Book review: reviewing Farhad Malekian, International Criminal Responsibility of States (Stockholm: [s.n.], 1985)

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Professor Louis B. Sohn certainly merits and is fortunate to have been honored by such a variegated and interesting set of essays. Some break new ground. Others provide valuable perspectives on the ups and downs of world public order in modern times. A few are controversial. The collection reflects the sure hand and the discriminatingly wise eye of the editor, Professor Thomas Buergenthal. The operative portion of the table of contents shows the range of coverage, one that coincides with three of the major sectors in which Sohn has worked: human rights, law of the sea and environment, and international organizations.

In part 1, "Human Rights," Professor Meron's useful essay, Human Rights in Time of Peace and in Time of Armed Strife, examines the growing convergence of substantive human rights (as stated in instruments of international human rights law) and international humanitarian law; thus making desirable linkages without, one hopes, provoking guerres des savants.

Mr. Garibaldi, in On the Ideological Content of Human Rights Instruments, attacks the notion that human rights instruments are "ideologically neutral," and thus focuses attention on a tremendous problem: the free world and the socialist bloc divergence on the essential elements of "democratic societies." This focus may be necessary for scholars in their closets, although it is obvious to most who have encountered these differences operationally.

Dr. Dolzer (Menschenrechte und Fremdenrechte) goes deeply (more deeply than my rudimentary German permits me to go with him) into the fascinating topic raised some years ago by Professor Francisco García-Amador: property rights as human rights. Although the focus of the essay is on regional human rights protection systems, such as the European one, the possible convergence of old-fashioned diplomatic protection and a human right "to have and to hold" is not far from conscious contemplation. And the Duke of Bedford's resort to the Strasbourg human rights system in default of a right to litigate "just compensation" in Britain for eminent domain as to London realty is linked to an aspect of Garibaldi's contribution: could a Marxist system coexist with a human right to private property?

In an anecdotal piece, The Frolova Case, Professor D'Amato writes, ap-
parently without tongue-in-cheek, of his success in getting an American bride's hunger-striking Soviet husband out of the USSR by mounting a federal court suit against the Soviet Union under the "foreign tort in the U.S." provision of the Foreign Sovereign Immunities Act (FSIA).\(^2\) Luckily, perhaps, his Frolova case was not sanctioned as frivolous\(^3\) by the judge who eventually dismissed it under the act of state doctrine.\(^4\) D'Amato implicitly advocates a degree of analogistic extremism in the pursuit of human rights in municipal litigation that more restrained exponents with very good reasons are—or have become—cautious about.\(^5\)

Professor Faundez-Ledesma deals with the extremely serious matter of human rights when states (particularly in Latin America) declare situations of emergency (La Protección de los Derechos Humanos en Situaciones de Emergencia). The interrelationships between national emergencies laws and human rights conventions and the risks of detriment to the latter are realistically appraised. The analysis is candid and the challenge is stated. No easy solutions are vouchsafed.

Buergenthal deals lucidly and in a balanced way with the advisory jurisdiction of the Court of which he is now President, the Inter-American Court of Human Rights. His tributes to his teacher, Sohn, both in the preface and at the end of his essay, are clearly heartfelt.

The first four essays in part 2, "Law of the Sea and Environment," recognize Sohn's influence on the 1982 Convention on the Law of the Sea. One hopes that these perspectives will have, one day, a role to play in the actual processes of dispute settlement about our watery planet's waters.

Attorney and Professor Bleicher, in *The Law Governing Exploitation of Polymetallic Sulfide Deposits from the Seabed,* provides one of the most exciting but, at the same time, disturbing pieces of information about deep ocean mining: polymetallic sulfide deposits of virtually unknown potential when the 1982 UN Convention was in gestation may become as important—or more important—than the famous nodules! And they present recovery and related


\(^3\) The tightening of FRCP Rule 11 in recent years has prompted both activity in bar association and law-improvement circles and some public comment, N.Y. Times, Oct. 2, 1986, at A25, col. 2.

\(^4\) The writer did not say whether dismissal preceded or followed the Soviet Union's release of the bridegroom.

