambridge, 2007, ix + 225 pp)

Law, War and Crime is a history of international criminal law. The field is a young one and its tensions, ironies and incoherencies, illuminated in the first five chapters of Gerry Simpson's book, are many; can, and how does, international criminal law transcend the charge of 'victor's justice?' To what extent does international criminal law's selectivity discredit its claims to universality and impartiality? Are war crimes trials fatally flawed by their inevitable politicization? What is the proper 'place' of the war crimes trial: within the state or above it? How well does the international criminal trial function as a vessel of historical truth, as a forum for dissenting narratives, as a means of redress for victims? Can we really individualize war and ascribe criminal intent to men who do no more or less than fight on the losing side of a battle between states? Chapters 6 and 7 of *Law, War and Crime* stand somewhat apart from the preceding ones; in Chapter 6, Simpson investigates the insertion of law into international politics, the 'way political events are given juridical form.' Then, in somewhat ahistorical fashion, Simpson discusses 'Law's Origins;' we are given 'the Pirate', predecessor to the modern terrorist, without allegiance to any state and the enemy of all states.

Laying bare the uncertainty of international criminal law's horizon is a worthwhile endeavour. If one of the author's aims in *Law, War and Crime* is to dampen any unrestrained moral enthusiasm we may have had for the cosmopolitan project of international law (p 2), then he succeeds. Complacencies (that international criminal law might be above politics, that the apparatus and techniques of domestic law can be easily applied to crimes against humanity), are unseated. Simpson's principal argument is that 'the politics of war crimes trials can be thought of as a set of relationships: between the cosmopolitan and the local; between the collective and the individual; between the didactic and the juridical; between show trials and legitimate proceedings; between law in war and law of war; and between legal sanction and extra-legal action' (p 29). At the end of Chapter 4, 'Law's Place,' Simpson writes that 'the modalities of international justice involve a perpetual negotiation between the claims of the cosmopolitan and the needs of the local, the former constantly threatening to collapse into hegemony, the latter into parochialism. As this chapter has argued, this negotiation is the very stuff of international criminal law' (p 53).

But *Law, War and Crime* is far from being a destructive critique of international criminal law; its principal strength is its function of empowering us to shift our understanding of the field. For example, judges of the International Criminal Court have recently authorised the issue of an arrest warrant for President Omar al-Bashir of Sudan, the first issued by the International Criminal Court for a sitting head of state. Arguments such as those pursued by Simpson, that 'war crimes trials are best understood as a form of legalistic politics,' (page 24), have resonance. The Security Council's referral of Darfur to the ICC in March 2005 was a political action, but hardly one that deferred unambiguously to 'Great Power

preferences' (p11); the United States' abstention from the Security Council vote was indication of the ambivalent attitude of at least one of the Great Powers to prosecution of States that are not party to the Rome Statute.[1] Nor was Security Council Resolution 1593 reflective of 'institutional and doctrinal tools working *against* those preferences' (p 11); Article Six of the Resolution preserved the imperviousness of states not party to the Rome Treaty, such as the United States. The indictment of al-Bashir, a sitting head of state, has been met with accusations that the international community was using international law to pursue regime change by judicial means (Simpson's 'legalistic politics'). Other commentators deplored the harm the prosecution was doing to the African Union's efforts to reach a peaceful resolution of the Darfur crisis (Simpson's 'Utopian Politics'). The ICC prosecutor, Moreno-Ocampo, maintained that the impact of the indictment on the Comprehensive Peace Agreement or the Sudanese government's eviction of aid workers, was not any part of the prosecutor's deliberations; 'our job is basically judicial' (Simpson's 'transcendental legalism.') As the ICC moved to try yet another defendant from an African state, we are reminded of Simpson's arguments about 'deformed legalism;' it indeed appeared that 'international criminal law, from the perspective of the industrialized North, appears to be what other states breach' (p 17).

The bulk of *Law, War and Crime,* then, provokes a certain mode of thinking about international criminal law; a recognition of its 'insufficiency and incompletion, always necessarily attuned to what could be.'[2] In the face of this achievement, my quibbles with the book are minor; such as its Eurocentric focus that paints a trajectory from Nuremberg to The Hague, with little more than a nod to Justice Pal's dissent at Tokyo as evidence that the rest of the world has thought much about war and law. A slightly larger quibble is with the final chapter of *Law, War and Crime*, 'Law's Fate'. The chapter is only one and a half pages long and is more perplexing than its preceding chapters. In it, the author concludes that '[l]aw and crime are now central to our understandings of how war should be judged. And we understand, too, that war must be judged, and that we are capable of judgment. This is the modernist project of law made global.' If we are uneasy with judging war, it is because of an 'ancient sense that we are at the same time incapable of judgment: that judgment is still to come' (p 178). The author concludes the book with a reference to Steiner's contrast of Old Testament wars with the Peloponnesian Wars, wars in which men, driven by 'obscure fatalities and misjudgements ... go out to destroy one another in a kind of fury without hatred' (p 179).

Simpson's reference to the Peloponnesian Wars and the wars of the Old Testament is no mere rhetorical flourish. At the end of Chapter 5, 'Law's Anxieties: Show Trials' the author concludes that 'the war crimes field, then, is founded on a schism between Judaic judgment and Greek fatalism. In the Judaic

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1 China also abstained, as did Algeria and Brazil.

2 B Golder, 'Foucault and the Incompletion of Law' (2008) 21 *Leiden Journal of International Law* 747, 761.

version of the action / accountability axis, men are punished for a moral failure of some sort; they do wrong and are condemned before the tribunals of man or by a reasoning God. In the Greek version, men are at the mercy of gods; they are unanchored to any rational universe. The continuity between thought and action dissipates to be replaced by 'an ironic abyss' (p 131). At the end of the book we are asked: 'What sort of wars are we now waging? And how should we respond to them? With law? Or with fatalism and irony?' It is clear that in the author's view, the answer should be law.

