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RECENT BOOKS ON INTERNATIONAL LAW

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BOOK REVIEWS


For the past half century, the international law regime regarding the use of force seemed to take as fundamental the UN Charter’s flat and absolute ban on states using force, except in self-defense, against other states. NATO’s 1999 bombing campaign to stop the ethnic cleansing by the Milošević regime of Serbia in its province of Kosovo put to question the viability of that Charter-based system. Milošević was directing his bloodletting against inhabitants of his own nation; no one seriously argued that the nations of NATO had to bomb Serbia into submission as a form of literal self-defense. Moreover, the Security Council did not authorize the bombing campaign, and while the campaign’s proponents could attribute this failure to crass Russian and Chinese agendas, the absence of Security Council resolutions of authorization even further removed the use of force from colorable legal justification under the Charter.

Some commentators justified this use of force by an expansive doctrine of humanitarian intervention, but even those approving the campaign acknowledged the gap between such a doctrine and the original intent of the Charter. In Limits of Law, Prerogatives of Power: Interventionism After Kosovo, Michael Glennon of the University of California, Davis, Law School starts by acknowledging this gap and proceeds to conduct “a critical, top-down reassessment of the whole use-of-force edifice” (p. 4). His direct and eminently readable study goes far beyond identifying the irreconcilability of the Kosovo bombing campaign and the Charter. Rather, Glennon effectively scoffs at what the structure of Charter-based use-of-force law has become, labeling it as a fifty-year doctrinal experiment that no longer works, and taking a sharp logical axe to the many attempts at propping up that venerable structure.

Glenmon’s challenge, further elaborated in his writings since the attacks of September 11, 2001, has major implications both for use-of-force law, in general, and for the United States’ own legal stance on the use of force, in particular. If the central post–World War II legal structure designed to contain the dogs of war has been undermined to the point of crumbling, just what confines them now? More specifically, if the United States can make its own decisions on the use of force without constraint by Charter-based law, does anything legally restrain it other than the calculations of realpolitik? Glennon adopts the heretical approach of following these lines of questioning to their full limit. His direct, no-nonsense analysis succeeds in stripping away his readers’ comforting illusions that the Charter edifice is sufficiently intact to be easily defended. That analysis deserves full elucidation, after which we see how the Charter-based regime, rather than lapsing as Glennon suggests, might be seen as continuing on in a somewhat adapted form.

The starting point for Glennon’s substantive analysis is that the Kosovo campaign violated the flat textual prohibition in Article 2(4) of the Charter against “the threat or use of force against the territorial integrity or political independence of any state.” He reviews Oscar Schachter’s studies.


of the Charter’s travaux préparatoires—in which Schachter found no exception to the prohibition against nondefensive force, in general, and certainly none for humanitarian intervention, such as in the Kosovo campaign. Moreover, Glennon shreds (as having “scant support”) the argument of some commentators that, by a backhanded method, the Security Council “authorized NATO to use force against Yugoslavia” (p. 92).

Glennon rejects the arguments set forth in *Humanitarian Intervention* (particularly its second, 1997 edition) by Fernando Tesón, who used examples of state practice to contend that humanitarian intervention was consonant with the Charter. Glennon debates Tesón over such central examples as the 1971 intervention in West Pakistan (later Bangladesh), the 1979 intervention in Uganda, the 1979 intervention in the Central African Republic, and the United States’ 1983 intervention in Grenada. Each, Glennon argues, has problems as a precedent, with respect both to the intervening states’ nonhumanitarian motives and the reluctance of responsible officials to cite humanitarian intervention as a justification.

Glennon’s challenge to the Charter’s use-of-force regime continues with his argument that it has failed, in practice, to achieve its goal. Citing a study of sixty-five international conflicts that produced a total of eleven million deaths between 1945 and 1996, he rejects the theories of Louis Henkin, Thomas Franck, and others that the often pacific contemporary interactions of states are a reflection of a viable, Charter-based legal regime. It is illusory, he argues, to try to fit within the obsolete categories of Charter-based law the extent and diversity of either the use or nonuse of force. The Charter has simply lost its relevance, as (in Glennon’s judgment) the Kosovo intervention makes readily apparent.

In an even more controversial position, Glennon challenges the legal justifications for the Security Council’s authorizations to use force to deal with intrastate violence. In this context, he surveys authorizations “beginning with Southern Rhodesia and continuing with legally questionable interventions in South Africa, Iraq, Somalia, Rwanda, and Haiti” (p. 114). It is not that Glennon disputes the morality or, in most instances, the wisdom of the interventions. He shares the common horror at “stomach-wrenching atrocities” (p. 141) such as the “mass slaughter of the Tutsi population” in Rwanda, where “the dead numbered 500,000 to one million” (p. 119). But he rejects the conflation of the consensus against genocide with the legal issue of how, in view of the authorized interventions, Article 2(7)’s principle of nonintervention “within the domestic jurisdiction” could still be deemed to be honored—other than in the breach.

Glennon acknowledges that the bloodiest problem of violence today occurs not between organized states, but at less organized levels, ranging from ethnic warfare within failed nations, to terrorism. And he acknowledges the emerging pattern of response by regional organizations and alliances, acting usually (though not always, as in the case of Kosovo) under some degree of Security Council authorization, as in Bosnia, Sierra Leone, Tajikistan, and the former Soviet Union. While recognizing that there is some merit to this “adaptivistic” approach (p. 123)—an important concession—he nevertheless sees in it a breakdown of the Charter-based regime because the Security Council, a “creature” of its Charter (p. 126), has been intervening in ways that its creators (that is, states) “would never have agreed to” (p. 135).

In place of what Glennon sees as a defunct Charter-based regime, he does envision the “eventual establishment of a true legalist system to govern use of force” (p. 11). In his judgment, however, that time is decades away, for he sketches vividly an assertedly unbridgeable clash of viewpoints: between the West as supporter of the use of force when necessary, and Russia and China, which fear it; and also between developed nations, which generally might employ humanitarian intervention as a means of bringing order to a chaotic Third World, and undeveloped nations, which view such intervention as smacking of colonialism.

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5 See also SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* (1996).


7 Various scholars have presented strong arguments that the contemporary meaning of “domestic jurisdiction” must and should reflect the evolution of international law since the time of the Charter. While Glennon respects these arguments, he argues against them on several levels, ranging from an adamant emphasis on original intent to the unsoundness of an evolving interpretation of the Charter on this particular matter. “The limits explicitly imposed by Article 2(7) . . . constitute express proscriptions. To argue for power to override express proscriptions is, in a very real way, to argue against the rule of law” (p. 128).
Until a new “legalist system” emerges, Glennon credits in practice “the same solution had in Kosovo: Humanitarian intervention by preexisting regional coalitions of democracies” (p. 198), but he does not consider such intervention to be pursuant to a regime of international law based on the Charter (except, in effect, in name only). Thus, as he comments on the Kosovo campaign: “Clearly the Charter was breached, but international law? Using international law’s traditional methods, no one can say” (pp. 180–81).

In newer writings published in the wake of the September 2001 attacks—and while the Bush administration audibly contemplated scenarios in which the use of U.S. force helps topple Saddam Hussein in order to preempt the Iraqi threat of using weapons of mass destruction—Glennon has argued that the UN Charter’s proscription of preemptive force can no longer be interpreted, within a contemporary context, as barring such preemptive actions. He therefore asks both commentators and officials today “to make way for the new without remaining wedded to the old” (p. 205). That is, he urges the development of a new international law on the use of force—law based on what states do now and would agree to do in the future, not on an outmoded, Charter-based doctrinal structure based on a superseded vision of the world from half a century ago.

*Limits of Law, Prerogatives of Power* presents its arresting thesis elegantly and concisely. Glennon deploys a varied array of legal tools with relentless intellectual honesty. He cooly and objectively credits foreign legal assessments as often being more valid than U.S. ones. He bluntly declares, “There is no question that Russia and China were correct in arguing that NATO’s bombing violated the Charter” (p. 29). He reminds us that when told by British Foreign Secretary Robin Cook that the lawyers were having difficulty coming up with justifications for the Kosovo intervention under the Charter-based system, Secretary of State Madeleine Albright responded, “Get new lawyers” (p. 178). Glennon embeds his legal analysis in the history of international relations and the sociology of cultural differences about force. The tone is conversational, and the pace is brisk. Readers seeking a more abstrusely technical treatment can follow, if they choose, the ample footnotes to studies on subjects ranging from the classical Roman doctrine of desuetude, to Web sites on contemporary legal theory.

10 *Yoram Dinstein, War, Aggression and Self-Defense* 93 (2d ed. 1994).
concepts in the Charter-based system. By creating the Security Council and recognizing a role for regional collective-security organizations, the Charter launched something that amounts to more—legally—than a spot contract between states. The Security Council and regional organizations, as international institutions established with considerably open-ended expectations, contribute to the evolution of law and derive credibility in their collective-security role not just from states' original consent to the Charter itself, but also from states' continuing participation and support. Accepting, as Glennon suggests, that international law founded upon the Charter sometimes seems these days almost as much patch as fabric, it is nonetheless true that patching by institutionalized processes that have independent legitimacy, as well as their original foundation in the Charter, amounts to something more than the lapse and desuetude of the Charter system.

The animosity of Russia and China toward the NATO campaign in Kosovo has given way, since September 11, to at least a temporarily renewed recognition of common security interests among the great powers. Suppose that this concern about security continues and that severe problems, whether potential or actual, stimulate further development of the international regime on the use of force. For example, suppose that the collapse of other states or the actions of internally genocidal regimes threaten to bring whole populations to the fate of Rwanda; or that peaceful national governments suffer replacement by ones with aggressive and destabilizing intentions, as in the former Yugoslavia; or that governments with hostile, aggressive attitudes like those of Iraq show evident capability and intent to unleash weapons of mass destruction. Under such circumstances, the international community may well shift its views toward approval of more interventionist and preemptive approaches to the use of force than the Charter initially envisaged a half century ago. The overpowering suspicion among weaker states regarding the actions of stronger ones—a suspicion that underlay the Charter's narrow view of legitimate use of force—would yield to an acceptance of regionally organized intervention, under the approval of the Security Council, as more legitimate than any alternative.

Recurrent patterns of legally respectable use of force would gradually lead to adjustments in the rules of the past without the clear-cut demise of the Charter-based system. Rather, over time, the adaptation of the existing system would maintain the inherited set of Charter-based institutions as still the best available basis for world discourse about the legitimate use of force. Even the substantive rules regarding the occasions for use of force would still be recognizable, albeit perhaps in an evolved form. Force would continue to be illegal when used without broad multilateral international authorization (generally from the Security Council, though sometimes, as in Kosovo, from other sources), or when used for other than essentially defensive and order-promoting purposes to counter threats to the peace. The shift would be in the definition of what constitutes a threat to international peace and security. These threats—which would provide the basis for collective decisions on the use of force—would increasingly be recognized to include both the internal bloodletting that generates regionally destabilizing refugee streams or ethnic tensions, as Serbia's actions did, and the development of weapons of mass destruction by states with demonstrated aggressive tendencies, as in the case of Iraq. The Charter's original, narrow notion of what constituted a threat to the peace would thereby be broadened, as Glennon ably demonstrates, but the use of force would still be confined to essentially order-promoting and hence security-preserving purposes, and would not extend to humanitarian purposes as such. Meanwhile, the great advance made and codified by the Charter—delegitimizing the use of force for state self-aggrandizement, for the resolution of disputes having no collective-security element, and for other purposes unrelated to

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13 Other commentators who have recently pursued a similar line of analysis include, in these pages, Jonathan Charney in his 1999 editorial on the Kosovo intervention. See Jonathan I. Charney, NATO'S Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo, 93 AJIL 834, 838–39 (1999).
threats to international order—would continue, as modified, to be respected.

The rest of the world would better tolerate the actions of Western states, and of the United States in particular, if those states stretched, but acknowledged, the existing system of the use of force in this way rather than simply acting as if there were no legal constraints at all on the use of their weaponry. It is one thing for the United States, as in the Kosovo campaign, to transgress the Charter's original rules—as Glennon usefully clarifies that it did—while at the same time also relying upon other multilateral sources of legitimacy. It is quite another thing for the United States to claim freedom from well-established standards when taking military actions solely because it deems them to be in its own self-interest.

Whatever may be the potential for such an adaptive and evolutionary path, Limits of Law illuminates the powerful contradictions in today's law on the use of force, and engages its readers in tough-minded analysis of the import of those contradictions. Has the world drifted so far from the UN Charter of 1945 that the old rules continue only as figments of diplomatic double-talk? Do the de facto practices today depart so much from the norms as to render Charter-reading legal advisers the priesthood of a defunct cult? Glennon's analysis may well come to be seen as one that disclosed the necessity of substantial replacement—at least for large components of the original Charter-based regime regulating the use of force, if not for the regime's whole set of institutions and principles. By the same token, his analysis has prepared the way intellectually for the reoriented legal regime that must eventually emerge—by one process or another—to handle the changing problems and perils of collective security.

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The destruction of the World Trade Center, President George W. Bush has repeatedly declared, constituted an attack not only on the United States, but on all states and peoples. It was not, therefore, simply the equivalent of an act of war; it was a crime against civilization. What follows, the president has further affirmed, is that all states should support the efforts of the United States to hunt down and punish the perpetrators; for in so exciting itself, America is acting on behalf of the international community, as well as its own national interest. In brief, the president sees the United States acting in this instance as enforcer of the global order's basic norms and as executor of raison d'état. By the same token, in pursuance of the national and the human interest—that is, in making war on terrorism—the president sees the United States adhering to the letter and spirit of the laws governing the initiation and conduct of war, thereby distinguishing itself from its enemies.

As Peter Maguire demonstrates in his well-written book, Law and War, this most recent effort to surround U.S. war making with an aura of legality has a long and decidedly problematic pedigree. For most of American history, he argues, this emphasis on legality distinguished the United States from the leading European states, which insisted on visualizing war as an incident of sovereignty, or in Clausewitzian terms, as the continuation of politics by other means—means that have no natural limits. For Maguire, the exemplar of the worldly European perspective was the Second German Reich before its extinction in the convulsive aftermath of World War I.