\(^5\) Especially since the disposition of a suit that divided human rights activists on the advisability of its being brought in an American court, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), and the extraordinary default judgment in Von Dardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246 (D.D.C. 1985), *summarized in* 80 AJIL 177 (1986), which will not be reviewed due to the continued abstention of the respondent. In this latter instance, D'Amato and his associated counsel, far from being sanctioned under Rule 11 as some had feared, won by an implausible combination of the FSIA and the Alien Tort Statute (28 U.S.C. §1350 (1982)) to reach (as tortious) acts that began in Budapest, Hungary, during the later days of World War II, involving the detention and disappearance of Swedish diplomat Raoul Wallenberg. Nonetheless, whether the outcome will encourage wider resort by aliens to suits against foreign states for injuries localized abroad, despite the new teeth in Rule 11, is problematical. Cf. Johnson v. New York City Transit Authority, 639 F.Supp. 887 (E.D.N.Y. 1986), and a spate of cases listed cumulatively as of Oct. 6, 1986, under Rule 11 for 640 F.Supp.
problems that the Convention did not foresee. Let us hope that this new
example of legal projections being overtaken by scientific discovery does
not have so destructive an effect as the first aerial bomb dropped in World
War I had on the learned Professor Fauchille's "très logique" application
of an innocent passage concept to "aerostats" in national airspace.\(^6\)

In *To Achieve the Desirable: The United Nations Marine Resources Organization*,
one is touched by Professor Stern's evocation of Sohn's "few thousand pages
of mimeographed materials" on "World Law" issued to students 37 years
before, when the United Nations was only 2 years old. One is sobered and
prepared in part for Professor Franck's magistral essay in part 3 by Stern's
additional recollection:

Our exploration of old and new organizations went smoothly until the
midsemester. Then the issue which clearly dominated the rest of that
semester surfaced. What had become clear was that the division of
authority between the Security Council and the General Assembly left
an enormous management void and that the void could not be filled
by the Secretary General.

Sohn has never left off his inquiry into this dilemma . . . [p. 229].

Stern then puts forward a "potential model" to resolve the problem, a
"UN Marine Resources Organization" to be "[e]ndowed with a true legis-
lative body shaped against [the] background of the UNCLOS III negotia-
tions." Truly, this is a laudable and technically feasible solution—if only
structuralist solutions themselves were feasible in the present world political
environment.

Professor Weiss breaks new conceptual ground in her essay on *Conservation
and Equity Between Generations*. Aside from political declamations about sadd-
ing future generations with debt, law and politics have not focused much
on "posterity," despite the Preamble to the 1789 Constitution. Weiss most
rightly tells us that "the international community must be concerned at the
global level with the natural heritage that we pass to future generations." Fortunately, her concept of the duty to do "equity between generations" is
not left suspended; she sets out "proposed principles" (pp. 255–64) and
their application and implementation. The significance of Weiss's contribu-
tion is its goal-oriented perspective and its rich content beyond mere
structural arrangements. Despite the current frailty of efforts to contain the
use of force and to provide a better "common heritage," if the species is to
survive it must also not rob "spaceship earth" of its irreplaceable life support
systems. While the lawyer's propensity to devise systems often overlooks the
real problems of effectiveness, most would accept the need for concepts at
the "Grand Design" level. We have such concepts here.

Part 3, "International Organizations," contains wide-ranging surveys of
international organizational situations and needs. Two of the essays bear on
the ineluctable current problem of the post–World War II Grand Design,
*viz.*, *The Problem of Effectiveness*.

A wise essay by Franck (Great Expectations) explains that today's depressed American attitude towards the United Nations is to a considerable degree the backlash from earlier failures to perceive the Organization clearly and wholly, both as to inherent limitations and realizable promise. The analysis is good for those who were sentient and attentive at the creation and essential for those who were not. Franck captures a characteristic of American public opinion that others have noted: ebullient overexpectations for new structures, combined with a "set it and forget it" idiosyncrasy (i.e., a comfortable belief that arrangements, once made, will work pretty much on their own). His conclusion by implication is that with so much inflated expectation it is not surprising that when times of difficult operations come, a negative, "abandon ship" attitude arises. His clearly expounded descriptions of these tendencies may help to ameliorate them.