The positing of international criminal law as 'founded on a schism between Judaic judgment and Greek fatalism' (p 131) underpins Simpson's attempt to achieve the second major project of *Law, War and Crime*; to convince the reader that, despite the author's vigorous and conscientious unearthing of the play of power and politics in international criminal law, 'universal justice' is a worthy and (ultimately) attainable goal; 'it seems unarguable that justice ought to be done and that war crimes law has done much to achieve that end' (p 9). We are encouraged to agree with the author, because he casts the dilemma of international criminal law as being between 'reason and justice' or 'arbitrary death and pointless destruction overseen by capricious gods' (p 131). Naturally, we prefer reason and justice. By framing the debate thus, Simpson has replaced the familiar juxtaposition of international law, that it is 'a manipulable façade for power politics,' (too apologetic to be taken seriously in the construction of international order) or that 'its moralistic character hopelessly distances it from the realities of power politics,' (too utopian to be taken seriously) (Koskenniemi),[3] with his own defining juxtaposition of the field.

But words are not used carelessly in *Law, War and Crime.* 'Tragedy' resurfaces again and again as the dark undertow to the acutely observed oscillations between the individual and the collective, the state and international society, legalism and show trial. Earlier in the book, in a chapter dealing with 'Law's Subjects' (an exegesis on individual accountability for structural evil, whether and how states commit crimes and the consequences of holding states accountable), the author makes a rather large claim: '*and I show, too, how implicated in all this is the relationship between individual evil, structural deformity and the tragedy of being human*' (p 59). My concern with Simpson's characterisation is that whether one's tastes run to Greek tragedy or to the theatre of retributive justice is less a matter of logic and reason than of one's appetite for a particular *Weltanschauung.* It is questionable whether we are offered, in the end, any more than the author's personal conviction that the law, despite its vagaries, limitations and hypocrisies, is a fitting response to war.

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3 M Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4.

Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee

(Alex Conte and Richard Burchill 2nd ed, Ashgate, 2009, 408pp)

The second edition of this work is to be welcomed. One of the original three authors, Professor Scott Davison, was obliged to withdraw owing to university commitments. The continuing authors are established scholars in human rights from New Zealand and Great Britain, respectively.

The book covers, in the manner of a synthetic analysis and commentary, the jurisprudence of the Human Rights Committee. The term "jurisprudence" normally implies the repertory and trends of the decisions of a judicial body. It is generally conceded (and acknowledged by the authors) that the Human Rights Committee, established under the International Covenant on Civil and Political Rights, 1966, is not a judicial body. It issues "views" on complaints made to it (termed "communications") by persons claiming that a party to the Optional Protocol to the Covenant has violated a provision of the Covenant in relation to the claimant personally. These views, issued after consideration by the Committee in closed session following a purely written procedure conducted by the Petitions Unit of the Office of the High Commissioner for Human Rights located in Geneva, may contain a finding of a violation or a non-violation (some communications may be rejected for inadmissibility.) In the former case, the respondent State party is called upon to report to the Committee within 90 (recently altered to 180) days on its implementation of the Committee's views by way of a remedy.

Shortly after the book appeared, the Committee issued a General Comment on the obligations of States parties to the Optional Protocol.[1] The Committee took a nuanced position on the legal character of the Committee's views:

> 11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decision.
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> …
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> 13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their

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1 General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/33 (2008).

> character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.
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> …
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> 15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

For Australians, the book under review, which covers the jurisprudence of the Committee up to 2008, comes at a significant time.

First, the Human Rights Committee, in April 2009, issued its Concluding Observations on the 5th periodic report of Australia on its implementation of the Covenant. Paragraph 10 of those Concluding Observations stated as a concern of the Committee that –

> While acknowledging the measures taken by the State party to reduce the likelihood of future communications regarding issues raised in certain of its Views, the Committee expresses once again its concern at the State party's restrictive interpretation of, and failure to fulfil, its obligations under the First Optional Protocol and the Covenant, and at the fact that victims have not received reparation. The Committee further recalls that, by acceding to the First Optional Protocol, the State party has recognised its competence to receive and examine complaints from individuals under the State party's jurisdiction, and that a failure to give effect to its Views would call into question the State party's commitment to the First Optional Protocol (art. 2).

The Committee followed this expression of concern with the following recommendation:

> The State party should review its position in relation to Views adopted by the Committee under the First Optional Protocol and establish appropriate procedures to implement them, in order to comply with article 2, paragraph 3 of the Covenant which guarantees a right to an effective remedy and reparation where there has been a violation of the Covenant.

The Committee thus considers, in these Concluding Observations in relation to Australia, its views to be essentially binding. It does not acknowledge that Australia is not the only State party to consider them recommendatory only. Nor does it acknowledge that Australia has been assiduous in responding to every communication lodged against it and in providing detailed and respectful reasons in those cases where it has felt itself to be unable to accept the Committee's views.

Second, Australia is currently considering how best to advance human rights at the national level, and in particular whether a national Bill or Charter of Human Rights should be enacted. The Brennan Committee reported in October 2009 in favour of the enactment of a national Human Rights Act. The Human Rights Committee also recommended such an enactment in its Concluding Observations of April 2009 (paragraph 8). How will such a Bill or Charter, if the proposal is accepted by the Australian Government and enacted by the Parliament, enhance Australia's application and observance of human rights treaties? The debate on this question is already vigorous and will be continued.

To the extent that any such Bill or Charter would necessarily incorporate the provisions of the International Covenant on Civil and Political Rights, 1966 (among other instruments and material), would the jurisprudence of the Human Rights Committee become regarded as the authentic interpretation of those provisions and thus de facto binding on — or at least highly persuasive before — Australian courts? That remains to be considered by Australian courts. In any event, if the enactment of a national Human Rights Act proceeds the book under review will assume enhanced usefulness in the hands of Australian lawyers.

The introductory chapter surveys the Covenant and the work of the Human Rights Committee. It is worthy of special note (although the authors do not state this) that of the present 164 States parties to the Covenant 112 have adhered to the Optional Protocol. This represents an impressive degree of readiness by States to allow their own citizens or residents to bring complaints to the Committee (having exhausted all domestic remedies). Regarding the methods of interpretation employed by the Committee in considering individual communications, the authors note the frequent reliance by the Committee on the canons of interpretation of the Vienna Convention on the Law of Treaties and the interpretation of the provisions of the Covenant in the light of their object and purpose. They question, however, the apparent reluctance of the Committee to refer to the jurisprudence of other bodies, notably the European Court of Human Rights and the Inter-American Court of Human Rights, and the difficulty of discerning any general interpretative trends in the Committee. This they attribute to the diverse and changing membership of the Committee, the limited time during which the Committee sits (9 weeks a year) , its obligations to consider also State party reports, and the limited support facilities available to the Committee (compared with, for example, the European Court of Human Rights).