German and American perspectives first clashed nakedly at the 1898-99 Hague Conference, convened at the instance of that determined autocrat, Czar Nicholas II, to promote peace. The Germans and other Europeans proved willing to endorse rules—on subjects such as flags of truce, the treatment of prisoners, and armistice—designed to mitigate gratuitous suffering in the event of war. But “American statesmen wanted to go further . . . [and] reform statecraft itself” by securing agreement on compulsory recourse to arbitration—in the event that interstate disputes could not be resolved by diplomacy. Exemplifying the American elite's imagination of itself and of what distinguished the United States from the great powers of Europe, Joseph Choate, the chief U.S. representative at the conference, spoke of war as "an anachronism, like dueling or slavery, something that international society had simply outgrown" (p. 49). Although the U.S. proposal would have encompassed only those “differences” that were “not of a character compelling or justifying war,” it was still too much for the Germans, who believed that “treaties to limit arms and provide for ‘neutral’ arbitration of disputes negated [Germany’s] most

important strategic advantage: the ability to mobilize and strike more quickly and effectively than any other nation” (p. 48).

Americans spoke in sunny, optimistic terms about “this continuous process through which the progressive development of international justice and peace may be carried on.” The German General Staff’s *Manual of Land Warfare* implied a rather grimmer view of the human condition. “No consideration can be given to the dictates of humanity,” it declared, “such as consideration for persons and property, unless they are in accordance with the nature and object of the war” (p. 71). War, the Germans insisted, both in its ends and means is a prerogative of sovereignty not subject to judgment by third parties.

In this context, Maguire’s book can be understood as an account of, and ethical reflection on, the fitful and often ambivalent attempt by the United States to subject war-making to impartial judgment concerning its legality. While focusing primarily on the single most important such attempt before the present moment—namely, the Nuremberg trials following World War II—Maguire aspires to position Nuremberg in the frame of American thought on the relevance of law to war. The result is not a pretty picture.

At the turn of the nineteenth century, American and German elites were not nearly so far apart in their views as their collision at The Hague might suggest. In celebrating the accomplishments of the second Hague Conference, held in 1907, Joseph Choate rhapsodized on “the completion of a century of unbroken peace between ourselves and all of the other great nations of the earth” (p. 69, emphasis added). Whatever their rhetorical differences over the propriety and normality of war in their mutual relations, American and European elites openly converged in their expressed opinions on relations with the not-so-great nations, specifically with the non-Western peoples of the world. “International law becomes phrases,” thundered Heinrich von Treitschke, the turn-of-the-century panjandrum of German public intellectuals, “if its standards are also applied to barbaric people. To punish a Negro tribe, villages must be burned, and without setting examples of that kind, nothing can be achieved. If the German reich in such cases applied international law, it would not be humanity or justice but shameful weakness” (p. 50).

The historian John Fiske, coiner of the term “manifest destiny,” was von Treitschke’s American counterpart. “So far as relations of civilization with barbarism are concerned today,” he wrote, “the only serious question is by what process of modification the barbarous races are to maintain their foothold upon the earth at all” (p. 50, quoting *The Beginnings of New England*, published in 1842). Writing of the butchering of the Pequot Indians by colonists in Connecticut before the American Revolution, Fiske stated his belief that “the annihilation of the Pequots can be condemned only by those who read history so incorrectly as to suppose that savages, whose business is to torture and slay, can always be dealt with according to methods in use between civilized peoples” (*id.*). Military action against “savages and barbarians” was necessary and appropriate, Fiske argued, because the “world is so made that it is only in that way that the higher races have been able to preserve themselves and carry on their progressive work” (*id.*).

The United States had long been suiting practice to theories like Fiske’s (and would continue to do so for years thereafter). In 1779, when ordering Major General John Sullivan to undertake a campaign of chastisement against certain Iroquois tribes, his superior officer, General George Washington, wrote that “you will not by any means listen to any overture of peace before the total ruin of their settlements is effected” (p. 22). Nearly a century’s passage did not alter this view of how to deal with the Indian problem. “We must act with vindictive earnestness,” General William T. Sherman advised his superior, General Ulysses S. Grant, following the defeat and massacre of a U.S. army contingent by Sioux warriors in 1866, “even to their extermination, men, women, and children. Nothing else will reach the root of this case” (p. 45). Colonel and Methodist minister J. M. Chivington had anticipated this strategic doctrine two years previously when he led the 700-strong Third Colorado Regiment in a massacre of women, children, and old men encamped at Sand Creek, Colorado.

While mirroring the past, Fiske was anticipating the future, specifically the extracontinental imperial project that the United States would launch in the Philippines before the end of the century. As if to effect the ideological disarmament of the United States, on the eve of the American occupation the Philippine independence leader, Emilio Aguinaldo, declared to his Filipino compatriots that “[w]e are not a savage people,” and exhorted them to “follow the example of the European and American Nations” by “march[ing] under the flag of Revolution whose watchwords are Liberty, Equality and Fraternity” (p. 51). But to no avail. The American
foreign-policy elite would decide for itself who was and was not a savage. According to its criteria, the Filipinos did not qualify for the status of “civilized people.” And when Aguinaldo failed to grasp the necessity of an American tutelary role, America proceeded to educate him in the school of total war.

The decision to annex the Philippines—made initially by President McKinley after what he characterized as a conversation with God—was defended by his successor, Theodore Roosevelt, following conversations with the likes of Admiral Alfred Thayer Mahan, apostle of American expansion and member of its delegation to the second Hague Conference. Roosevelt had doubtless exchanged ideas with his peer, Senator Beveridge of Indiana, who believed that “God has been preparing the English-speaking and Teutonic peoples for a thousand years . . . [to be] the master organizers of the world where chaos reigns” (p. 57). In order to reduce the reign of the evil god chaos, Roosevelt successfully prosecuted the repression of the benighted islanders. Evil being tenacious in this case, and resistance being generalized among the population, extraordinary measures were needed.

The story is told in two sets of figures. One was the ratio of killed to wounded among the Filipinos. Even in Britain’s extraordinarily brutal war with the Boers in South Africa, the ratio was 1:4—that is, one dead Boer for every four who were wounded. In the U.S. war against the Filipino nationalists, the ratio was more than reversed: five dead Filipinos for each one wounded. Unless one assumes against all reason that most nationalists fought to the death, the figures bespeak a war with little quarter. The other figure is the ratio of Filipino to U.S. deaths: roughly 200,000 to 5,000—40:1—in a war without large-scale battles. That kill ratio implies indiscriminate decimation of the Filipino population wherever U.S. forces encountered resistance.

In his citations and his data, Maguire marshals a powerful indictment of American behavior in the Philippines. But awful as it was, it is not the whole story. Well before the Philippine repression was over, Roosevelt’s policy, vigorously effected by the ubiquitous Secretary of War Elihu Root, came under strong assault in the Congress and the press. Even some military men dissented more or less openly. Rising in response to the paradox of violence that marked the last stages of the American campaign, the criticisms finally drove the government to prosecute several members of the army, including General Jacob Smith, an old Indian fighter, who had issued orders to take no prisoners and “to kill and burn,” assuring his subordinates that “[t]he more you kill and burn, the better you will please me” (p. 60).

Succumbing to public pressure, Secretary of War Root pressed the military for what he later privately called “the token courts-martial of a total of ten officers” (p. 66). Risible sentences for those convicted (a fine of $300 and an official reprimand for a lieutenant convicted of “assaulting prisoners and cruelty” (p. 67)) were sometimes further reduced by administrative action. Charged and found guilty only of “conduct to the prejudice of good order and discipline” (p. 65), General Smith was, on the order of President Roosevelt, simply retired from the active list, his wrongdoing, according to Roosevelt, being mitigated by “a long career distinguished by gallantry and on the whole for good conduct” (id.).

While recalling the savagery of this colonial conflict, Maguire restates the book’s main ordering theme—in brief, the centrality of “strategic legalism” in the conduct of American statecraft. Unlike the Germans, who repeatedly surface as champions of raison d’état and frankly rejected the enmeshment of statecraft in a skein of legal constraint, the American statesmen are, in Maguire’s narrative, always struggling to live, or at least to appear to live, within the law. By “strategic legalism,” Maguire generally seems to mean the conscious manipulation of legal forms to conceal unpleasant realities deemed necessary for the national interest. But the precise nature of those realities is not always made clear. Are they illegal acts like those performed by General Smith and his men, or are they acts that, while superficially consistent with arguably relevant legal norms, are grossly unjust, as the suppression of the Philippine independence movement seemingly appears to Maguire? Or is it both?

Also a little unclear in this work is the extent of the explanatory burden that Maguire wants to place on “strategic legalism” with respect either to American history as a whole or to American foreign policy, in particular. Like a multitude of historians before him, Maguire notes the tenue “dualism” of the American self-image that enabled its male white electors to imagine themselves as

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5 It would be incorrect to infer that the United States was alone in undertaking such imperialist endeavors using similar means. In the same period of world history, Germany responded to a revolt by the Herero people in what was then German Southwest Africa (now Namibia) by self-consciously setting out to exterminate them.
egalitarian democrats, supporters of freedom everywhere, whether in the first four score and seven years of the Republic, when they lived with constitutional slavery, or the next half century when they completed the decimation of the American Indian and embarked on an imperial career. Maguire does not precisely specify the connection between "strategic legalism" and that dualism—an unfortunate, even puzzling, lapse.

If the dualism results, as one might speculate, from the temporal coincidence of a communal identity steeped in universal moral ideas and a vast, relatively unorganized land open to aggressive exploitation, where does law fit in? Is legalism integral to the moral ideas and hence to that identity, or is it just a byproduct of the insinuation of moral narrative into all of the pedestrian functional domains of communal life? At some points in this book, the two seem almost coterminous in Maguire's mind; at others, the ubiquity of legalism in American foreign policy seems to enjoy a narrative all its own. In noting the occupation of Washington's foreign policy institutions by New York corporate lawyers like Choate, Root, and, after Root, his protegé, Henry Stimson, Maguire sometimes seems to see them as sources of the emphasis on law in American statecraft rather than simply as occupationally specialized instruments of the same cultural forces that shaped the American character before we had a foreign policy or even a nation.

A final ambiguity in the book is Maguire's ultimate verdict on the legalism that he thinks distinguishes American foreign policy, and on that particular manifestation of it that occupies most of this work—namely, the conclusion of wars by recourse to criminal proceedings against the losers. By his selection of incidents, he rightly makes much of the hypocrisy or convenient schizophrenia attending the movements of American statecraft—the sanctimonious invocations of law joined to the often ruthless application of power. Yet if I construe him correctly, he much prefers this "dualism" to the sinister integrity of German statecraft and thought that persisted even after World War II, until a new generation succeeded to national leadership.

Construing his verdict on what he calls "conflict resolution" by judicial process is more difficult. In terms of an ethic of consequences, is it generally wise to think of armed conflict as a struggle between criminals, on one side, and their intended victims, or the stewards of legality, on the other? Or would humanity be better served if, in most instances, belligerents imagined themselves simply as tough competitors in a struggle for power native to the human condition? Apart from the issue of responsibility for a conflict's initiation, should the conclusion of conflicts be attended by the trial of individuals on both sides who have exceeded legal restraints on the means for waging war? While these questions brood over Maguire's historical narrative, they are never directly addressed. He implies, I think, that at a minimum, justice is served by trying persons who have committed shocking crimes. But he is mainly concerned with the fairness in particular cases of initiating prosecution, with the kind of legal process employed, and with the justness of legal outcomes.

Maguire sees a trinity of possible postwar processes of punishment. One is executive and summary, as in Churchill's initial proposal to seize and execute the top Nazis, and the wartime view of the Supreme Allied Commander, General Dwight Eisenhower, in favor of summary execution of the entire German General Staff. A second process, only superficially distinguishable from the first, is the show trial with a predetermined outcome crafted to serve various political ends. Among the examples that Maguire cites are the post–Civil War trial of Captain Henry Wirtz, commander of the infamous Andersonville concentration camp for Union prisoners of war, and the post–World War II trial of General Tomoyuki Yamashita, commander of Japanese troops in the Philippines at the time of the American reoccupation of the islands. In the latter case, there was what Maguire (contrary to the interpretations of some other historians) seems to believe was persuasive evidence that Yamashita had lost command and control of his troops. Nevertheless, a commission of five generals serving under General Douglas MacArthur and appointed by him to hear the case concluded that the rape and massacre carried out by Japanese troops as U.S. forces closed in on them were attributable to General Yamashita on the theory of "command responsibility." They sentenced him to hang, and hanged he was.

Maguire contrasts these examples of "political justice" with the Nuremberg trials held in Germany after World War II—which he sees collectively as a novel effort to afford the defeated a fair judicial process and to create an unimpeachable record of criminality that would have an educative and redemptive effect on the defeated nation, if not the defendants. There were three trials or sets of trials. One was the trial of twenty-two of Nazi Germany's highest ranking survivors conducted by an International Military Tribunal (IMT) constituted
by the four occupying powers: England, France, the Soviet Union, and the United States. Following on after the conclusion of the IMT’s labors, the United States alone conducted twelve trials by civilian American judges of lower-ranking officials and also industrialists who had participated in the Nazi slave-labor program. Finally, there were trials, conducted by U.S. military courts, of German officers for alleged violations of the laws of war. It is the trials conducted by civilian judges, including the author’s great-grandfather, Robert Maguire, that engage the bulk of Peter Maguire’s attention.4

These American military trials occurred in the shadows of the incipient Cold War between the United States and the Soviet Union. As tension rose between the wartime allies, the United States resolved to incorporate the parts of Germany occupied by the Western powers into the anti-Soviet alliance it was beginning to construct. There was a threshold problem, however, in securing the requisite cooperation of the German people. Neither defeat nor the IMT’s massive documentation of German criminality during the recently concluded war had served to persuade the wider body of German opinion that the defendants in the successor trials deserved punishment. Indeed, the bulk of respectable opinion—academic, professional and political—held even the process against the Nazi High Command to be an instance of “victor’s justice.” In the view of many Germans, the successor trials overlooked questions concerning command and control—a defense that was also raised at Nuremberg.