From his title (my translation), "The Inter-American System: Between Unilateralism and Inoperativeness," I expected that attorney Diaz of Mexico would weigh evenhandedly the negative aspects of the Reagan administration's notorious "go it alone" policies in relation to all international organizations, including the Organization of American States, and the many evasions by Latin American members of their responsibilities in such organizations. Regrettably, Diaz has written a "blame it all on the gringos" polemic, linked to the Falklands/Malvinas crisis as it was dealt with in the OAS. Somehow, he sees it as a virtue that all but a handful of Latin members completely disregarded their obligations to resist naked, irredentist aggression by a military junta of torturers and ignoramuses and as yet another North American vice that the United States (and a few others) opposed this flouting of fundamental limits on the use of force.

While I very well understand—perhaps better than 99.9 percent of my fellow countrymen—the unfortunate effects of U.S. hemispheric policy up to the mid-1920s, or, if Diaz prefers, 1933, I am distressed by the lack of objectivity displayed in this piece in this symposium. It does not have the flavor of Sohn; nor can it speak to the many in this country who at this time are doing all they can to prevent regressions to darker times. Worse, it tends to encourage further abandonments of principles within Latin America.

We have an interesting contrast between Franck and Diaz: the first directs
Americans to criticize themselves and correct errors of perception. The latter defends the undermining of international organizational structures for the “inherent vice” of yanqui influence.

Professor Nafziger, in his essay, calls attention to an aspect of the International Court of Justice that must have crossed the minds of many readers of its opinions, the writings themselves. It is evident, alas, that his helpful evaluations and criticisms did not have much effect on most of the writing in Nicaragua v. United States! But better clumsy ICJ opinions than none at all, perhaps we will have to say for the short haul, as a result of the incredible stances of the respondent at the various stages of this very, very important development, whose potentially negative effects cannot yet be appraised with assurance. May the Court live to heed the advice of Nafziger!

Professor Boyle, writing of Lebanon in August 1983, described what then might have been a courageous possibility for a solution conforming to international legal principles and modalities. As of this date, his essay illustrates in somber measure the tragic drift to transnational anarchy in the Middle East.

Professor Gottlieb’s model of a “framework state” for Palestine, together with an appendix containing proposed drafts for its creation, is linked by the author to Sohn’s classic structuralistic energy and optimism. That the plan seems very remote from acceptance once again suggests that in a “true conflict of interest” situation, structural solutions are generally secondary to accommodations of a psycho-diplomatic, negotiations-linked nature.

The other essays in part 3 are fairly specialized. Such sharp focuses are most useful in particularized situations. The coverage by these former students and colleagues of Sohn further expands our comprehension of the wide range of his influence and of his great contribution to world peace and just order.

Covey T. Oliver

Board of Editors


A major gap in the teaching materials for public international law is the paucity of books that succinctly set forth an overview of existing law. Students invariably ask for this. Practitioners who may be only occasionally exposed to such issues also need a concise introduction to basic doctrines and methodology. Public International Law in a Nutshell meets these needs. It is part of the Nutshell series of West Publishing Company, which since the mid-1970s has published many volumes on subjects of domestic law such as corporate taxation, family law and injunctions. It follows Sohn and Gustafson’s excellent Nutshell volume on the law of the sea. It is a useful addition to Michael Akehurst’s more detailed A Modern Introduction to International Law (5th ed. 1984).
The book is organized into 10 chapters that address in order the application and relevance of international law, sources of international law, international organizations, international dispute settlement, international law of treaties, rights of individuals, jurisdiction, foreign relations law in the United States, immunities and international legal research resources. The material is well researched, generally carefully summarized and clearly written. The chapters on jurisdiction and on international human rights law are exceptionally well written; the latter covers material on the various regional human rights institutions, which is otherwise difficult to find in one place. The generous attention to arbitration in the chapter on dispute settlement is timely and valuable. The last chapter, on international legal research sources, may prove to be the most useful to both practitioners and students, for it provides a clear guide to researching the many sources of international law. The authors deserve praise for including it.

The choice of topics is puzzling, however, and there are no criteria to clarify the choice. The chapter on international organizations, while excellent, might usefully have been expanded and published as a separate Nutshell volume. The subject frequently appears as a separate course in law schools. The wisdom of the heavy focus on U.S. law is questionable in a volume that purports to provide basic coverage of public international law. Over 60 pages, one-quarter of the book, are devoted to a discussion of U.S. foreign relations law, the U.S. foreign sovereign immunity statute, the act of state doctrine and U.S. jurisdictional law. As acknowledged by the authors, some very significant issues in international law are, as a result, not treated at all. These include international law related to the use of force (both collective security and terrorism), international economic (trade and monetary) law and international environmental and natural resources law. To these can be added such topics as sanctions, arms control, outer space and communications.