The survey of the Committee's jurisprudence that follows is divided into chapters and sections tracking the provisions of the Covenant. The manner of treatment by the authors is analytical, and seeks to identify trends rather than to engage in extensive summaries of the cases. The footnotes supply references to all relevant decisions. The survey is comprehensive and clearly presented.

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United Nations Sanctions and the Rule of Law

Jeremy Farrall

(Cambridge Studies in International and Comparative Law, 2007, 542pp)

The United Nations sanctions system has been increasingly scrutinised in recent times, as questions are raised about its effectiveness, fairness and adverse humanitarian consequences. *United Nations Sanctions and the Rule of Law* by Jeremy Farrall represents a significant contribution to this body of work.

The book contends that the UN has undermined the rule of law by the manner in which it has applied sanctions. This has weakened the authority and credibility of the UN Security Council's sanctions mechanism and consequently the likelihood of full implementation of UN sanctions by States. Overall, it has meant that UN sanctions have been less effective than they could have been. According to Farrall, the remedy is to reform the UN's sanction practice to reinforce the international rule of law so that States desire, and feel compelled, to implement sanctions effectively.

The book begins by examining the relevance of the rule of law to UN Security Council practice, concluding that it has been given greater emphasis in the post-Cold War era, though the rhetoric has not always translated into practice. It then traces scholarly, governmental and UN interpretations about the nature of the rule of law, before proposing a 'pragmatic' model incorporating notions of transparency, consistency, equality, due process and proportionality. According to Farrall, the intention is not to impose external regulation on the Security Council, but to promote greater awareness and adherence to the rule of law in its decision-making processes, thereby minimising the risk of misuse or abuse of political power.

The book next considers the historical evolution of sanctions in the international system, as well as the framework for the passing of sanctions under the UN Charter. It contains a useful analysis of the key sanctions powers in Articles 39 and 41 of the UN Charter, as well as some potential limits upon those powers. This part ends with an analysis of the strengths and weaknesses of the system of implementation of UN sanctions by States.

The book then explores, in significant detail, the manner in which sanctions have been utilised in practice by the UN. In this context, it refers to specific provisions of the 25 major sanctions regimes established by the UN to date, from Southern Rhodesia in 1966 to more recent regimes established against North Korea and Iran. These sanctions regimes are fully summarised in appendices to the book. This part examines how the Security Council has made determinations of a threat to the peace, breach of the peace or act of aggression under Article 39 and invoked Article 41 or Chapter VII of the UN Charter in the contexts of these sanctions regimes. It also explores the types of sanctions passed by the Security Council, including those of an economic, financial and diplomatic nature, as well as common exemptions contained in the regimes. There is a passage on the targets of the regimes that have ranged from individuals to terrorist groups to multiple States. This part also examines how the Security Council has defined its objectives in

passing sanctions and experimented with temporal limitations. Most interesting is the passage on how the Security Council has sought to address some of the unintended consequences of its sanctions, which has been the subject of criticism in the past. The final chapter in this part concerns the manner in which the Security Council has delegated its responsibility for sanctions administration and monitoring.

The final part of the book returns to evaluate how the UN could strengthen the degree to which its sanctions system follows fundamental rule of law principles. It applies the pragmatic rule of law model developed earlier in the book to Security Council sanctions practice. It identifies problems with transparency (negotiations behind closed doors, inadequate record-keeping, no reasons for decisions), consistency (inconsistencies in the objectives, scope and administration of regimes), equality (the privileged position of the veto powers), due process (no opportunity to make representations) and proportionality (the burden placed on civilians and third States). Finally, the book makes specific recommendations as to how some of these deficiencies might be addressed by the Council, taking into account ever-present political realities.

This analysis of the UN sanctions system is a welcome addition to the sanctions literature. It presents a comprehensive and coherent description of the sanctions system, an insight into its practical machinations, along with a much-needed critique of the system and how it might be improved. The recommendations are largely reasonable and many can be achieved without great disruption to the system or cost. It will be a useful resource for academic, government, non-government and inter-government officials who are involved in sanctions law and policy. The book is systematic, balanced and is evidently the product of methodical and thorough research. It is also written in a clear, easily accessible style.

It would have been useful for the book to explain in greater detail the degree to which adherence to the rule of law by the Security Council would necessarily result in greater compliance and fuller implementation by States. After all, some States may be unable to implement sanctions because of lack of capacity and resources. Other States may be unwilling to implement sanctions because it suits their national interests, no matter how rule of law compliant they may be. It would also have been helpful to explain why the Security Council's compliance with rule of law principles would 'compel' States to implement sanctions. Further analysis in these areas may have strengthened arguments as why it is in the Security Council's interests to self-regulate in these areas.

Hopefully the book will be read and absorbed by those in a position, and with the desire, to improve the UN sanctions system. There are many useful ideas in this book that, if materialised, could potentially strengthen the effectiveness of sanctions, while minimising humanitarian and other collateral consequences.

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Looking South: Australia's Antarctic Agenda

Edited by Lorne K Kriwoken, Julia Jabour and Alan D Hemmings

(The Federation Press, Annandale, NSW 2007, pp xxi +227).

The Antarctic Treaty celebrates its fiftieth anniversary in 2009.[1] This agreement provided for, *inter alia*, freedom of scientific investigation, demilitarisation and denuclearization of the region and prohibition of radioactive waste disposal within the treaty's jurisdiction south of 60° South Latitude. During the last five decades, this treaty has grown from a single international agreement consisting of fourteen provisions with twelve original contracting parties to a full-fledged, multifaceted regime comprised of a vast collection of ancillary agreements, norms, principles, rules and laws governing a vast array of issues that affect one-tenth of the Earth's surface. Special binding international agreements were negotiated and are in force for conserving the local seal population,[2] conserving living marine resources in the region,[3] and for protecting the environment of the continent and its circumpolar waters against human degradation and resource exploitation.[4] Negotiations for a complicated Antarctic minerals treaty were also completed during the 1980s, but the agreement never was legally consummated and thus remains moribund.[5] That failure aside, among the critical issues successfully mandated by the Antarctic parties are special obligatory provisions for environmental impact assessments,[6] conserving Antarctic fauna and flora,[7] ensuring proper disposal and management of wastes,[8] preventing marine pollution,[9] protecting and managing designated areas in the Antarctic,[10] and enforcing operator liability in the event of environmental emergencies in the region.[11] No less impressive is that since 1959, the number of contracting parties has grown from the original dozen to 47 today.[12]

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1 The Antarctic Treaty (1 December 1959), 402 UNTS 71 (entered into force 23 June 1961).