The newly elected German government, conservatives led by Konrad Adenauer, and its electoral supporters began demanding—as a condition for joining the Western alliance—an end to the trials and the absolution of those already convicted. Even as the trials continued, pressure for leniency began to affect the American tribunals. Maguire shows how that pressure influenced punishments that were, in some cases, remarkable for their leniency in relation to the crimes charged. He also shows how that pressure produced decisions implicitly questioning the very legality of the IMT mandate to prosecute not only violations of the law of war, but also aggression (“crimes against peace”) and “crimes against humanity”—the last being the charge that was essential for punishing the extermination of German Jewry.

Two factors unrelated to the Cold War also seem to have affected these tribunals. Some American judges shared the narrow positivist legal perspective of German lawyers who condemned prosecutions for “crimes against humanity” as the ex post facto legalization of merely moral norms, and who also disparaged the crimes-against-peace charge as the meretricious objectivization of an inherently subjective judgment about when war is aggression. In addition, although Maguire does not make much of it, some American judges may not have been entirely untouched by the then fairly pervasive anti-Semitism in American society.

Once the trials concluded, the focus shifted back to the executive branch. In the belief that the onset of the Korean War in 1949 signaled a Soviet plan for unlimited expansion, the United States accelerated its efforts to construct a full-fledged military alliance capable of containing Soviet power. Germany being perceived as an indispensable member, official Washington moved quietly, although not without internal struggles, to accommodate German demands for the release of all persons convicted by the American tribunals. The task of rehabilitating these loyal servants of the Third Reich—who included mass murderers, as well as diplomats and captains of industry—was left to the German government. Within a few years—through a variety of legal stratagems combining executive reduction of sentences and parole, all exhaustively recalled in Maguire’s careful work—the prisons emptied. And Germany, in another triumph for strategic legalism, became a loyal member of the free world coalition.

In the end, did the Nuremberg trials accomplish more than hang a very few murderers and not very seriously inconvenience many others? Maguire persuasively argues that despite the fair procedures and massive documentation of Nazi atrocities, the trials did not have their intended educative effect on the immediate postwar German population. Respectable Germans admitted to defeat and possibly imprudence. Crimes, if any, were imputed to Hitler and a few dead cronies. It took a new generation of Germans to discover and accept the horror that was Germany in the age of the Third Reich. One may reasonably assume, as I think Maguire does, that the meticulously accumulated evidence of Nazi atrocities contributed to the ultimate moral epiphany that has transformed German civil society and helped consolidate its liberal democracy.

Law and War is a fine work of history written with a quiet, illuminating passion. Particularly in
its historical account of the repeated triumphs of strategic legalism, it should have its clearly intended effect of inducing among Americans a measure of self-reflection about our commitment to the rule of law and the triumph of common morality in international affairs. Let us consider it a sober call for continuous self-examination as we embark on another great "crusade" on behalf of American interests and also, one hopes, the rule not only of law, but of justice.

**TOM FARER**
*Of the Board of Editors*


German scholarship in international law is to be commended for taking note of what has undoubtedly been the most innovative theory about law of the twentieth century. In this valuable book—a doctoral dissertation written under the guidance of Christian Tomuschat of Humboldt University, Berlin—Sandra Voos sets out to describe and critique what she calls the "New Haven School," described in the subtitle as "an American theory of international law." The first part of the book introduces the "founders" of the School and its "principal disciples" before presenting its "essential characteristics" and "main theses." In a second part, the book analyzes the application of the New Haven School's approach to "concrete problems of international law," using law review articles on the American hydrogen bomb tests, the blockade of Cuba during the 1962 missile crisis, and the bombing of Baghdad. The third and final part discusses the question of whether the School's characteristics and theses as presented are sound and persuasive—whether they "may convince" (p. 16).

Voos endeavors to be scrupulously fair and comprehensive in her description and critique. She compliments the approach for adding a social science and a policy dimension to the study of law, for providing methodology for interdisciplinary research, and even for presenting a comprehensive framework for legislation. She agrees that lawyers, and especially law professors, often disguise their own policy choices or preferences—their ideas about what the law "should be"—as statements about what the law "is." In conceiving of "the law," she accepts the School's notion of the "law in action" as superior to the "law on the books." Still, she concludes that its framework of inquiry, while an interesting proposition for the structuring of studies in the sociology of law, is "of limited use as a framework of analysis for legal monographs" (p. 320). The School's approach is also, in her opinion, inherently suited to serve the interests of a "superpower" such as the United States over those of weaker states, and it neglects the "goal of certainty of law" (p. 322).

Throughout the book, one sees an author tempted by the realism and logic of an interesting, novel approach, but ultimately never allowing herself to taste, let alone consume, the forbidden fruit. In the final analysis, the author herself exemplifies best the need to undertake the first task identified by this *verbönten* intellectual framework: the clarification of one's observational standpoint. The author does not describe this jurisprudential approach from an Archimedean point outside the universe of her own theory of, or about, law. Voos squarely approaches both "description" and "critique" convinced of the need both to distinguish between *Sein* and *Sollen*—the *is* and the *ought*—and the resulting triradition of law into the disciplines of legal dogmatics, legal sociology, and legal policy. By contrast, however, the School's policy-oriented jurisprudence tends to level the walls of separation between these time-honored pigeonholes of academia. Thus, the author's conclusions are somewhat predictable.

Let us start with the title of the book. Designating this theory about law as "The School of New Haven" is both over- and under-inclusive. Over-inclusive since other scholars at Yale Law School—recently, for example, public choice theorists

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1 All translations are by the reviewer.

2 See Voos's introduction (p. 15), quoting Colin Warbrick's description (in *Theory and International Law*, p. xi) of the fortress mentality of Cambridge University in the 1960s, which had put McDougal's and his associates' studies on the index:

When I was a law student in Cambridge in the 1960s, two things were forbidden: one was not permitted to entertain (sic!) women in one's rooms overnight and one was not allowed to make reference to the copious writings of Myres S. McDougal and his associates. McDougal, so it was put about, 'had a theory'—much as one might speak in the same deprecating way about someone who 'had a theory' that the Earth was flat or that the bad weather was caused by the Germans. Under the curious morality that prevailed in Cambridge, it was all right to engage in carnal activities during the hours of daylight (…). However, McDougal was as dangerous by day as by night.
and liberal law-and-economics scholars—would protest against the implication that this jurisprudence is "the" school of the venerated place. And under-inclusive since it fatally neglects the global range, applicability, and application that this theory has achieved, moving far beyond the ivy of New Haven. In teaching the approach, its main protagonists have called it "studies in law, science, and policy" or "policy-oriented jurisprudence." Such a designation would have been more appropriate. Moreover, referring to the approach as "an American theory of international law" fails to recognize the depth and breadth of this unique theory. It is a theory about law in general, not just international law (as the author must have noticed when she discussed, inter alia, the theory's core concept of "law" as a process of authoritative and controlling decision), and its influence has extended far beyond its place of birth.

The author's biographical statements on the founders of the School—Myres S. McDougall, Harold D. Lasswell, and W. Michael Reisman—make for good reading and are fairly accurate. There is one lamentable oversight, however: Voos does not mention, not even in a postscript, that McDougall, the main focus of her critique, passed away on May 7, 1998, well before the publication of the book under review. In order to capture his true impact, the author might well have considered presenting a broader range of the intellectual contributors to the approach, above and beyond the three "most important students" of McDougall that she does introduce. Although tres factant collegium, the "School" of New Haven could not have gained the worldwide influence it has achieved were it not for the enthusiastic reception received, and critical contributions made, by other scholars not only from the United States, but also from beyond its borders. What McDougall respectfully called his "associates" were people from around the world, including scholarly heavyweights such as W. Michael Reisman, Rosalyn Higgins, and Richard Falk. Moreover, McDougall's main and lasting contributions to the academic literature—the interdisciplinary volumes on various broad segments of international law, such as Law and Minimum World Public Order, Law and Public Order in Space, and Human Rights and World Public Order—could not have seen the light of day without the substantial contributions by co-authors of the likes of Florentino Feliciano, Ivan Vlasic, and Lung-chu Chen. One could also mention the line of monographs published over the years by other scholars such as Douglas Johnston, B. S. Murty, and so on. What do all these scholars, from Feliciano to Murty, have in common? They generally are not, at least not originally, American. In fact, Richard Falk—one of the original proponents, later turned critic of the approach—faults the "New Haven School" exactly for its attractiveness to foreign, rather than American, scholars. Maybe the jurisprudence is truly global in its reach, rather than a purely "American" theory?

Another unfortunate constriction in the book's focus is related to its choice of writings subjected to close analysis. The author selected three short articles by McDougall and Reisman. She could have chosen to review the crowning exposition of the approach—Lasswell and McDougall's Jurisprudence for a Free Society, published in 1992. She could have chosen to take a closer look at the major area studies on what has been traditionally called the law of war, human rights, the law of treaties, the law of the sea, the law of outer space—impressive, problem-oriented analyses that have stood the test of time, and some of which have been reissued recently needing no change in text, only introductory updates. She could have

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5 Harold D. Lasswell & Myres S. McDougall, Jurisprudence for a Free Society: Studies in Law, Science and Policy (1992). Most of the relatively few references to this book appear in the context of longer footnotes that also refer to other works. This glance at treatment stands in marked contrast to the frequency, and emphasis given to, Voos’s citations of two other works discussing McDougall’s approach: Knud Krakau, Missionsbewußtsein und Völkerrechtsdoktrin in den Vereinigten Staaten von Amerika (1967), and Bent Rosenthal, Etude de l’oeuvre de Myres Smith McDougall en matière de droit international public (1970).


looked at McDougal’s early stand against racism in his native South and abroad,11 as well as his global-common-interest approach to novel areas of legal exploration such as outer space, putting them out of reach for national desires of appropriation.12 She could have referred to Reisman and McDougal’s championship of rights of oppressed groups such as the Ibo13 and indigenous peoples.14 No. The articles chosen relate exclusively to certain instances of use of the military instrument by the United States—hydrogen bomb testing in the Pacific, the Cuban quarantine, and the bombing of Baghdad. Only by this very selective use of materials can the author possibly leave the impression of having justified her contention that the approach inherently serves the interests of “Superpower U.S.A.”

Still, the abiding value of this book lies in its careful introduction of the main pillars of policy-oriented jurisprudence to the German-language audience.15 The author is to be commended for translating the framework’s distinctive terminology—often seen as a forbidding metalanguage—into German. More importantly, the author accurately relates the approach’s concept of law as a process of authoritative and controlling decision, and explains in detail the key concepts of decision, authority, and effective control. She captures particularly well the function of prescriptions (be they treaties or consolidating instances of state practice) as only one part of a process of decision making in any community, from the local to the global. She also points out the valuable contribution that the approach has made to the description of customary international law by recasting it as the authoritative and controlling response by the international community to claims and counterclaims in given problem situations. She sees some merit in the statement that law is essentially a matter of choice, a decision of “policy.”

Where Voos loses some clarity is in the exposition of the key concept of “values.” Not only is this term used to describe the assets that humans bring to bear upon particular struggles (base values), but it also signifies the aspirations that humans harbor for their lives (scope values). The author sees the list of eight values that humans desire—power, wealth, affection, respect, rectitude, skills, enlightenment, and well-being—as largely postulated by the approach. Lasswell, the main conceptualist in this field, as well as principal draftsman of the “cognitive map” of any social problem, had taken pains to explain that values are empirical statements of what humans cherish—or value, hence the term—and that proof of these categories and their universality can be found in history and anthropology.

Moreover, Voos gets into intellectual quicksand when she deals with the approach’s central concept, the guiding light of a “public order of human dignity.” There is an important distinction between “minimum” and “optimum” world public order. The author considers “minimum public order” as largely synonymous with “world peace,” while a proper conception of this expression would refer to the minimization of unauthorized violence and coercion.16 More critically, the concept of an optimum public order and its definition fail to receive proper attention. Instead, the author faults the School for not properly defining the concept of “human dignity,” while claiming that the approach accords “human dignity” a higher rank than the eight particular values (see p. 106). The concept of “optimum public order,” often used interchangeably with the term “world public order of human dignity,” properly refers to an order that maximizes all human beings’ access to all of the values, as well as the processes by which those values are shaped and shared.17 That grounding of desired law in empirically observable human aspirations is a cardinal contribution of policy-oriented jurisprudence to theories of and about law—in particular, to the theory and philosophy of human rights. By anchoring legal

12 SPACE, supra note 10, at 825–827.
15 For a brief introduction published over two decades ago, see Christoph Schreuer, New Haven Approach und Vilkerrecht, in AUTORITÄT UND INTERNATIONALE ORDNUNG 63 (Christoph Schreuer ed., 1979).
16 Myres S. McDougal & Siegfried Wiessner, Law and Minimum World Public Order, Introduction to the Reissue, in WAR, supra note 6, at xix, xxvii.
17 For details, see HUMAN RIGHTS, supra note 7.
prescriptions in the universe of what humans desire, the approach does not need a freestanding definition of human dignity. Human dignity is respected and preserved by making decisions that would foster access to everything that humans value. Thus, human dignity is not superordinated above the concept of values, as the book asserts. In effect, values are the operational categories that define and drive a public order of human dignity.

In sum, the book does a thorough job of highlighting essential features of policy-oriented jurisprudence. Its general critique, based on a different theory about law, is internally consistent, but its specific observations on the application of the approach based on an analysis of a scant three articles cannot convince. If Voos had taken into account and digested the major treaties produced by the New Haven School, she might have better appreciated the full analytic range and prescriptive potential of its jurisprudence. Nevertheless, this well-written book will greatly assist German readers in coming to understand a compelling approach to law that has, until now, been considered taboo. This will probably be the book’s main, and lasting, contribution.

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The recent financial crisis in Argentina provoked a new round of criticism of the International Monetary Fund (IMF) and renewed scrutiny of IMF policies with regard to their effects on the domestic politics of debtor states and the enjoyment of basic economic rights. Likewise, the impact that the World Bank1 and its projects may have on the human rights of persons in developing states has been a subject of intense concern for some years. In this study, Sigrun Skogly, a lecturer in law at Lancaster University in the United Kingdom, tackles the jurisprudential question whether these international financial institutions have obligations under international human rights law and, if so, what the source and scope of these obligations are.


The book, revised from a doctoral dissertation for the University of Oslo, is neither as comprehensive nor as topical as its title might suggest. Within its limitations, however, the study provides a solid legal analysis of the status of the World Bank and IMF under international law, their connection to the UN human rights regime, the nature of their human rights obligations, and the very modest steps so far taken to incorporate human rights concerns into their work. In her conclusions, which build upon and apply her legal framework, the author suggests directions for future research on the practices of these institutions, and analyzes the prospects for holding them accountable for their human rights obligations. Some of the analysis in the book may also be applicable to other important economic actors, such as multinational corporations.