2 Convention on the Conservation of Antarctic Seals (1 June 1972), 1080 UNTS 175 (entered into force 11 March 1978).

3 Convention on the Conservation of Antarctic Marine Living Resources (20 May 1980), 1329 UNTS 47 (entered into force 7 April 1982).

4 Protocol on Environmental Protection to the Antarctic Treaty (4 October 1991), Doc XI ATSCM/2, 21 June 1991, (entered into force 14 January 1998).

5 Convention on the Regulation of Antarctic Mineral Resources (2 June 1988), opened for signature 25 November 1988, (1988) 27 ILM 859 (not in force).

6 Annex I to the Protocol on Environmental Protection to the Antarctica Treaty: Environmental Impact Assessment Doc, ATS Ser No 6 (1998)..

7 Annex II to the Protocol on Environmental Protection to the Antarctica Treaty: Conservation of Antarctic Fauna and Flora Doc, XI ATSCM/2, 21 June 1991.

8 Annex III to the Protocol on Environmental Protection to the Antarctica Treaty: Waste Disposal and Waste Management Doc, XI ATSCM/2, 21 June 1991.

9 Annex IV to the Protocol on Environmental Protection to the Antarctica Treaty: Prevention of Marine Pollution Doc, XI ATSCM/2, 21 June 1991.

10 Annex to Recommendation XVI: Annex V to the Protocol on Environmental Protection to the Antarctica Treaty: Area and Management Doc, XI ATSCM/2, 21 June 1991.

11 Annex VI to the Protocol on Environmental Protection to the Antarctica Treaty:

Among the leading national players in Antarctic affairs is Australia, which prominently advocates conducting science on the continent, protecting fisheries in the Southern Ocean, and using international law to advance its interests in the region. *Looking South* takes a hard but fair look at Australia's Antarctic agenda, with the aim of assessing the legal, diplomatic, political, economic, scientific and geographical challenges that complicate that government's ambitions in the frozen south.[13] To a commendable degree, the authors in this volume admirably succeed in accomplishing that difficult task.

The fourteen chapters that comprise this compact anthology explore the central theme of how law, policy and science contribute to making Australia's many roles in the circumpolar south a successful national enterprise. The introduction by the three editors sets the stage by explaining the origins of the 'looking south project' and the two workshops that convened in 2004 and 2005 to produce the papers that comprise this volume. Five chapters focus on Australia's impact on various legal issues. The first substantive chapter by Donald Rothwell and Shirley Scott critically examines the nature of Australia's sovereignty claims to the continent.[14] As the authors rightly observe, Australia's national interests over the last fifty years have focused on fashioning a legal regime that protects its sovereignty claims in the region, while also promoting national policies devoted to ensuring freedom of scientific research and environmental protection. For this reviewer, what makes these policies especially intriguing is the degree to which the government has gone to assert claims offshore the Australian Antarctic Territory (AAT) within the context of the 1982 United Nations Law of the Sea Convention (LOS Convention).[15] Among these are Australia's national claims made to Antarctica's continental shelf (in 1953), a twelve-nautical mile (nm) territorial sea (done in 1990), and a 200 nm exclusive economic zone (EEZ) (done in 1994). As the authors note, Australia has made these maritime claims without actually implementing domestic law within these zones.[16] For the future, two ocean-related legal issues are likely to dominate Australia's attention. First, sovereignty concerns in Antarctica are likely to fall on the extension of its continental shelf claim, which if approved by the UN Commission on the Limits of the Continental Shelf, would give Australia a continental shelf area of nearly 3.5 million square kilometers,

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Liability Arising from Environmental Emergencies Doc, XXVIII ATSCM/1, 17 June 2005 (not in force), in (2006) 45 ILM 5.

12 Antarctic Treaty Secretariat, Antarctic Treaty System, Parties <http://www.ats.aq/devAS/ats_parties.aspx?lang=e> at 3 May 2009.

13 L Kriwoken, J Jabour and A Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (2007).

14 D Rothwell and S Scott, 'Flexing Australian Sovereignty in Antarctica: Pushing Antarctic Treaty Limits in the National Interest' in Kriwoken, Jabour and Hemmings, above n 13, 7.

15 United Nations Convention on the Law of the Sea (10 December 1982), (entered into force 16 November 1994), 1833 UNTS 396. As of 1 May 2009, 158 states are parties to the 1982 LOS Convention.

16 Rothwell and Scott, in Kriwoken, Jabour and Hemmings, above n 13, 12.

making it one of the largest territorial claims in the world.[17] Second, Australia's policies of promoting whale conservation and strong opposition to commercial whaling in the region cannot avoid bringing that government into juridical conflict with Japanese whalers engaged in 'scientific whaling'. What remains puzzling to this reviewer is why the Australian government has not enforced more rigorously the conservation standards in the national Whale Sanctuary it adopted in 2000.

Another law-related chapter by Tim Stephens and Ben Boer analyses Australia's ability to enforce compliance with legal measures in the AAT.[18] The authors first examine the efficacy of these factors in the Antarctic Treaty System as a whole, and conclude that a critical unresolved problem remains that of state jurisdiction throughout the continent. Obviously this is complicated by the ambiguity of Article IV in the treaty, which agrees to disagree on the status of the claims, and it is complicated further by Australia's participation in several components of the Antarctic legal regime system. Similarly, certain policy dilemmas impinge upon Australia's ability to enforce compliance in the Antarctic, chief among them being application since 1933 of several pieces of Australian national legislation concerned with human activities in the AAT. Also interesting is that Australia adopted national legislative acts to implement laws affecting environmental protection, as well as new assertions of jurisdiction over maritime zones offshore the AAT. Once again, the critical factor is not the law that exists; it is the political will to enforce compliance with that law.