Skogly begins with the history of the two institutions and provides a close textual analysis of their articles of agreement. The World Bank provides financing for international development and engages in both project lending (funding for specific infrastructure development, such as dams) and, to a lesser degree, program lending (funding for ongoing development). The bank has concentrated on large infrastructural projects. Poverty reduction is one of its objectives. In the 1980s, the bank began to emphasize the importance of free-market economies as the long-term solution to poverty, and began to link its program lending to structural-adjustment policies.

The IMF was established to deal with its member states’ balance-of-payment problems. Each member pays a quota into the fund and has special drawing rights. Other lending programs have been established by the IMF, which in the 1980s also began to emphasize structural-adjustment programs (SAPs) for debtor states. Skogly provides a helpful thumbnail sketch of such programs: “Although no two SAPs are identical and the weight of each individual factor will vary, most of the following elements are present in all SAPs: trade liberalisation, abolishment of subsidies, devaluation of local currency, privatisation and reduced public expenditure in general” (p. 21). Structural-adjustment policies of this type can have a profoundly negative impact on the enjoyment of human rights and on such matters as food security, health care, and education, as well as by causing popular discontent that is met, in turn, by repressive political measures. Freedom of movement, the rights of indigenous people, and freedom of association may also be adversely affected.
The problems of structural-adjustment serve, in effect, as the jumping-off point for Skogly’s study. She has an enduring interest in economic, social, and cultural rights, and has worked in the development field. She examines the conditionality requirements imposed by the World Bank and IMF, and whether these institutions are legally obligated to assess the human rights effects of their policies and programs. She notes that the World Bank has taken far more extensive steps to address environmental concerns, as compared to human rights concerns, in its political-conditionality policies, and that both financial institutions are becoming increasingly concerned with good-governance issues. The IMF has traditionally insisted, however, that human rights issues relate to domestic political matters that the fund’s articles prevent it from addressing.

Skogly examines the legal relationships among the World Bank and IMF, the United Nations, and member states. She notes that both international financial institutions are specialized agencies of the United Nations. As such, they potentially have an obligation to cooperate with the human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights. Skogly explains, however, that the involvement of specialized UN agencies with the treaty bodies has generally been quite modest. Moreover, the World Bank and IMF are not parties to the treaties and thus have few compliance obligations as such. She can identify little more than a duty to respond to requests for information from the treaty bodies, and perhaps a moral duty to support the treaty bodies’ work. The World Bank has adopted operative directives on matters such as involuntary resettlement, indigenous peoples, and poverty reduction—which serve as internal policy guidelines—but it does not have an elaborate human rights policy. The IMF continues to insist, as noted earlier, that human rights compliance is a matter for states.

The chapter on rights and obligations, which covers familiar territory, includes an analysis of those rights that are immediately binding and those that are “programmatic”—that is, subject to progressive implementation. Skogly briefly examines the relevance of justiciability to the definability of rights. The chapter on international law (in general) explores the international legal personality of the World Bank and IMF. One difficulty Skogly identifies is that the two institutions are creatures of their articles of agreement. She discusses Kelsen’s injunction that international organizations may carry out only those tasks and policies that are explicitly authorized by their charters, and finds a greater scope for action so long as the action is not inconsistent with the constitutive instruments. She briefly explains treaties, customary law, general principles of law, and jus cogens as sources of international legal obligation for the World Bank and IMF.

In the chapter addressing sources of international human rights and how those sources might generate obligations for the World Bank and IMF, Skogly carefully examines the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). With respect to the ICESCR, Skogly asserts that the World Bank and IMF have an obligation not to impose policies or to implement programs that would cause presently enjoyed human rights to be violated or that would worsen a situation where human rights are not yet fully respected. Further, she suggests that a debtor state’s efforts to meet its own obligations to realize progressively the rights protected by the ICESCR should not be a basis for the denial of financial assistance by the World Bank or IMF. Skogly thus suggests a basis in existing, widely ratified treaty law for requiring moderation of the structural-adjustment policies of the international financial institutions—which have aroused such controversy among human rights advocates and in developing states. This aspect of the book offers a creative, if modest, way forward in the often heated debate over the human rights obligations of international financial institutions. Her argument does not carry forward, however, with a detailed plan for implementing these obligations or for protecting developing states from unjustifiable denial of assistance.

Skogly briefly examines other UN human rights treaties, regional instruments, and the 1986 General Assembly Declaration on the Right to Development. She concludes “that the obligations stemming from the Charter, customary international law and general principles are of a negative or neutral character, and that the minimum obligation is not to violate international human rights law as expressed in the United Nations Charter and customary and general principles of law” (p. 145).

In the seventh of her nine chapters—“The Institutions’ Human Rights Obligations,” in which she draws out the consequences of her preceding analysis—Skogly’s discussion becomes less general and abstract, and hence more engaging. She examines three levels of state obligations regarding rights: to respect (not to violate the right directly),
to protect (to prevent violations even by nonstate agents), and to fulfill (to take affirmative steps to ensure enjoyment of the right). She analyzes the applicability of “minimum core obligations”—a concept developed by the Committee on Economic, Social and Cultural Rights—to the World Bank and IMF. She briefly explains how structural-adjustment policies imposed upon states may interfere with specific rights guaranteed under the ICESCR—in particular, the rights to food and education.

Skogly raises the issue of the procedural obligations of the World Bank and the IMF with respect to human rights. She suggests that human rights considerations should be integrated into all stages of a lending project, from the initial identification of possible human rights consequences of general policies and programs, preparation of specific projects, appraisal of their feasibility, implementation of projects, and evaluation following their completion. She recommends the adoption of operational directives that would integrate human rights concerns into these stages of planning and evaluation—thus treating human rights in a manner similar to environmental protection. She concludes:

[T]he Bank and the Fund are under an obligation to respect international human rights law when designing and implementing their own projects and programmes. Furthermore, the two institutions are not bound by the covenants and conventions making up international human rights treaty law to the same extent as States that have ratified the instruments, as they are not parties to the treaties. The obligation to respect is generally fulfilled through non-intervention. However, even if the conclusion is that the institutions are not under an obligation to protect and fulfill human rights, this does not prevent them from promoting and fulfilling human rights through their policies. (P. 172)

This conveys the tenor of Skogly’s study: she clearly wishes that she had been able to identify a solid legal basis for imposing greater and more meaningful human rights obligations on the World Bank and IMF. She cannot escape the conclusion that states bear the primary legal obligations, with the international financial institutions being only indirectly implicated in states’ compliance. Skogly’s suggestion that these institutions take human rights as seriously as they have taken environmental concerns is valid, even if the impetus for such policy changes must come from public pressure and moral suasion, rather than from a clarification of existing international legal norms.

In her last substantive chapter—“Possible Avensues for Redress or Reparation”—Skogly reviews the possibilities for legal accountability of the World Bank and IMF for breaches of the human rights obligations that she has identified. She discusses the problems posed by immunity claims arising out of the institutions’ status as intergovernmental organizations. Unfortunately, the alternative that Skogly suggests—suing states that violate human rights in implementing policies demanded by the World Bank or IMF—poses equally difficult barriers of sovereign immunity.

Skogly examines the authority and the activities of the Inspection Panel established by the World Bank in 1993, suggesting that the operational directives on indigenous people and involuntary resettlement might serve as bases for raising human rights issues. She notes, however, that the views of the Inspection Panel do not bind the bank’s Board of Directors, which can proceed with a project without conducting an investigation recommended by the panel. Skogly also briefly discusses UN human rights bodies that might scrutinize the human rights implications of the work of the World Bank and IMF, but she perhaps does not give sufficient attention to the Charter-based thematic mechanisms. The UN Commission on Human Rights and the Sub-Commission on the Protection and Promotion of Human Rights have either appointed special rapporteurs or commissioned studies on a number of economic and social issues, and these thematic mechanisms may expose the involvement of the international financial institutions in policies and projects that impede the realization of economic and social rights.

Skogly’s conclusion candidly sums up her project:

This study has had a limited aim: to analyse current international law and international human rights law to arrive at conclusions concerning the human rights obligations of the World Bank and the IMF. The study has addressed the various sources of public international law that are applicable to this subject, and has emphasised the need to apply general public international law on all subjects with international legal personality, and that there is often a deficiency in terms of holding intergovernmental organisations accountable to this set of legal rules. (P. 195)

The limited purpose of this study, however, leaves a number of issues underdeveloped. First, many readers would probably want to see a more detailed and concrete analysis of the actual track record of the World Bank and IMF in terms of their respect for, or violations of, human rights.
Second, following an examination of that track record, it would be important to conduct a systematic analysis of how the human rights obligations should best be fulfilled. For example, it would be desirable to have both a thoroughly worked out plan for operational directives on human rights and also the necessary revisions in the authority of the Inspection Panel. Finally, and possibly most difficult, there is the issue of redress. What types of external review and checks can be imposed on these bodies? How can persons adversely affected by ill-conceived development projects and structural-adjustment policies hold these financial institutions and their executives accountable? What lessons can be imported from the growing field of corporate responsibility for human rights violations, in which questions of indirect complicity in human rights violations also arise? In view of these still-open issues, Skogly’s study may be of greatest value to scholars and policy analysts seeking to carry out the research agenda that she describes in the preceding quotation.

While concise and largely abstract, Skogly’s study is solidly grounded in international law and clearly describes the international human rights framework within which the World Bank and IMF have functioned—although without, she argues persuasively, sufficient sensitivity to the human rights dimension of their activities.

JOAN FITZPATRICK
Of the Board of Editors


For most of the United Nations’ first two decades, the principles of sovereignty and noninterference in domestic affairs were taken as insulating states from critical international examination of their human rights practices. Of course, they could remove that insulation by treaty if they chose to do so. This open possibility was one of the main reasons that, after the adoption in 1948 of the Universal Declaration of Human Rights (Declaration), the United Nations went on to develop what were to become the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both of which were adopted by the UN General Assembly in 1966 and went into force in 1976. Together with the Declaration, these two Covenants completed the long-awaited International Bill of Human Rights.

There are four other main UN human rights treaties in force: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984) and the Convention on the Rights of the Child (CRC) (1989). Each of these Conventions, as well as the two Covenants, has a committee charged with reviewing the extent of compliance by states parties. The committees are composed of individual “experts” (from ten to twenty-three), usually elected by states parties. Members of the Committee on Economic, Social and Cultural Rights are elected by the UN Economic and Social Council. The core function of all the committees is to review periodic reports submitted by states parties. In addition, the Human Rights Committee (established under the ICCPR), the Committee on the Elimination of Racial Discrimination (under ICERD) and the Committee Against Torture (under CAT) may, if states agree separately, receive individual complaints from those states. The same three committees may also receive interstate complaints on a similarly optional basis (except the ICERD Committee, which has this power on a compulsory basis), but this function has never been used. Finally, the CAT Committee may, of its own motion, study and investigate alleged systematic torture practices. With the entry into force in December 2000 of the recently adopted Optional Protocol to CEDAW (1999), its committee is now able to examine individual complaints and alleged systematic violations in respect of states parties to that Protocol.

The Future of UN Human Rights Treaty Monitoring, edited by Philip Alston and James Crawford, is a collection of updated (to about 1999) and revised 1997 conference papers. Each essay is written by a scholar, committee member, practitioner, or official of the UN Secretariat or a nongovernmental organization (NGO), with several contributors fitting more than one of these descriptions. After a succinct summary by James Crawford of the problems besetting the treaty bodies, including the problems of work backlog and overdue reports (solving the latter would exacerbate the former), one group of essays looks at some—but by no means all—of the work of each treaty body. Each essay is authoritative in the coverage given, allowing the reader to get a sense of the details.
of the committees' work and the problems faced. To single out just one essay (however invidiously), Henry Steiner’s examination of the approach of the Human Rights Committee was especially thoughtful. (I here declare an interest as a member of the Committee.) He makes a strong case for more reasoned findings in the Committee’s “views” on individual cases, although he acknowledges that the Committee has begun to reflect this concern—a trend that I believe has continued. He also gives brief—perhaps too brief—consideration to the interpretative “general comments” of the Committee.

After the chapters on the individual treaty bodies, it would have been useful to have a comparative analysis on a function-by-function basis of their practices. As far as reviewing reports is concerned, the gap is partially filled by Andrew Clapham’s chapter offering an NGO perspective on the reporting procedures. It is an interesting piece, but tends towards the anecdotal, evidently reflecting the author’s experiences at the time that he was Amnesty International’s representative at UN Headquarters. There is no overview of the practice of the individual-complaints mechanisms. Since only the CAT Committee has the right, of its own initiative, to examine apparent systematic practices of torture, Roland Bank’s chapter provides valuable reading on its work under this authority. It should also be read by those interested in using and promoting the use of the equivalent authority that the CEDAW Committee now has under that Convention’s Optional Protocol.

The next group of essays looks at the question of implementation at the national level. The essay by Anne Gallagher looks mainly at the relationship between the treaty bodies and national human rights institutions (ombudspersons, national human rights commissions, and the like). She is constrained to note the paucity of contact between them, but points out that the national institutions, where their mandates refer to their countries’ treaty obligations, could have an important role in promoting compliance with the findings of treaty bodies. Other essays in this section examine aspects of practice in various jurisdictions: Hong Kong (Andrew Byrnes), Japan (Yuji Iwasawa), Nordic and Baltic countries (Martin Scheinin), South Africa (John Dugard), and the United States (Stephanie Grant). While there is no apparent coherent reason behind this choice of jurisdictions, each essay is well written and interesting. Grant’s essay on the United States is especially helpful, focusing on the vexed problems concerning the U.S. practice of attaching extensive reservations, interpretations, and declarations to its ratifications of human rights treaties. It has often been noted that this practice of limiting the extent and internal effect of U.S. obligations calls into question the seriousness of the U.S. commitment to accept, like other governments, international human rights obligations that are not already consistent with its own internal practice. The chapter’s subtitle is “For Export Only?” Grant’s response—regretfully—is a qualified “yes.”