Murray P Johnson and Lorne K Kriwoken furnish a third chapter on legal issues, specifically on how Australia treats Antarctic tourism.[19] The authors examine Australia's domestic legislation that is concerned with tourist activities, especially as it relates to environmental protection as stipulated by the Madrid Environmental Protection Protocol. As they rightly observe, with 16 Australian-based companies, Australia has vested interests in its relationship with the International Association of Antarctic Tour Operators (IAATO). Even so, Johnson and Kriwoken are not sanguine about Australia's regulatory approach toward the tourist industry. Serious deficiencies still exist, such as the lack of specific regulatory controls on the number of tourist visitors, or on vessel size, or on types of tourist activities or technological developments.[20] They suggest that a more precautionary approach might improve Australia's regulatory approach to its tourist visitors. In addition, Australia's environmental protection interests would be strengthened by encouraging a stronger government role to enforce IATTO standards, which are mainly industry self-regulating, particularly on non-IAATO members. The authors note three potential valuable contributions that Australia could make to more vigorously regulating Antarctic tourism. The government

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17 Ibid 13.

18 T Stephens and T Boer, 'Enforcement and compliance in the Australian Antarctic Territory: Legal and Policy Dilemmas' in Kriwoken, Jabour and Hemmings, above n 13, 54.

19 M Johnson and L Kriwoken, 'Emerging Issues of Australian Antarctic Tourism: Legal and Policy Directions' in Kriwoken, Jabour and Hemmings, above n 13, 85.

20 Ibid 89.

could: (1) sponsor an industry accreditation scheme by which agreed minimum standards would be adopted by all tourist operators in the Antarctic; (2) promote a wider onboard observer scheme manned by Australian inspectors on tourist vessels; and (3) adopt a set of strong shipping guidelines that regulate vessel design, operation and manning standards for ships navigating through circumpolar Antarctic waters.[21] In the end, though, enforcement of stronger tourism and shipping standards can only be as strong as governments are willing to impose on their industries.

A fourth law-oriented chapter by Gail L Lugten concerns Australia's role in Southern Ocean fishing.[22] Among Antarctic Treaty members, Australia has been a leading proponent of more robust conservation standards being applied and enforced in the circumpolar Antarctic seas. This is especially true of protecting Patagonian toothfish and dealing with problems of illegal, unreported and unregulated (IUU) fishing activities. Successful negotiation of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) in 1980 and the adoption by its Commission of subsequent conservation measures places that organisation among the most progressive regional fishery bodies in the world.[23] Yet, as the author points out, a major conundrum debilitates the CCAMLR regime: member states remain so preoccupied with surveillance and enforcement demands on fisheries within their own national exclusive economic zones that they tend not to devote strong enforcement actions to protect fisheries within CCAMLR's area of jurisdiction.[24] Australia has not escaped this dilemma. While the government has demonstrated impressive due diligence in enforcing conservation measures agreed to for the CCAMLR area, these efforts clearly are counterbalanced by the pressing need to manage EEZ fishing grounds around its sub-Antarctica territories, namely Heard, McDonald and Macquaire Islands. National legislation has been adopted to deal with IUU fishing offshore these territories, and it is here that much of Australia's enforcement efforts are concentrated. Finally, Lugten makes brief, but compelling arguments that three provisions in the 1982 LOS Convention should be 'reformed' to strengthen international law's response to IUU fishers. These include, first, Article 87(1)(e), which concerns the traditional high seas freedom to fish that conflicts with conservation efforts on the high seas by regional fishery management organizations; second, Article 73 that deals with the rights and duties of coastal states within their EEZs, to which the author advocates that additional inclusion of stronger punitive disincentives be applied against unlawful fishers; and third, Article 111, which provides for the right of hot pursuit of vessels in violation of fishing laws, contains 'anachronistic restrictions' that essentially undercut the ability of the coastal state's (i.e., Australia's) navy to enforce its own resource

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21 Ibid 94–98.

22 G Lugten, 'Net Gain or Loss: Australia and Southern Ocean Fishing' in Kriwoken, Jabour and Hemmings, above n 13, 100.

23 See C Joyner and L Aylesworth, 'Managing IUU Fishing in the Southern Ocean: The Plight of the Patagonian Toothfish' (2008) 22 *Ocean Yearbook* 241.

24 Lugten, in Kriwoken, Jabour and Hemmings, above n 13, 104–07.

management laws against fleeing IUU fishers. Lugten would reform this provision by removing these restrictions.[25]

Finally, a chapter by Lorne Kriwoken and Nick Holmes assesses law-related issues that affect Australia's administration of Macquarie, Heard, and McDonald Islands.[26] After briefly discussing the history of exploring the islands, the analysis turns to setting out the governmental arrangements for managing them. Macquarie has progressed from a several protected status categories since 1933, and today is designated as an International Biosphere Reserve, included on the World Heritage List and declared as a Marine Park managed under the State Government of Tasmania. Similarly, Heard and McDonald Islands are on the World Heritage List and are protected nationally under their finalised 2005 Marine Reserve Management Plan. To strengthen prohibitions against fisheries, Australia placed these two islands within a declared national EEZ, with sections being specially designated both for habitat and species management and for high protection. The inclusion of map figures in the chapter greatly simplifies explanation of how these protection zones are legally configured. In addition, the point is well made by Kriwoken and Holmes that critical to dealing with emerging issues affecting these island possessions will be Australia's ability to plan and implement prudent policies for conducting scientific programs and environmental management, especially through ocean zoning. Relatedly, certain threats to the islands must be directly addressed, in particular, continued growth of tourism, preventing disease and alien species from being introduced, and stricter regulation of commercial and IUU fishing (especially for Patagonian toothfish) in the area.[27] Perusing this chapter leaves one with the clear impression that Australia has sufficient national legislation in place to deal with these threats to the islands; the key to successful environmental protection and resources conservation in this part of the sub-Antarctic will lie in the ability of Australia's government to enforce compliance with those laws on foreign tour operators and fishers.

Three chapters specifically address policy concerns of Australia in the Antarctic. Marcus Haward, Rob Hall and Aynsley Kellow provide an insightful assessment of how Australia sets and implements national policy for the polar south.[28] For them, Australia's Antarctic policy is driven by two forces: (1) the domestic political agenda and (2) the government's obligations under relevant international agreements. Accordingly, the Australian government not only is concerned with administrative matters affecting the AAT; it must also take decisions on how it participates in Antarctic Treaty Consultative Party meetings, the Scientific Committee on Antarctic Research, the CCAMLR Commission, the Committee for Environmental Protection and the Council of Managers of National

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25 Ibid 113–15.