A third section of the book—on regional and sectoral comparisons—contains two authoritative essays on reporting from the regional sphere, one on the inter-American system (Antonio Augusto Cançado Trindade) and the other on the lesser-known European Social Charter (David Harris). Some discussion in this section of the underused reporting procedures under Article 52 of the European Convention on Human Rights would also have been interesting and helpful. The significance of these procedures materialized only in 2000, however—that is, after the book’s period of coverage—when the Council of Europe’s secretary general requested a report from the Russian Federation in respect of Chechnya. A third chapter in this section deals with reporting in international environmental treaties (Daniel Bodansky), which serves as a useful reality check for the analogous human rights procedures.

The fourth cluster of essays deals with common challenges for the treaty bodies. Eric Tistouet explores problems created by the overlap among the treaty bodies. He wisely does not overstake these problems, rightly puts the blame on states for building in overlap (thereby creating duplication problems), and, more controversially, advises the general treaty bodies (the Human Rights Committee and the Committee on Economic, Social and Cultural Rights) to defer, in their work on matters dealt with in greater detail by the specialized conventions, to the appropriate specialized treaty bodies. In separate essays, Elizabeth Evatt and Markus Schmidt address the administrative and resource obstacles to optimally efficient functioning of treaty bodies. Philip Alston’s concluding chapter presents a meticulous debunking of some of Anne Bayefsky’s criticisms of the international human rights system.1

1 He cites Anne F. Bayefsky, Making the Human Rights Treaties Work, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 229 (Louis Henkin and John Lawrence Hargrove eds., 1994), and Anne F. Bayefsky, Report on
her observations on problems of publicity and accessibility, on the fact-finding capacities of the system, on the weaknesses of the complaints systems, and on the inadequacy of measures to follow up on the work of the treaty bodies. He considers that “her analysis of most of these matters is based on a selection of one-sided and unrepresentative examples which, rather than providing an accurate reflection of the overall situation, paints an unduly bleak picture” (p. 504). Yet his assault on her key suggestion—that compulsory on-site fact-finding visits to all states parties would be desirable—seems excessive, especially in the light of states’ interest in this technique, as evidenced by the Convention Against Torture and the Optional Protocol to CEDAW.

Like most collections of conference papers, this work is not, nor does it aspire to be, a sustained comparative analysis of the relevant field—or in this case, of all the functions of all the treaty bodies. Yet there is much of interest in respect of each of the treaty bodies, and the reader emerges with a good sense of the practical and political realities of, and impediments to, their work. Anyone concerned with the system, from either a scholarly or practical perspective, will find this volume well worth consulting.

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The end of the Cold War opened the door to a dramatic increase in the use of UN sanctions. After over a decade of this newly intensified practice, a careful review of the experience is long overdue. These two invaluable books approach the subject of sanctions in radically different ways. UN Sanctions in International Law is a collection of essays, each of which approaches the subject from a distinct, and often theoretical, perspective; United Nations Sanctions Management is narrowly focused on a practical case study of the UN Security Council’s Iraq Sanctions Committee.

Each in its own way, the two books reviewed here raise one fundamental question: are the existing UN sanctions practices acceptable, or do they need to be significantly improved? Because of Cold War tensions, which impeded consensus among its permanent members, the Security Council could rarely agree upon sanctions before the Soviet Union collapsed in 1991. The end of the political logjam in the Council left it with a host of unresolved legal issues and no principled mechanism for resolving them. At present, there is a high level of political opportunism and normative incoherence in the application of sanctions under Chapter VII of the Charter. While UN member states, acting within the Security Council, have reaffirmed the Council’s authority to act, they have carefully avoided recognizing that the Council’s authority may be subject to limits or that its actions should perhaps be subject to external review. These books show that some concerned scholars hold the United Nations to a much higher standard than do its member governments, particularly where UN sanctions are concerned.

The essays in the edited volume were first presented at a colloquium organized by the Graduate Institute of International Studies in Geneva, Switzerland. This book, like that colloquium, assembles contributions from a highly eminent group of scholars who collectively bring much light to bear on the topic of sanctions. The collection consists of thirty-one papers, eight of which are in French. Editor Vera Gowland-Debbas, who has published illuminating studies of sanctions throughout her career, did an excellent job of coordinating the project. In the loosely translated words of one contributor, “each essayist was charged with a precise angle of attack, ensuring that no aspect of the subject would be left unexplored” (p. 167).

Part I of the book, devoted to theoretical issues, is the most wide-ranging in scope. The two essays that introduce it, one by Gowland-Debbas and another by Georges Abi-Saab, stress that there are many profound disputes concerning the definition of sanctions. The UN Charter never uses the term, and there is no consensus as to its exact meaning. As they explore the host of definitional issues raised by the concept of sanctions and analyze how to integrate that notion into the Charter framework, the contributors end up touching upon many of the central issues in international law today.

Abi-Saab sets the stage for the sweeping scope of the theoretical essays with his keynote address,
The Concept of Sanction in International Law," which, true to its title, addresses at length the broad role of "sanction" as an essential function within any legal order. He defines "sanctions" in the strict sense of the term, as "coercive measures taken in execution of a decision of a competent social organ, i.e., an organ legally empowered to act in the name of the society or community that is governed by the legal system" (p. 32). This definition, more than most others, stresses multilateral procedural authority as the essential basis of sanctions. Regardless of terminology, there are various ways in which sanctions may be imposed against a state that has acted illegally: unilaterally, by one state against another; by a regional body such as the European Union, or by decision of the UN Security Council. A sanctions-like function is also fulfilled when individuals who have committed international crimes are held criminally responsible for their acts. Each of these possibilities is given due consideration in this volume.

The scope of the book is, in fact, considerably broader than its title might imply. The title UN Sanctions in International Law seemingly refers only to a single form of "vertical" sanctions—that is, those imposed from above by UN Security Council decisions. While the focus is, indeed, upon such sanctions in most of the volume’s essays, others focus upon "horizontal" sanctions (imposed state to state), upon sanctions imposed by regional organizations, and even upon unilateral countermeasures, such as acts of reprisal or self-defense, not usually considered to fall within the definition of sanctions.

When it comes to sanctions, one underlying issue is always the legitimacy of the measures imposed, for "sanctions" are, by their nature, expected to be legal and appropriate responses to illegal acts. The problem is how to ensure that they are in any particular case. When sanctions are authorized by the Security Council as the "competent social organ," there is an apparent procedural legitimacy, since the Charter’s Chapter VII procedures have presumably been followed. This authorization does not ensure fundamental fairness, however, or even consistency with the other basic principles of the Charter.

After all, the Council is a political rather than a judicial organ—albeit a political organ that sometimes decides that international law has been violated and that, as a consequence, sanctions will or may be imposed. Pierre-Marie Dupuy, in his essay on the evolution of sanctions practices under Chapter VII, notes that the Council has assumed this "quasi-judicial" function in a range of situations involving Haiti, Iraq, Libya, Rwanda, and Yugoslavia. Although it is not specifically provided for in the UN Charter, some such quasi-judicial authority is necessary because without it the Council would be powerless to react in the short run to the threats created by potential violations. Unfortunately, however, the exercise of such authority is free of legal restraints; there is presently no effective means of legal review. John Dugard’s contribution notes that the subject of judicial review of Security Council sanctions is "high on the agenda of international law and one that seems bound to challenge the International Court [of Justice] in the years ahead" (p. 91). That challenge will not be easily met, but Dugard offers some useful suggestions on how the Court might eventually decide to proceed along this path.

As noted above, the problem of legitimacy is linked to the very definition of sanctions—which is one reason why characterizing unilateral countermeasures as sanctions can be particularly troublesome. States imposing such measures might not object to their characterization as "sanctions," but third states, not to mention the state targeted, will frequently question their legality. U.S. sanctions against Cuba are perhaps the best example of this phenomenon. The U.S. government defends those sanctions as legally justified countermeasures against Cuba for illegal expropriations of U.S.-owned property in 1959—a view that is widely rejected outside of the United States. The politics of the Security Council, including the veto, prevent it from addressing such matters, which are rarely, in practice, subject to the rulings of impartial referees. The inability to resolve questions about the legality of unilateral countermeasures is one argument against their classification as "sanctions."

There are also some strong arguments for including unilateral countermeasures within the definition of sanctions. Andreas Lowenfeld’s essay on unilateral sanctions—"An American’s Perception"—makes the case that unilateral economic sanctions are not forbidden and can be quite lawful, but he is careful to acknowledge that the extraterritorial enforcement of the Helms-Burton Act against U.S. allies "is not only unwise but in my view is a violation of international law" (p. 102). The conclusion that unilateral countermeasures, however we may classify them, can nonetheless be consistent with international law is somewhat grudgingly accepted by other contributors. Although Abi-Saab laments that "from time to time, new
terms suddenly emerge, like parasitical plants, purporting vaguely to cover, in all or in part, the same ground as old concepts, such as 'counter measures' in relation to sanctions'' (p. 29), he concedes with regard to unilateral countermeasures that "we cannot totally ignore these means of private justice in a far from perfectly integrated international community" (p. 32).

Part II of this collection addresses the humanitarian issues raised by sanctions. Two of the most powerful objectives of the United Nations can potentially collide here. The protection of international peace and security is arguably the organization's principal purpose. It is the first goal mentioned in the Charter's preamble and the first purpose listed in Article 1(1). The preamble's second goal—and the third purpose identified in Article 1—is to promote and encourage respect for human rights. How are these two goals to be reconciled, should they ever come into conflict?

The Security Council commonly includes some kind of broad humanitarian exception in the text of its resolutions on sanctions. A number of the essays in this section of the Gowland-Debas volume explore the difficulties of reconciling humanitarian concerns with the need for effective sanctions. The task falls to the sanctions committee, comprising all the Council’s members; the committee's experience is the subject of two very useful essays in this volume. Separate essays explore the perspectives of other organizations that struggle with this dilemma—including the International Committee of the Red Cross (ICRC), International Labor Organization (ILO), and UNICEF.

This humanitarian dilemma has emerged as one of the most troubling aspects of the increased use of UN sanctions. The perception that women and children in Iraq, starving and in need of medicine, are bearing the brunt of UN sanctions against Saddam Hussein's regime has undermined the perceived legitimacy both of the UN sanctions regime and of the Security Council itself. In a very real sense, the issue of legitimacy, much discussed in the theoretical essays of Part I, also reverberates as a subtheme throughout the extended discussion of humanitarian issues in Part II. Separate essays centered on the experiences of the

ICRC, ILO, and UNICEF reveal the tensions faced by each of these organizations in attempting to reconcile sanctions with humanitarian concerns.

Many of the contributors to this volume raise the issue of how the Security Council can more effectively incorporate international human rights concerns into the design of its sanctions. When Andrew Clapham focuses on economic, social, and cultural rights, he turns the issue on its head, so to speak, by suggesting that international human rights treaty bodies, such as the Human Rights Committee, should "start to include hard questioning when Security Council members come before" them, thereby "inserting a sanctions dimension into the world of human rights monitoring" (p. 141). Even if the treaty bodies did engage in such questioning, however—which is not beyond the range of possibility—it seems unlikely that fear of such questioning would cause the permanent members to alter their behavior within the Council.

Part III of this collection offers eight concise essays on the implementation of Security Council sanctions resolutions. These essays supplement the earlier parts of the book by describing particular states' and regions' practical experience with UN sanctions.

Unlike parts I to III of this volume—which provide a comprehensive overview of the challenges that UN sanctions have raised for the international community, international organizations, and states not the target of those sanctions—each of the three essays in the final section (on the future of sanctions) offers an alternative proposal for resolving the problems raised. The solution proposed by Amir Al-Anbari, a former Iraqi ambassador, would involve the elimination of economic sanctions in favor of diplomatic sanctions or, when absolutely necessary and subject to proper restraints, the use of force. But any such use of force is likely to be rare, and the intermediate possibility of economic sanctions should not be completely abandoned as an option. A less radical but more feasible proposal, by Christine Chinkin, calls for greater use of preventive measures, such as peacemaking and the peaceful settlement of disputes, in lieu of economic sanctions. The most radical of the three proposals comes from Monique Chemillier-Gendreau, who calls for a fundamental restructuring of the international system; through the elimination of the Security Council veto and other measures, her goal is to achieve democracy at the level of the international community. Although it is difficult to imagine how changes of

\[\text{\footnote{See, for example, Security Council Resolutions}\text{687, para. 20 (Apr. 3, 1991), and 986 (Apr. 14, 1995) authorizing the limited import of petroleum products from Iraq, with the proceeds to be used for foodstuffs, medicine, and medical supplies for essential civilian needs, despite the broad economic sanctions imposed under Security Council Resolution 661 (Aug. 6, 1990).}}\]
this magnitude could be achieved in the near future, the value of her vision is that, like Plato’s Republic, it reminds us how much the present system falls short of the ideal.

The second book reviewed here—United Nations Sanctions Management by Paul Conlon, a former deputy secretary of the UN Iraq Sanctions Committee (ISC)—is a tightly focused case study of the ISC between 1990 and 1994. It brings to the public for the first time a wealth of information about the day-to-day working of the ISC. While containing little of the legal/theoretical reflection on sanctions found in the Gowlland-Debbas book, it does offer some insights on the definitions of, and distinctions between, different types and functions of sanctions. What makes Conlon’s book a valuable addition to the literature on sanctions is its detailed revelations concerning the day-to-day functioning of the ISC and its insights into the causes of that organ’s failure to operate more effectively.

This book is written from a completely practical perspective. The chapters divide the topic functionally rather than embarking on an analysis according to a grand theoretical framework. The book meticulously describes the nuts and bolts of the ISC’s efforts to interpret and implement the sanctions resolutions of the Security Council. The administration of humanitarian exceptions to sanctions is, predictably, the most troublesome.

Iraq’s invasion of Kuwait was the first major crisis in international peace and security to occur in the post-Cold War period, and provided an early test of how the Security Council would function in the “new world order.” Conlon expresses his surprise that the United States, the United Kingdom, and France chose “to anchor their challenge to Iraq squarely in the Security Council,” and he finds it “even more surprising . . . that the Western countries chose to center their strategy around sanctions” (p. 25). Less surprising is that they did not limit their response to economic sanctions for very long. When the focus shifted to the use of force, the Council’s sanctions were maintained, but their implementation soon fell prey to the kind of political and bureaucratic problems that have historically plagued international organizations. It is this process that Conlon so minutely describes.

The consensus procedures within the ISC were part of the problem. Although the Western powers were quite successful in gaining Security Council authorization for economic sanctions, they could not dominate the continuing debates on implementation within the ISC since it included states such as Cuba and Yemen, which were unenthusiastic about the sanctions regime. Conlon concludes that the lack of principle in the application of Chapter VII sanctions tends to undermine their effectiveness, allowing states opposed to the Council’s formally binding decisions to “vote[e] against sanctions resolutions after the fact” (p. 9). A lack of true consensus seems to be the real problem here.

Conlon’s description of the legal setting within which the Security Council makes and implements its sanctions decisions is shocking. After two generations the Council itself is still using an inadequate set of provisional rules of procedure, and there is even less procedural clarity concerning subsidiary organs such as the ISC. There is no manual of procedures for these organs, or any codification or compilation of precedent—which results in arbitrary and inconsistent decisions on the application of sanctions. The author presents numerous examples that support his assertion that the “law of the Security Council and its subsidiary organs is probably the least developed part of international organization law” (p. 7).

Conlon does not attempt to hide his distaste for many aspects of the UN system. Much of his critique of the United Nations and its bureaucracy is applicable to areas beyond the ISC. For the most part, the wealth of factual detail he offers on the practices of the ISC is judiciously used to support his implicit critique of the UN system. At times, however, his conclusions and critiques go beyond what can be supported by the details he offers. For example, after writing of a pro–Third World bias within the UN Secretariat and of “U.N. officials [who are] more at home with [Third World] culture than with that of modern industrial society,” he suggests, rather tenuously, that such officials are “responsible for a work ethos among U.N. officials” that is said to “militate against the development of a professional civil service” (p. 20). Conlon’s language is harsh, although there is no denying that many other observers share this view.

Despite his often scathing critique of the United Nations, Conlon supports international institutions. In his view, the United Nations is in crisis, and the international community will soon be faced with the task of “either radically reconstituting the United Nations or replacing it with a more adequate centerpiece of international organization and governance” (p. xiii). The preface tells us, moreover, that the purpose of the book is to assist in the process of “refin[ing] methods and
practices of international organization in the future" (id.). Thus, Conlon’s critique is offered in the positive spirit of “tough love.” If and when the international community does set out to reform or replace the UN system—or even its dysfunctional sanctions regime—Conlon’s book will be useful as a compilation of past errors to be avoided next time around.

Conlon’s detailed descriptions of practice complement the multiple theoretical perspectives of the Gowlland-Debhas book. Taken together, the two books provide much-needed insight into problems with the administration of UN sanctions over the past decade.

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The International Dimensions of Cyberspace Law.

The six essays in The International Dimensions of Cyberspace Law, the first volume in a new UNESCO legal series on cyberspace, discuss issues of law, policy, and legal taxonomy relevant to creating a “law of cyberspace.” In the end, their stated purpose of exploring “the timeliness of drawing up the most appropriate international standard instrument . . . [and] defining [UNESCO’s] precise role” (p. xv) is overshadowed by the fundamental principles that they identify for Internet law: freedom of expression; universal access to information and knowledge; protection of privacy, personal data, and intellectual property; and cultural and linguistic diversity. Taken together, the essays argue persuasively that these principles, together with universal Internet access, will improve the democratic processes of all nations.

The collection confronts several challenges in identifying an international “cyberlaw.” First, systems of law generally develop gradually as facts are identified and understood. For “cyberlaw,” this standard developmental process presents a problem. Internet technologies develop so rapidly that factual discussions are quickly overtaken by events. Consequently, even these essays—now several years old—may appear dated for reasons outside their control. There is, for example, no mention of the World Trade Center/Pentagon attacks of September 2001. That tragedy reveals the tension between privacy, openness, and security—overlapping concerns that future essays must consider now that Internet misuse, along with the need for a collective international response, has become a reality.

Second, “cyberspace” seems not to have been a fully developed concept when these essays were written. It is often treated in the book as a distinct physical jurisdiction that will require the creation of a new body of law, rather than as it has come to be viewed more recently—that is, as the product of an advanced telecommunications technology, and to which traditional legal principles can be adapted and applied. This semantic confusion bedevils the analysis of several essays.

Third, while a framework of international legal principles for cyberlaw would be useful and consistent with UNESCO’s charter, progress toward this goal will be slow without direct U.S. involvement. As the jurisdiction where the Internet and its technology originated and where Internet developments and use are greatest, the United States and its experience are likely to be central to developing an international legal system for the Internet. Relevant, too, is the value of U.S. common law, which offers an approach ideally suited to tailoring traditional legal principles to new factual contexts.

Finally, several essays comment on a lack of national law pertaining to the Internet and the corresponding absence of international consensus on the need for, and content of, any international multilateral instrument on cyberspace law. The essays note that the details of decisions of individual jurisdictions must be more developed before the international community can begin to take positions and build consensus on specific topics, as opposed to taking positions on topics so general as to be without significance to this developing area of law. Even so, specific agreement does emerge on the need for international action against child pornography and criminal activity on the Internet.

1 As quoted in the editor’s introduction (p. 1), the 1945 UNESCO Constitution, Article 1, paragraph 2(a) and (b), states that UNESCO is to “[advance] the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary . . . [and to give] fresh impulse to popular education and to the spread of culture.”

2 Very recent progress on these issues among different jurisdictions has been sufficient to warrant a discussion of jurisdiction and choice-of-law issues in any future collection. Though not covered in the book under review, such issues may well be central to the development of an international cyberlaw.
As a whole, the collection leads to the conclusion that creating sources of governance and control of the Internet will be complicated and varied, with law, regulation, national cultural and social norms, market place conventions, and user regulations each playing a role. The number of concerned players will be significant, and each will have different private, commercial, and political uses to consider. With regard to the need for multilateral solutions to the problems of cross-border Internet use, the essays single out the efforts of specific interest groups, particularly those in the commercial community, as likely to be particularly helpful. The attention given to the work of both private and public entities in advancing common international legal principles for the Internet is thus instructive. Overall, the collection provides a thoughtful set of discussions for any serious student of this emerging area of law.

Individually, the essays range from useful surveys of cyberspace law to discussions of legal problems specific to cyberspace (freedom of expression, the relationship of the law of cyberspace to the law of outer space, liability in cyberspace, and fostering an ethical cyberspace environment).

The collection begins with editor Teresa Fuentes-Camacho’s description of the broad policy concerns raised by the Internet. She includes a discussion of UNESCO’s catalytic and interdisciplinary approach to cyberspace, which is based on complementary societal and technological factors, with the goal that “cyberspace . . . serve the common good” (p. 6).

Next, Elizabeth Longworth carefully surveys Internet legal developments in “The Possibilities for a Legal Framework for Cyberspace—Including a New Zealand Perspective.” She rejects the need for a consensus-based international agreement on cyberspace law, but stresses the importance of ensuring traditional legal relationships. In the course of her sophisticated analysis, Longworth makes a number of interesting points. For example, she finds similarities between “cyberlaw” and lex mercatoria of the Middle Ages, where individual trading partners established the rules of their own self-governance. She thus concludes that central governmental authority over the Internet will diminish with increased control by Internet users. The resulting governance model will be decentralized, dynamic, and self-regulating, with important implications for democratic governance within individual nations. As for international structures, Longworth predicts that regulation of Internet activities will depend more on individual contracts than on multilateral international agreements about specific cyberspace topics. Consistent with this decentralized model, Longworth also rejects the concept of a single international governing organization that would be responsible for the creation of cyberspace rules, and instead foresees the emergence of control by a variety of organizations—for example, the United Nations, the nonprofit Internet Corporation for Assigned Names and Numbers (ICANN), and the World Intellectual Property Organization (WIPO)—each governing a specific area.

Well versed in the Internet’s technical features, Longworth projects that technology will solve many problems of applying traditional law to Internet facts (for example, verifying contract signatures through technological means). Along with other contributors, she fears that the anonymity of cyberspace could undermine the application of traditional law to cybertransactions, but she also recognizes that technology can address concerns of anonymity and mobility, making possible identification of both Internet actors and activities.

For Longworth, cyberspace is an actual place to be governed—not only a new means of communication—and she views the Internet as leading to an “irrelevance of geographic boundaries” (p. 14), requiring new legal structures. Nevertheless, Longworth rejects the creation of a distinct “cyberjurisdiction” to manage cross-border electronic transactions.

Gareth Grainger reviews efforts to control objectionable Internet content in “Freedom of Expression and Regulation of Information in Cyberspace: Issues Concerning Potential International Cooperation Principles.” In addition to focusing on recent Australian, European, and U.S. initiatives to regulate offensive Internet content according to varying national standards, he discusses UNESCO’s role, which emerged from the 1997 General Conference in Paris, as the intellectual leader for the United Nations’ work on the legal, ethical, and societal aspects of cyberspace. The tension between rights of free expression and the desire of communities to foster morality and ensure the safety of Internet users remains an unresolved legal challenge for which Grainger recommends a self-regulated approach, using codes of conduct, hotlines, and content-labeling technologies to balance free speech, safety, and morality.

The concept of cyberspace as location, not simply a new communications technology, appears once again in Anna Maria Balsamo’s essay, “An International Legal Instrument for Cyberspace? A
Comparative Analysis with the Law of Outer Space.” Although Balsamo defines cyberspace as “the space where electronic entities interact” (p. 129), she also recognizes the Internet as a means of communication, one which challenges government control of information and thus fosters the worldwide growth of democracy. These ideas persuade Balsamo that the Internet will eventually be governed by its own laws and conventions outside national legal systems, a conclusion that encourages her to compare cyberlaw to the evolving international law of outer space. Balsamo’s definition of cyberspace may be technically correct, but I believe she mistakes the real task of cyberlaw—to regulate human conduct, not the actions of “electronic entities.”

In sum, Balsamo’s discussion of outer-space treaties does provide a useful review of the process by which international legal systems are created among nations in order to tackle novel factual situations, but a review of international telecommunications law might have provided a better understanding of how international law will deal with the Internet. To assume that the Internet will require its own distinct legal system—as if it were a newly discovered physical jurisdiction, or a utopian community beyond the normal legal governance structures of the real world—seems to me to ignore something crucially important. That is, as revolutionary technologies go, the Internet may be no more remarkable for its time than earlier communications technologies, such as the telephone, television, and radio, were for theirs. Is there any reason that law today cannot adjust to the Internet, without altering its basic principles, just as it did in the case of earlier technological advances?

Yves Poulet’s essay, “Some Considerations on Cyberspace Law,” assesses the impact of the Information Age on traditional legal concepts, identifying speed and the resulting loss of traditional boundaries of time and space as the principal challenges presented by the Internet. Examining two new cybertechnologies (electronic signatures and the new Electronic Copyright Management Systems), Poulet observes that “[t]echnology comes to rescue the law” (p. 154). In the end, Internet-based technologies may actually revitalize the application of traditional legal principles to activities in cyberspace. Technology can ensure that “information . . . is better protected . . . than it would be in a bank vault,” even offering “protection in some cases not previously afforded any legal cover” (p. 152); for example, by protecting copyrights through the use of new technologies such as cryptography and “tattooing” (the placement of digital watermarks in electronic files and images).

If regulation by technology is more effective than traditional legal control, Poulet predicts that those who promote Internet services will seek to legitimize technical solutions that maintain traditional legal relationships and interests. Still, he cautions that such technological solutions must themselves comply with the law, especially in the areas of privacy, copyright, and consumer protection.

Comparing the roles of private and state actors in governing the Internet, Poulet sees the former as more nimble in addressing new digital age problems. The private sector will meet regulatory needs more rapidly than its state counterparts, but state actors will continue to have a vital role to play in ensuring the defense of public values as law develops on the Internet. Lawyers, in particular, must ensure that mechanisms exist to consider and determine legal questions in a transparent fashion that takes into account “the interests of each party concerned by the question under debate” (p. 182).

To resolve questions of cyberlaw, Poulet suggests the creation of “a place of national reflection, a place of technological vigil, for the concentration and definition of global policies” (id.). This idea bears similarity to the way in which the common law functions in the United States. The recent Napster litigation provides an example. Technological advances produce challenges for traditional legal rules. Litigation results, creating a national conversation between litigants, judges, legislators, academics, and the public. This national conversation advances understanding of new facts and ultimately facilitates the application of traditional legal and policy considerations to dynamic and novel technical facts. Poulet’s suggestion here is useful in pointing to the potential value of a common law approach to the development of cyberlaw. As noted earlier, it is for this reason, too, that the United States, as the world leader in the development both of the common law and of Internet technologies, is likely to be the leader in the development of a global cyberlaw.

Without totally dispensing the notion of cyberspace as an actual place—it is “virtual space, a place for interaction” (p. 190)—Pierre Trudel’s essay, “Liability in Cyberspace,” rejects the idea of the Internet as a type of twenty-first-century utopia having no need for laws, limits, and liability for individual action. “It is naïve to imagine that increasingly significant interaction can be developed
in cyberspace without anyone being answerable for what goes on" (p. 211). He points out that cyberspace communities have an interest in promoting "a coherent and equitable legal framework to define the responsibilities of the participants in electronic communication" (id.), and sees liability as "the most pressing issue" (p. 189) in the emerging field of cyberlaw. He shows how the traditional legal concepts of common carrier, publisher, and owner can be applied to the unique Internet roles of service provider, site operator, and communicator so as to assign differing levels of liability for harmful communications on the Internet. He recommends that liability in the cyberworld, just as in the "real" world, be determined according to the levels of control that various Internet actors exert over the content communicated. He also notes, however, that liability is a legal determination by which the rules of individual jurisdictions are applied to specific fact situations. Thus, to create a consistent set of rules for liability in cyberspace—where one set of facts may involve several different jurisdictions—it becomes necessary first to understand how each of the involved jurisdictions would apply their respective legal rules to the facts under review.

Trudel's successful application of traditional legal concepts to new cyberfacts shows that "cyberlaw" is often "old wine in new bottles." The challenge for lawyers is not to create a new body of law, but to determine how existing legal principles of tort, contract, criminal law, and other fields can be applied to new and technically complicated factual circumstances. Surprisingly, Trudel stops short of recognizing the full power of this approach and concludes that the "categories of law, as we know them, seem inadequate to cover all the rules essential to the smooth working of something as global and virtual as cyberspace" (p. 212).