26 L Kriwoken and N Holmes, 'Emerging Issues of Australia's Sub-Antarctic Islands: Macquarie Island and Heard Island and McDonald Islands' in Kriwoken, Jabour and Hemmings, above n 13, 149.

27 Ibid 157–61.

28 M Haward, R Hall and A Kellow, 'Setting and Implementing the Agenda: Australian Antarctic Policy' in Kriwoken, Jabour and Hemmings, above n 13, 21.

Antarctic Programs. Policies pursued in these fora, the authors properly posit, are determined pragmatically by calculating what option best serves Australia's national interest. To be sure, sovereignty considerations are an ongoing salient interest, even if often downplayed. Likewise, Australia took a leading role during the mid-1980s in tempering the developing world's challenge to the Antarctic Treaty System in the United Nations General Assembly. Not unrelated, Australia was a major force in 1989 in precluding the possibility that the Antarctic mineral treaty might enter into force, which eventuated in 1991 into the about-face negotiation of the Antarctic Environmental Protection Protocol. Especially interesting to this reviewer is the authors' discussion of the Australian Antarctic policy community. At the core of the decision-making process are senior ministers, whose roles are greatly augmented by the lead agency for Australia's Antarctic policy, the Australian Antarctic Division. Other government bodies directly concerned about Antarctic policy include the Department of Foreign Affairs and Trade, the Department of the Environment and Water Resources, the Australian Fisheries Management Authority, the Australian Defence Force, and Tasmania's role in administering Macquarie Island. [29] In addition, nongovernmental organisations such as the Antarctic and Southern Ocean Coalition and Greenpeace and industry groups such as IAATO and the Coalition of Legal Toothfish Operators also impact on governmental policy making that affects activities in the Antarctic. As the authors' analysis makes evident, Australia takes its role in making policy for its activities in the Antarctic very seriously and very responsibly. Indeed, there are lessons to be learned by other governments from the successful achievements of policy making under the Australian model.

Stephen Powell and Andrew Jackson contribute an assessment of Australia's influence in the Antarctic Treaty System, especially since the publication in 1984 of Stuart Harris' celebrated work, *Australia's Antarctic Policy Options*.[30] Key among these opportunities is the role Australia plays to advance its national interests in Antarctic Treaty Consultative Party Meetings. Chief among these interests are protection of the Antarctic environment, better understanding of how Antarctica fits into the global climate system and the need to undertake scientific work that is of 'practical, economic and national significance'.[31] This chapter discusses Australia's critical role in the establishment in 2003 of the Antarctic Treaty Secretariat, the negotiations from 1993–2005 to adopt a special annex to the Environmental Protection Protocol on liability in the case of environmental emergencies, the submission in accordance with Article 76 of the 1982 LOS Convention of geological data supporting its claim to an 'extended continental shelf' offshore the AAT and the development of guidelines to protect specified sites on the continent to improve management of Antarctic tourism.[32] Last, as

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29 Ibid 28–32.

30 S Powell and A Jackson, 'Australian Influence in the Antarctic Treaty System: An End or a Means?' in Kriwoken, Jabour and Hemmings, above n 13, 38.

31 Ibid 42.

32 Ibid 42–49.

Powell and Jackson affirm, Australia continues to exert a leading influence on Antarctic affairs, which is demonstrated by its new air link between Hobart, Tasmania and Casey Station on the continent, as well as leading eight major projects during the 2007–08 International Polar Year.[33]

Australia's policy to fervently oppose international whaling is analysed by Julia Jabour, Mike Iliff and Erik Jaap Molenaar.[34] In short, the authors assert that Australia's anti-whaling policy is based on the moral grounds that underpin a modern civilized society. Beginning in 1978, the Australian government has persistently argued for a permanent ban on commercial whaling, not only in the International Whaling Commission and though national legislation, but also in the Australian Federal Court. Not surprisingly, as the authors rightly posit, relations between Australia and whaling states (chiefly Japan and Iceland) became strained over this issue, though not to the point of seriously damaging bilateral trade relations. To demonstrate the lawfulness of the government's policy against whaling, the authors examine Australia's participation in the International Convention for the Regulation of Whaling,[35] the 1982 LOS Convention, the Convention on the Conservation of Migratory Species of Wild Animals[36] and the Convention on the International Trade of Endangered Species of Wild Fauna and Flora[37] — all of which contain provisions for the protection of endangered species. Though admittedly brief, when taken in concert these treatments make a convincing case that whales should be protected and conserved, not killed and butchered for profit. Two other chapters treat policy-related issues, but are more heavily law-related, namely, those related to enforcement and compliance in the AAT and the management of Australia's Antarctic tourism. While these both have already been discussed, it is important to realise that they highlight the symbiotic relationship between law and policy, namely that new policy action is necessary to create law and new law is needed to effect policy behaviour.

The contribution made by four chapters in *Looking South* to explaining Australia's Antarctic science policy is exceptionally significant. A framework study by Rosemary A Sandford generally examines the subject through the lens of global climate change.[38] As she notes, Australia's scientific activities in the frozen south are centered in three stations — Casey, Davis and Mawson, and a sub-Antarctic station on Macquarie Island — and a number of temporary bases and

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33 Ibid 50–51.

34 J Jabour, M Iliff and E J Molenaar, 'The Great Whale Debate: Australia's Agenda on Whaling' in Kriwoken, Jabour and Hemmings, above n 13, 133.

35 International Convention for the Regulation of Whaling with Schedule of Whaling Regulations (1 December 1946), 161 UNTS 72 (entered into force 10 November 1948).

36 Convention on the Conservation of Migratory Species of Wild Animals (23 June 1979), 1651 UNTS 28395.

37 Convention on the International Trade of Endangered Species of Wild Fauna and Flora (3 March 1973), 993 UNTS 243 (entered into force 1 July 1975).

38 R Sandford, 'Antarctic Science in a Changing Climate: Challenges and Future Directions for Australia's Antarctic Science and Policy' in Kriwoken, Jabour and Hemmings, above n 13, 71.

field stations. Australia's scientific initiatives and programmatic directions are largely shaped by three national groups, the Advisory Committee on Antarctic Programs, the Antarctic Research Advisory Committee and the Antarctic Scientific Advisory Committee. Their reports have focused on four main priorities of Australia's scientific policy in the polar south after 2000: (1) to maintain the Antarctic Treaty System; (2) to protect the Antarctic environment; (3) to understand the role of Antarctica in the global climate system; and (4) to engage in scientific activities that promote 'practical, economic, and national significance'.[39] Stanford's treatment explains quite cogently the ways and means by which these priorities are translated through scientific programs into Australia's Antarctica policy. Australia's national scientific concentration in the Antarctic aims especially at a better understanding of global climate change and how it impacts the Southern Ocean region. Related resource and human issues encroach on this effort, especially hydrocarbon resource availability and energy security, as well as the prospect of environmental refugees from low lying countries having to migrate or flee to other states in South Asia and the Pacific (especially Australia). Further, the interdependent forces of population growth, economic development, expanding international commerce and resource depletion merit closer scientific attention with regard to how they affect the polar south. Accordingly, Australia's scientific activities are now directed at investigating those pressing issues. But as Stanford makes clear, for the future, the most critical Antarctic-related issue for Australian science to investigate must be to find the most efficient response to the effects of climate change in the region. Indeed, the processes of global climate disruption should rank as a cardinal imperative for study by scientists from all over the world.

This latter point is underscored in a subsequent chapter by Aynsley Kellow, who argues that the criticality of climate change itself justifies Australia's commitment to conduct science on the continent.[40] While fish and minerals were early Australian interests in the Antarctic, post-1980 developments by the Antarctic Treaty states purposefully curtailed such exploitation opportunities to secure resource conservation and environmental protection. Australia's science tended to follow suit and has concentrated on global climate change largely for practical reasons — Australia's own climate system is greatly affected by what happened in the polar south. Atmospheric warming and ocean currents such as El Nino can produce reduced water supplies and severe droughts in Australia.[41] Significant also is that higher concentrations of greenhouse gases would lead to greater Antarctic ice melt and consequent sea level rise. Such an event would impact on many low-lying Pacific island states, making likely the possibility that their populations would have to flee, with many of them seeking Australia as a place of refuge. The portents for such scenarios occurring make Australia's scientific enterprise in studying climate change in the Antarctic all the more important.

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39 Ibid 74.

40 A Kellow, 'A Caution on the Benefits of Research: Australia, Antarctica and Climate Change' in Kriwoken, Jabour and Hemmings, above n 13, 165.

41 Ibid 170–71.

The chapter by Rob Hall thoughtfully examines the major threats in the Southern Ocean to seabirds, especially albatrosses and petrels.[42] These threats are principally man-made, especially when birds get caught up in longline fishing operations and die as incidental by-catch. Hall is quick to point out that since the mid-1980s Antarctic Treaty governments began taking concerted decisions to prevent such incidental seabird mortality. As he cogently demonstrates, what evolved over the past two decades was a discreet legal regime for seabird conservation in the Southern Ocean. Special conservation measures were adopted by the CCAMLR Commission in 1991, 2004 and 2006. Important, too, is that IUU fishing operations exact detrimental impacts on seabird populations because they do not deploy bycatch mitigation measures that protect seabirds. To dissuade these practices, the UN Food and Agriculture Organisation in 1999 contributed soft law to the seabird conservation regime in the form of its International Plan of Action for Reducing Incidental Bycatch of Seabirds in Longline Fisheries.[43] Although not legally binding, this plan does provide technical guidelines for governments to effect better seabird conservation. Moreover, practical facets of this plan are likely to be adopted by affected governments and even integrated into their own national laws. The basic hard law foundation for this seabird regime is the 2001 Agreement on the Conservation of Albatrosses and Petrels[44] that grew out of diplomatic initiatives by Australia between 1991 and 2001. Hall evaluates the convention's provisions and concludes the agreement marks a signal achievement toward seabird conservation in the oceans. Even so, he realizes that the accord is severely debilitated by not having as parties Japan, Taiwan or the Republic of Korea — polities who have the world's major high seas fishing fleets.[45] For the foreseeable future, it seems reasonable that more in-depth study by Australian scientists on the population, life cycle and behavior of seabirds, coupled with stronger diplomatic pressure by Canberra and other CCAMLR members on governments supporting longline fishing fleets, could contribute to stronger conservation standards.

The final science-related chapter by Alan Hemmings concerns the salient role that globalization has played in ending the Antarctica's isolation from the rest of the world.[46] As he persuasively argues, the multifaceted forces of globalization have rendered the polar south much more accessible and significant in a global context — scientifically, economically, politically, technologically and legally. To highlight these interrelationships, the author examines the critical impacts that six

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42 R Hall, 'Saving Seabirds' in Kriwoken, Jabour and Hemmings, above n 13, 117–32.

43 International Plan of Action for Reducing Incidental Bycatch of Seabirds in Longline Fisheries (1999) <ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf> at May 2009.

44 Agreement on the Conservation of Albatrosses and Petrels (19 June 2001), (entered into force 1 February 2004) <http://www.acap.aq/en/images/Core_Documents/Final_agreement_Amended%20MoP2_2006_English.pdf> at 4 may 2009. By 1 May 2009, 13 states were contracting parties to this agreement.

45 Hall, above n 42, 130.

46 A Hemmings, 'Globalisation's Cold Genius and the Ending of Antarctic Isolation' in Kriwoken, Jabour and Hemmings, above n 13, 176.

worldwide interests — fishing, minerals, tourism, bio-prospecting, logistical and support services, and education—have had as commercial activities affecting Antarctica. To be sure, special drivers promote these forces in the frozen south. In broad scope, however, technological advances have been vital to humans gaining greater access to the region and to ensuring the capability of successfully satisfying those interests. In his analysis Hemmings makes evident that new, improved technologies have revolutionised Antarctic affairs; consider what the advances in remote sending, communication technologies, automation and modeling capabilities have meant for science, existence, tourism, and even survival in the polar south. But danger to the successful survivability of the Antarctic Treaty System lurks in these developments as well. For fifty years the ATCPs for the most part proceeded at a "limited," ad hoc pace in dealing with problems that become apparent. If the impacts of globalization in the Antarctic accelerate in speed and breadth, the ATCPs 'will be running to catch up', as Hemmings puts it.[47] At the same time, ATCP membership has burgeoned over the past five decades from twelve to twenty-seven states in a consensus-based decision-making system; that expansion could make expedient remedies of regional problems more difficult, depending on the varied interests of ATCP governments. The lesson from this chapter is real and stark: The degree to which the ATCPs can respond effectively to pressures from modern commercial demands in the region, which are propelled by forces of globalization, will tell much about the prospects for success or failure of Antarctic governance in the coming decades.