Christina Hultmark's essay, "Developing Legal Systems and Good Morals for the Internet," concludes that the "latest forms of communication via the Internet are causing new problems for national legislative bodies" (p. 219). Her goal—to "describe some of the problems related to designing legal rules and outline the shortcomings of legislation as a tool for enhancing morals for cyberspace" (id.)—is a frustrating one; until the facts of Internet usage are better understood, a comprehensive regulatory system will be difficult to design.

While observing that "legal rules apply irrespective of the medium being used" (p. 219), Hultmark worries that this traditional approach will prove to be unworkable because of the international character of cyberlaw and the anonymity of Internet users. The question thus raised is whether cyberspace is a medium that requires the creation of new legal rules. Perhaps the availability and use of address technologies will solve her concern about "Internet anonymity." Certainly, the accountability that accompanies the ability to identify individual Internet users will facilitate society's moral strictures. Hultmark's view—that the need for morality is greater on the Internet than elsewhere in an open society—is interesting but difficult to assess. She seems somewhat wrongheaded, however, in arguing that "[t]he judicial system is unable to function as an efficient or adequate supporter of good morals on the Internet because the legislature is very closely connected to the national state, and its powers do not extend to cyberspace" (p. 222). In fact, no judicial or legislative authority is ever adequately equipped to mandate moral conduct in a democratic society. Such authorities establish broad limits for enforcement by civil and criminal sanction, but cannot regulate specific ethical content. The finer points of moral behavior are beyond the consensus required to support civil and criminal laws in a democracy. In short, the task of mandating moral conduct is better left to those in society responsible for setting religious and ethical goals for individual conduct—whether or not the Internet is involved.

As these six essays show, developing an international cyberlaw will not be easy. The facts in a "cyberlaw" setting will always challenge traditional legal principles. And those who master the facts of cybertechnology will often not understand traditional legal concepts—and vice versa. The common law approach may be useful here, with its emphasis on careful judicial analysis of legal concepts applied to multiple individual fact patterns. Yet such an approach will also proceed slowly. Still, this is a minor concern, for significant time will be required to identify the basic working principles needed for safe, effective, and economic use of the Internet when so many jurisdictions and

Hultmark acknowledges this development, yet sees it as of only limited impact:

Technology may help in securing evidence of the identity of the sender of an electronic message. The new techniques produce more cogent evidence, thereby making it possible to secure predictable and rapid judgements. To some extent, strong technical evidence replaces the social pressure on members of society to behave in accordance with the law. Despite this, the judiciary's role as supporter of good morals on the Internet is very limited. (Pp. 222-23)
their legal systems must necessarily be involved. Future volumes of collected essays would do well to adopt a comparative posture, analyze in detail the approaches developed by local jurisdictions for regulating Internet use, and then explore international agreements based on the areas of consensus thus identified.

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Citizenship Today: Global Perspectives and Practices.  

The term citizenship has many meanings in sociology, political theory, and law. It can denote a relationship to a polity, a social status, an activity, a package of rights, or a package of responsibilities. Consequently, “the scope of a ‘theory of citizenship’ is potentially limitless.”

For international lawyers, concerned with the state system and with phenomena that transcend state borders, the most salient version of citizenship is nationality, membership in a state. (I will use the term state in preference to the term nation-state, which sometimes inserts connotations of mono-ethnicity where they were not intended.) When we consider other meanings of citizenship, we may ask how they do or do not relate to nationality, and how that relation may be changing in response to globalization, increased mobility, and technological change. The volume Citizenship Today: Global Perspectives and Practices illuminates numerous aspects of these questions from a variety of disciplinary perspectives, while holding a focus on nationality. The cumulative impact of the essays is to emphasize the enduring importance of nationality, in opposition to the thesis of a postnational age in which state membership is fading in significance, eclipsed by the rise of transnational identities and human rights protections.

Citizenship Today is the second of three volumes emerging from the multiyear Comparative Citizenship Project of the Carnegie Endowment for International Peace. It follows a prior volume of individual country studies, Migrants into Citizens: Membership in a Changing World (2000), and will be followed by a volume of policy recommendations.

I will summarize the individual contributions by experts from several countries and disciplines, before turning to the postnational challenge and the question of what Citizenship Today implies about citizenship tomorrow.

After an introduction by co-editor Douglas Klusmeyer, the volume opens with “Access to Citizenship: A Comparison of Twenty-Five Nationality Laws” by Patrick Weil, who analyzes the historical development of rules for acquisition of nationality across a broad selection of European and non-European states. He detects an ongoing process of convergence toward a roughly similar mixture of elements based on descent and location of birth (particularly jus soli in the second generation) in democratic countries with stable borders that come to recognize themselves as countries of immigration.

In “The Evolution of Alien Rights in the United States, Germany and the European Union,” Christian Joppke examines the sources of legal protection for alien residents in three legal systems. He concludes that improvements in the legal status of aliens derive from domestic political considerations and the national (or, in the European Union, regional) constitutional regimes, not from the international human rights system as posited by postnationalists.

In “Plural Nationality: Facing the Future in a Migratory World,” co-editors Alexander Aleinikoff and Douglas Klusmeyer analyze the policies of twenty states toward the holding of additional nationalities by their citizens—a phenomenon that has become more common given current levels of mobility and overlapping nationality criteria. The degree to which states encourage or tolerate plural nationality varies, but has increased in recent years. Exploring the disadvantages commonly attributed to plural nationality, Aleinikoff and Klusmeyer conclude that this greater tolerance, at least so far, has resulted from “the paucity of actual adverse consequences” (p. 86). They predict that particular legal conflicts arising from plural nationality can be managed by adjustments at the margin of legal rules, while plural nationality will be accepted in principle.

Karen Knop turns to a particular category of plural nationality, the binational family, in “Relational Nationality: On Gender and Nationality in International Law.” Drawing on the insights of relational feminism, she argues that the achievement of


2 Knop explains relational feminism as a school of feminist thought that acknowledges the contribution of close personal relationships such as family and friendship to the constitution of individual identity (p. 95).
formal gender equality in nationality law leaves unaddressed the dilemmas that can arise in the triangulated relationship of parent, child, and state. Substantive equality may require that in binational marriages (or equivalent relationships), each parent be permitted to maintain dual nationality in order to ensure access to residence, work, social benefits, and, if the marriage should dissolve, visitation. Gender equality may thus entail transformation, rather than abandonment, of older patriarchal conceptions of family unity within the state.

In “Citizenship and Federalism,” Vicki Jackson engages in a comparative analysis of unit and subunit citizenship structures in federal systems and the European Union. She explains the diversity of available configurations for allocating power—over unit and subunit citizenships, and over the legal consequences of those citizenships—between the larger and the smaller territorial unit. She then explores what the operation of dual citizenship within federal systems may tell us about plural nationality, cautioning against its possible disintegrative effect while observing that its dynamics within particular contexts “may elude generalization” (p. 177).

Francis Deng provides a case study of conflict over citizenship in “Ethnic Marginalization as Statelessness: Lessons from the Great Lakes Region of Africa.” Deng focuses on the Banyamulenge, ethnic Tutsi in the eastern Democratic Republic of Congo whose claim to Congolese nationality and the rights it entails has been the subject of ongoing dispute and political manipulation, with violent consequences. He concludes that, in the African context of ongoing nation-building, liberal and nondiscriminatory citizenship norms are needed to reflect “the multiplicity of identities within pluralistic states and even more complex regional configurations” (p. 206).

Richard Ford, in “City-States and Citizenship,” pursues a further localization of citizenship—to the municipal level. He argues that the trends of globalization and revitalized localism are mutually reinforcing competitors of the state. Ford offers suggestions for fostering cities as alternative sites for citizenship; for example, he would allow them to intervene in foreign affairs, would provide municipal voting rights to alien residents, and would extend voting rights beyond city borders to a broader metropolitan region.

In “Denationalizing Citizenship,” Linda Bosniak examines the contention that a postnational, transnational, or global citizenship has arisen. Through a “cursory” empirical overview (p. 244), she concludes that in some dimensions of citizenship (in relation to rights, and even more so in relation to political activity and to identity and solidarity), the state is decreasingly the focus of citizenship practices. Normatively, she argues that postnational citizenship provides a desirable challenge to exclusionary nationalism, although that fact “should not lead to an indiscriminate celebration of things postnational” (p. 246).

Paul Johnston, in “The Emergence of Transnational Citizenship Among Mexican Immigrants in California,” focuses on citizenship as a “process of expanded involvement in evolving public institutions” (p. 256, emphasis omitted). He describes how events of the 1980s and 1990s have reversed the previous pattern of low rates of naturalization and civic involvement among Mexican migrants. Johnston emphasizes labor relations as an arena of conflict that can produce civic mobilization, and family networks as sustaining the transnational character of immigrant communities.

In “Immigrant and Minority Representations of Citizenship in Quebec,” Micheline Labelle and Daniel Salée explore minority attitudes toward Canadian and Québécois citizenship through qualitative interviews with community activists in multi-ethnic neighborhoods in Montreal. Although provincial citizenship is not actually a legal concept in Canadian law, Québécois politics have led the province to compete with the nation in seeking the identification of all its citizens. Labelle and Salée find that Canada has been more successful than Quebec in promoting a vision of multicultural citizenship, but that most informants prefer to construct their own, possibly transnational identities rather than to accept imposed identities.

In “Cultural Citizenship, Minority Rights and Self-Government,” Rainer Bauböck conducts a philosophical inquiry into cultural citizenship as a fourth kind of citizenship, supplementing T. H. Marshall’s trio of civil, political, and social citizenship. Bauböck distinguishes between the civil rights claim to toleration of the practices of a linguistic minority, and cultural citizenship involving official public status for a minority language. He ultimately concludes that persuasive claims to cultural citizenship rest on arguments for territorial self-government, which are normally available to established national minorities, but not to immigrant communities.

Finally, in “Integration Policy and Integration Research in Europe: A Review and Critique,”

Adrian Favell provides a wonderfully grumpy analysis of sociological conceptions and research strategies regarding the integration of immigrants into receiving societies. Favell challenges the unexamined assumption of the state as the context within which the process known as integration occurs, and he criticizes the way that government sponsorship has shaped the categories employed in research. He concludes by proposing an alternative comparative research strategy that would consider both strengths and weaknesses of immigrant-integration policies, and that would use cities rather than states as the sites of comparison, in order to allow for the fact "that immigrant integration might be influenced simultaneously by local, national, and transnational factors" (p. 390).

As the foregoing summary indicates, *Citizenship Today* presents a rich diversity of approaches to the current condition of citizenship, within certain limits. There are no theocrats, ethnic nationalists, or Chicago-school economists here. The authors express varying perspectives on how the institution of nationality can accommodate itself to contemporary levels of migration and to the increased density of connections between sending and receiving societies. They do not directly debate one another, however, and Bosniak's rather generalized defense of a postnational approach does not specifically address the criticisms presented in other chapters. As a result, the dominant impression produced by the volume amounts to a confirmation of the importance of nationality and a rejection of the postnational critique. Although the authors are not complacent defenders of current citizenship practices, most of their suggestions for reform assume the continuing centrality of state citizenship.

Undoubtedly the postnational thesis asserts an observed trend and not an accomplished reality. Yet, as Bosniak observes, it is a useful corrective to an overemphasis on state citizenship. Earl Warren's description of citizenship as "the right to have rights" was never formally accurate. It was too negative a statement of the position of aliens in the United States, and too positive a statement of the position of citizens in illiberal regimes. As a summary of aliens' status in international law, that description is even less correct today. Nonetheless, the prevailing limitations on aliens' freedom of movement gave Warren's observation a substantial truth that it retains: citizenship fre-

to distinguish between aliens of enemy nationality and neutrals usually helps to narrow the impact of security measures on innocent noncitizens.

It may be, as has been argued, that transnational jihad is a transitional phenomenon, destined to be reabsorbed into state structures, either by achieving governing authority in particular states, or by being dominated by the states that subsidize it. Similarly, it may be that the supranational European Union will evolve into a European federal state. For those living through the transition, however, the trajectory is not yet certain. Citizenship Today contributes a wealth of information and argument to the debate about where citizenship is going.

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Defendants charged with international crimes and the defense lawyers who invoke legal defenses on their behalf have always been, and may always be, particularly unpopular. More than in the case of "ordinary" crimes, these defendants and their lawyers are scorned by the public and press, and are generally held in low esteem in the courts. Within the academy, writing about the defense of international crimes and criminals, as well as about the defense lawyers for such cases, has traditionally held little scholarly interest.

Before the creation of the international criminal tribunal at Nuremberg at the end of World War II, for example, many world leaders, including Winston Churchill and U.S. Treasury Secretary Henry Morgenthau, strongly felt that the most appropriate treatment for captured Nazi officials was summary execution. One of the Nuremberg defense lawyers noted that during the trial, the bar association of the German city of Cologne proposed to "take measures" against certain defense counsel because they had simply taken on the task of defending alleged war criminals. Defense counsel at Nuremberg, sometimes selected by the defendants because of their own Nazi backgrounds, received threatening mail from fellow Germans throughout the trial. An account in the Berlin newspaper, Berliner Zeitung, published on February 2, 1946, criticized one of the defense lawyers "in the severest terms" for perceived wrongs in his cross-examination of a prosecution witness, and "in language both violent and intimidating," threatened the lawyer with "complete ostracism in the future."

U.S. Army Captain A. Frank Reel, one of several U.S. soldiers assigned to the defense of Japanese General Tomoyuki Yamashita before a U.S. military commission in the Philippines in 1945, wrote in his book about the proceedings that he originally asked not to be assigned the case. Reel reported that one of the men originally appointed to the defense team—a judge from Alabama—asked to be reassigned because of fear that his defense of a Japanese general would prevent him from ever being elected to the bench again. Even today, in the wake of terrorist attacks of September 11, the media discusses the potential difficulties faced by defense lawyers in defending accused terrorists in a hostile public atmosphere.