The concluding chapter by Alan Hemmings, Loren Kiwoken and Julia Jabour neatly summarizes Australia's complex bundle of national interests in the Antarctic, namely, to ensure through international cooperation and collaboration as much stability as possible for the spate of conflictive political, climatic, military, scientific and economic circumstances that impinge on the region.[48] In short, the authors conclude, while there is no reason to think that the sovereignty issue on the continent will be resolved in the foreseeable future, there is every expectation that Australia will continue to be keenly interested in Antarctic affairs.

Given the certainty of Australia's sustained involvement in Antarctic affairs, the overarching message gleaned from the cogent and perceptive contributions to *Looking South* is that the challenges confronting that government's future policies in the Antarctic are real and relevant: How will the contemporary law of the sea be applied by that government and other claimant states to the waters offshore Antarctica? What legal and political reactions will nonclaimant parties take? How should Australia deal with exacerbated global climate disruption that affects the polar south? How can ship-bourne tourism be better regulated so that the Antarctic marine ecosystem is best protected? What additional policy actions by Australia are needed to address more effectively IUU fishing in the Southern Ocean? How can

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47 Ibid 187.

48 A Hemmings, L Kiwoken and J Jabour, 'Looking Forward, Looking South: An Enduring Australian Antarctic Interest' in Kriwoken, Jabour and Hemmings, above n 13, 191.

the complex forces of globalization and accelerating world resource demands be managed in order to prevent them from impacting negatively on the Antarctic region? These posers will undoubtedly demand much of Australia's foreign policy attention in the coming decades. But to the extent that Australia can contribute to formulating robust multilateral legal, political and scientific solutions that prove acceptable to other concerned Antarctic parties, that government will remain a critical player in maintaining international peace, security, cooperation and environmental integrity throughout the region.

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Creating New States: Theory and Practice of Secession

Aleksander Pavković and Peter Radan

(Aldershot, Ashgate, 2007, 277 pp)

This book offers a very useful addition to contemporary scholarship on secession. For an interested audience of non-experts, it covers the main relevant on-going debates on the definition of secession, on its causes, on the normative debate concerning the right to secession and on its legal aspects (both in national and international law). The didactic structure of the book and its chapters (with numerous boxes offering short case-studies and definitions of concepts) is an additional asset.

The authors also devote three chapters to more in-depth analyses of secessionist processes (both historical and more recent examples). Two chapters discuss respectively peaceful and violent cases of secession (and are each hence centred on what is for the author a crucial discriminant in judging cases of secession, namely violence). The third chapter, on the process of state dissolution in the former Soviet Union and Yugoslavia, is equally interested in the issue, but is more concerned with the legal dimensions of secession (both internal, since these states included in their constitution a clause allowing secession, and the reactions of the international community).

The authors, however, also intend to offer their own contribution to the field. Their input intends to relate the use of violence to one of the most discussed items in recent scholarship on the issue, the normative theories on secession. The authors tend to be skeptical about most recent contributions on the debate, both of proponents of the choice-school and of the remedial school. They are in fact skeptical about the right to secession as such. They argue that normative assessments of secession, rather than focusing on the claims of the secessionist party, should be oriented towards the process. They argue for adopting a principle of *no irreparable harm*, ie no deaths and no forced evictions. In practice, this principle expresses the authors' clear preference for non-violent secession. Their book certainly has the merit of drawing attention to the violence and discriminatory practices even in cases of secession that gained approval from the international community (both from a legal and normative perspective), like Bangladesh. The authors moreover emphasize the coercive dimension of many secessionist movements, even peaceful ones with a liberal profile. An interesting example is Norway's breakaway from Sweden (1905): although the country displayed all the characteristics of a liberal democracy, the authors point out that the public debate within Norway hardly allowed for the expression and mobilization of anti-secessionist opinion.

The focus on the coercive dimension of secessionist processes is in itself highly laudable, and a useful corrective of the idealizing tendency in much of the literature on the issue. The authors nevertheless are not able to altogether avoid discussions on the right to secession, for example when they claim that 'a unilateral secession may, in certain circumstances, be a justifiable remedy for the breach of the liberal principle of equal rights even by an otherwise democratic state' (p 217). Their

discussion of the norms and values of the international community suggests in fact that these have created limited opportunities for such a right, especially through the Declaration of Friendly Relations of the UN General Assembly (1970) and that this document effectively impacted on decisions of the international community like the recognition of Bangladesh.

The book also devotes much attention to the causes of secession. In this field it mainly offers a good overview of the state of the art, but otherwise reflects the limited results of attempts to formulate general laws that explain the emergence of secessionist movements. More interesting is the concept of secessionist movement developed by the authors, which is suggestive but in need of further elaboration. They conceptualize it as something more like a social movement than a political party, and hence without a unitary structure. Their tendency to use the concept as if it corresponds with a political actor therefore seems problematic. To understand the dynamics of such movements, the authors obviously highlight their link with nationalism, but the dynamics of nationalism and the conditions in which it can become a carrier of secessionist mobilization certainly deserve more analysis. The authors are aware that nationalism and secessionism do not coincide — their list of secessionist movements certainly excludes many cases of subnational mobilization — but do not offer an explanation of how such a distinction can be drawn. The fact that secessionist movements can at some point decide to accept existent states, like the case of Atjeh seems to prove, certainly deserves more exploration.

The volume proposes some interesting insights concerning the discursive construction of legitimations of secession that deserve a more systematic development. They draw for example attention to the rhetoric of distancing of the host state developed by secessionist movements, while pointing out that the word secession itself tends to remain taboo. How these rhetorics of distancing are developed is less clear. They argue on the one hand that secessionist movements are characterized by their ideological inclusiveness but at the same time associate these movements with the problematic concept of nationalist ideology. What is exactly meant by this concept remains imprecise, and how it translates into secessionist proposals remains unclear as well. A further study of the crossroads between identity construction and political ideologies is definitely necessary for a better understanding of the construction of consent for secessionist proposals.

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