The subject of the defenses to international crimes also has met with scant historic or contemporary interest as a subject of academic study, particularly when considered against the plethora of new scholarship on international criminal law (ICL) and the mechanisms for its enforcement. As a relatively new and rapidly developing field of law, ICL has focused on issues of impunity and individual accountability, the definition of crimes and jurisdiction, and the scope of prosecutorial and judicial powers to determine guilt. All too little attention has been given to either ICL substantive defenses or to procedural issues of fair trial—what Geert-Jan Knoops, the author of Defenses in

2 Hans Laternser, Looking Back at the Nuremberg Trials with Special Consideration of the Proceedings Against Military Leaders, 8 WHITTLER REV. 557, 563 (1986) (Laternser served as chief counsel for the German High Command and the German General Staff at Nuremberg).
3 Quoting, in part, the Tribunal's president, Lord Justice Geoffrey Lawrence, in DREXEL A. SPRECHER, 2 INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 746-47 (1999).
Contemporary International Criminal Law, calls “international due process” (p. 263). M. Cherif Bassiouni’s three-volume treatise on ICL, for example, does not devote a single chapter to ICL substantive defenses, and provides only one chapter on “individual human rights” for defendants in the then-proposed International Criminal Court (ICC). The same is true of many of the new articles and books analyzing the creation of a permanent international criminal court.

Antipathy to criminal defendants—or to defenses for international crimes in general—is not, however, limited to the scholarly community. Early in 1997, as the ICC began to take shape in regional preparatory commissions, Amnesty International (AI) drafted an in-depth series of proposals for the operation of the court. Enunciating several “basic principles” on the definitions of crimes and defenses, AI stuck by its fundamental principles, opposed the death penalty as an available sanction for any such tribunal (a position eventually adopted by all of the current international criminal courts), and asserted that “applicable defenses should be clearly defined in the statute” of the ICC. When it came to the availability of the defenses themselves, however, AI was remarkably stringent. The organization asserted as one of its principles that “impermissible defenses under international law, such as superior orders, should be excluded,” not just limited. And in the case of various other possible defenses that are usually permitted or available to defendants—such as duress, coercion, necessity, self-defense, defense of others, mistake of fact or law, and statutes of limitation—AI argued that the defenses should be considered “limited,” “nonapplicable,” “prohibited,” or “inappropriate.” These positions may be typical of those taken by many advocacy groups and activists during the ICC drafting process, but for any seasoned criminal defense lawyer, the list of barred or limited substantive defenses sounds ominous coming from this progressive non-governmental organization (which later went to great lengths to articulate procedural fair trial rights for all defendants under ICL). In fact, the AI “blacklist,” if adopted, would have left available to international criminal defendants and their lawyers only a narrow range of defenses such as insanity or other mental impairment, alibi, and failure of proof. Moreover, AI’s position was written before international criminal defendants lost further ground through cases that have undercut or restricted the immunity of (former) heads of state (as in the Pinochet case) and that have eliminated, in certain circumstances, consent as a defense to rape (as in various judgments of the International Criminal Tribunals for Rwanda and the Former Yugoslavia).

It is this intimidating terrain into which Geert-Jan Knoops has stepped in order to elaborate his important and unique contribution to the field of ICL—terrain that he describes as “difficult, controversial and even antagonistic” (p. xxxv). As a lawyer specializing in ICL, extradition, and representation of petitioners to the European Court of Human Rights, and with offices both in Amsterdam and The Hague, Knoops is no doubt personally aware of the pervasive antipathy toward defendants charged with international war crimes—and also toward their lawyers. He acknowledges from the outset that the “tension between the judicial and moral or emotional implications of defenses to international war crimes, adjudicated at national levels, can be...a non-constructive element for building...a framework” for the analysis of such defenses (p. 2).

Defenses in Contemporary International Criminal Law is based on Knoops’s Ph.D. dissertation in comparative ICL at the University of Leiden. Although dissertations often tend toward the theoretical, the author succeeds admirably in integrating both theoretical and practical components into his analysis—an imperative given the paucity of writing on


9 Id. at 13–14.


12 For a discussion of the elements of rape in the decisions in Akerue (ICTR) and in Delalić and Fniezdić (ICTY), see John R. W. D. Jones, The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda 117–18 (2000) ("any form of captivity vitiates consent").
this subject. The book is thus a singular and manifestly significant contribution to the field of ICL. That it focuses almost exclusively on judicial aspects of defenses, without deeply probing the ethical aspects of the defense of international crimes and criminals, is both its greatest strength and a disappointing limitation.

Knoops confronts head-on the issue of excluding some defenses in ICL, as initially proposed for the ICC by AI and others. He argues that “it would be wrong to endorse, within the system of ICL, any a priori elimination of criminal law defenses from the arena of international crimes, including crimes against humanity. To neglect this notion,” he asserts, “is to negate the value not only of the law of the facts but also of the principle of fair trial and equality of arms which must be maintained especially as regards severe charges such as crimes against humanity” (p. 286). Knoops’s position prevailed in the drafting of the ICC statute, which provides for a range of defenses in Articles 30 through 33, including superior orders. The ad\mition against excluding defenses remains applicable, however, especially with regard to particular defenses such as act-of-state and head-of-state immunity, which will unquestionably again come into play in the trial of Slobodan Milošević before the ICTY. Throughout the book, Knoops argues against what he calls an “absolutist” approach to the availability of defenses, and instead suggests a “utilitarian,” “inductive,” or “law of the case” approach that would permit a defense if the particular facts of the case in question sustain it.

Defenses in Contemporary International Criminal Law is organized in three major sections. The first section is on the sources and content of ICL defenses (chapters 1–3); the second is on the application of such defenses in armed conflict situations (chapters 4–6); and the third is on procedural aspects of the defenses (chapters 7–8). The book breaks new ground in attempting systematically to organize and reconcile the competing doctrinal strains on ICL defenses by examining at least five independent sources of law: (1) Knoops explores customary international law, from which are derived such defenses as superior orders, command responsibility, and duress; (2) he draws on comparative law to explore such defenses as self-defense, necessity, insanity, toxicological defenses, and the new realm of neurobiological defenses; (3) he examines the statutes and rules of the various international tribunals created since the end of World War II, focusing his greatest analytical energies on the ICC statute; (4) he includes the ambiguous, but irrefutably crucial, body of “judicial legislation,” the body of substantive and procedural rules of law that derive from the decisions of the judges of the international tribunals;14 and (5) he suffuses his analysis with the doctrines and principles of international human rights and humanitarian law. Overall, he undertakes to construct a system of principles of defense accessible to the ICL practitioner, who remains his focus throughout.

Knoops provides practitioners from the common law tradition with an analysis of defenses in a familiar framework: defenses are either justifications or excuses. In that framework, an act that would otherwise be criminal is justified when the harm avoided is greater than the harm done, and when “the legal community positively approves this act” (p. 29). Criminal wrongdoing is excused when a disability in the actor causes an excusing condition and society holds that the deed is wrong, but that the actor is not responsible, due to “objective disapproval of the act but subjectively rightful acting of the accused” (id.).15 As Knoops notes, some international crimes, such as “crimes against humanity, genocide, torture, rape, hijacking and terrorism, cannot be justified; only the possible exoneration of an excuse can be invoked” since nearly all of the listed crimes have acquired the status of jus cogens norms (id.). While some defenses such as duress have been treated ambiguously in national law as either justifications or excuses, Knoops offers them only as excuses, a conclusion he asserts is supported by Article 33(1) of the ICC statute, which includes the introductory language that a “person shall not be criminally responsible.

14 Toxicological defenses are those that arise from such conditions as voluntary or involuntary intoxication (drug or alcohol induced) or diabetic poisoning. Neurobiological or genetic defenses are those tied in with the principle of neural science that “behavior is an expression of neural activity”—an area of defenses that “has not yet been established in criminal law,” according to Knoops (p. 126).


..." This language, he asserts, is the language of excuse, not justification. He therefore proposes "as a general principle of ICL that defenses to war crimes can only have an excusable result, with the exception of self-defense" (p. 30). Knoops does recognize, as do other ICL authorities, the possibility of raising defenses not only as excuses or justifications, but as factors in mitigation. His project here is focused almost exclusively, however, on revival and revitalization of the core substantive defenses in ICL.

Perhaps because there is so little written on ICL defenses, there is inevitably a craving for more than is provided here. Knoops was necessarily selective in his coverage, choosing to approach the subject in two dimensions. First, he develops both the "general part" of ICL defenses—the basic principles, structures, and rules for their operation—as well as an analysis of how the general part intersects with procedural rules in the operation of international tribunals. Second, he explores the ways in which defenses have developed historically, as well as the ways in which they continue to unfold in armed conflict situations, particularly those of peacekeeping and peace-protection operations, where doctrinal lines are blurred and ambiguous.

While these two dimensions are both important, one might have preferred that instead of following such an approach, the first major treatise on ICL defenses would have set forth a methodical elucidation of the content, strengths, and limitations of the basic substantive ICL defenses, defense by defense, in an ordered and structured fashion. For example, extended analysis of the rules of engagement in international peacekeeping and multinational military operations—which occupies much of chapters 4 and 5—distracts from the central topic of defenses. Similarly, the relationship of the use of force by states during such operations to that of individual self-defense, while more relevant to the overall topic of the core defense of self-defense, does not seem to merit the extensive coverage it is given in chapter 6. The effect of this structure, at bottom, is that each defense is discussed in different contexts in several different chapters. It would arguably have been more useful—to both practitioner and academic alike—to have organized the chapters around the defenses themselves. Similarly, the discussion on new neuro-

17 A more precise conclusion would suggest the use of the phrase "international crimes" instead of "war crimes," as the latter include only those crimes committed in armed combat, which narrows the principle beyond what seems to be the author’s frame of reference.

18 Biological defenses is so technical scientifically as to be more distracting than helpful.

The addition of procedural aspects of ICL defenses in chapters 7 and 8 raises expectations that the author’s discussion will cover the full range of relevant issues, but the chapters fall short in this respect. On the one hand, Knoops’s discussion of the fast-developing doctrines of fair trial, equality of arms, and the rights to effective representation and participation incorporates leading new cases on these interrelated subjects, particularly those of the European Court of Human Rights. On the other hand, a number of key aspects of procedure are left unexplored, such as the use of the defendant’s silence during interrogation, the right of confrontation, and mutual disclosure of evidence before trial.

Knoops ignores another aspect of ICL defense that is virtually invisible to all but ICL defense counsel themselves: the system or structure for the provision of assigned counsel to the accused when, in any international tribunal, an accused pleads inability to hire private counsel. I have suggested elsewhere that the structures for assigning defense lawyers can profoundly affect not only who is assigned, but also their performance. Crucial matters thereby affected—and that have a significant impact on the quality of legal representation—include the independence and training of defense counsel, as well as the resources available to them.

The specific method for assigning counsel at both the ICTR and ICTY, where very few counsel are privately retained, is for the Tribunals to make assignments from a list of qualified lawyers that is administered by a unit of the Tribunals’ Registries. The ICC will be using this same general method. It must be noted, however, that there are other possible systems for the provision of assigned counsel, just as the appointment of full-time staff lawyers working under the direction of a chief
prosecutor is merely one of several possible ways of organizing the prosecution of international crime. And just how this crucial structural question concerning the assignment of counsel is decided may ultimately determine the effectiveness and fairness of any system for the enforcement of international criminal law. In this context, it is unfortunate that Knoops devotes scant attention to the question of defense counsel’s role in ICL tribunals. His discussion (pp. 269–83) fails even to make the fundamental distinction between retained and assigned counsel, a crucial difference.

During the relatively short life of the ICTY and ICTR, the behavior of defendants and their assigned counsel has provoked the creation of codes of conduct in both Tribunals.21 (Unfortunately, neither Tribunal has seen fit to create a similar code for the office of the prosecutor, thereby leaving the impression that the prosecution never engaged in unethical conduct.)22 In the relatively short lives of the ICTY and ICTR, there has been a wide range of issues dealing with closely related ethical and legal questions about the relationships between defense lawyers and their clients, the prosecution, and the Tribunals. These questions concern, inter alia: defense counsel’s manipulation of witnesses to suborn perjury; a defendant’s freedom to choose assigned counsel; equality of resources as an aspect of equality of arms; fee splitting between defendants and their lawyers;23 and defense investigators alleged to be perpetrators of international crimes themselves. There are also recurrent questions about defendants’ claims of indigence, the filing of frivolous motions, and defense lawyers’ arguably excessive cross-examination of victims. One can reasonably hypothesize that these issues continue to arise in both Tribunals not because defense counsel are, as a class, inherently venal or corrupt, but because the system that provides assigned counsel is seriously flawed.24 If assigned defense lawyers are not, at the very least, carefully selected and effectively trained in the standards of ethical conduct before international criminal tribunals, one is hard pressed to imagine how those same lawyers will grasp Knoops’s sophisticated approach to ICL defenses.

In the few pages that he devotes to issues concerning the role of defense counsel in ICL, Knoops attempts to articulate a general “position” on what that role should be. He seems to endorse the views of the International Criminal Defense Attorneys’ Association in support of having independent defense before the ICG. He endorses a call by Michail Wladimiroff,25 the first assigned lawyer before the ICTY, for a “full and fair defense as an essential element of any claim to conduct a fair trial and enforce the rule of law” (p. 275). Knoops takes issue, however, with Alan Dershowitz of Harvard Law School, one of the most outspoken and controversial advocates of strong adversarial defense. Knoops quotes Dershowitz’s assertions that “when defense lawyers represent guilty clients . . . their responsibility is to try, by all fair and ethical means, to present the truth about their client’s guilt from emerging,” and that failure to do so is “malpractice” (pp. 272–73). Knoops’s conclusion concerning the Dershowitz position is simply that it “seems to me a judicial and ethical path too far taken” (p. 273)—a remark that exemplifies Knoops’s tendency to oversimplify the case for civility and fair play by defense counsel. He ignores a vast and ever growing literature spawned by the U.S. adversarial system on the tension between the obligations of defense lawyers to act as agents for the truth while, at the same time, providing

21 ICTY, Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal (June 1997); ICTR, Code of Professional Conduct for Defence Counsel (June 1998).

22 See, in particular, the ruling of the ICTY trial chamber in Prosecutor v. Furundžija, No. IT-95-17/1-T, Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution (June 5, 1998). The complaint’s allegations included: a pattern of violating court orders or rules; last-minute filings; and failing to provide an adequate explanation to the trial chamber for the alleged misconduct.