While it is impossible to treat all subjects in a single Nutshell volume, the failure to address some of those that have been most significant in the last few years may be a little disappointing to some readers. Perhaps this suggests a need for a companion volume.

In the topics covered, the authors provide a well-informed, up-to-date and careful statement of international legal doctrine. For this they deserve great credit. In a field plagued with controversy, this is not an easy task. A few readers may notice an occasional bias in favor of the U.S. position on controversial legal issues such as the U.S. effort to withdraw from World Court jurisdiction in Nicaragua v. United States (pp. 81–83), but generally the treatment is exceptionally balanced and fair.

The volume is highly recommended to all students of public international law and to all practitioners who desire an introduction to the methodology of international law and to some of the basic doctrines.

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Tony Carty criticizes public international law on the basis of its own theoretical foundations. He does not condemn international law for political naivety, Eurocentrism or imperialist sympathies. He neither bemoans its historical infancy nor chastises its moral failures. Since international law cannot sustain its claims to comprehensiveness without jettisoning its predominant theory of the state, Carty argues, international society is best thought of as a Hobbesian state of nature.

Carty's argument is difficult to untangle because he advances a number of organizing themes for the divergent issues pursued in his seven short chapters. Carty's most telling criticisms are directed at international law's claims to "completeness." He argues that international law claims to "define comprehensively the rights and duties of States towards one another" and to produce a complete geographic allocation of state jurisdictions. Carty traces these notions of normative and territorial completeness to two schools of European jurisprudence—the German historical school (e.g., Savigny) and the pure theory of law (e.g., Kelsen).

Carty associates these notions of completeness with a theory of the state as a legally ordered system of competences. This state theory, anchored in 19th-century European nationalism, relies upon an unsustainable jurisprudence. The law that orders its competences cannot also regulate its coming into being. Once the state exists, moreover, it cannot fully regulate the coming into being of the law if it is to remain a system of legally regulated competences. As a result, Carty argues, "the completeness of the legal order is nothing more than a hypothesis" (p. 10). International law must choose between its theory of the state and its comprehensive jurisprudential claims.

Several exemplary doctrines sharpen the contrast between state theory and jurisprudence. The inadequacies of self-determination doctrines developed to regulate the coming into being of international legal subjects expose international law's dominant state theory. Absent some doctrine relating the people and territory to the state (a relationship not sustained by self-determination doctrine), state theory must rely upon jurisprudence to complete the normative and territorial order of jurisdictions. Carty finds the doctrines that might establish these jurisprudential claims inadequate. Just as doctrines about self-determination signaled the inability of international law to regulate the coming into being of its own subjects, so also sources doctrine about non liquet signals the inability of legal subjects comprehensively to regulate the coming into being of their law. Similarly, doctrines about territorial jurisdiction, designed to complete the grid of sovereign authority, remain little more than "hypotheses" about a pattern of authority that must be established by states.

Carty's critical method is familiar and powerful. One identifies two elements of legal consciousness—here a theory of the state and a theory of
and demonstrates that each can only be sustained with the assistance of the other. One then demonstrates that those elements of each responsible for sustaining the other depend upon that which they were meant to support. Carty pursues this oppositional method in discussing doctrines about sources and territory. He argues that normative comprehensiveness depends upon institutional authorities and procedures that can develop gap-filling doctrine, while territorial comprehensiveness depends upon a complete and authoritative normative structure to regulate the jurisdiction of its subjects. To the extent that claims about normative comprehensiveness stem from the historical school while claims to territorial completeness can be traced to the pure theory of law, the opposition Carty identifies between state and legal theory is echoed within both legal theory and doctrine.

The direction of the critique is also familiar. By grounding a critique of law in its theory of the state and then undoing the theory of law, one leaves the reader with the state: debunking law to trumpet politics. Once Carty has critiqued international law's jurisprudential claims, his discussion of state theory is a mopping-up operation. We expect his conclusion that the international system is in some sense a state of nature.

Although the structure of Carty's critique is powerful whichever way one tells it, his indictment would have been far stronger had Carty forgone his conclusions about the "state of nature" and pursued his criticism somewhat farther. Instead, he adopts the familiar rhetoric of disciplinary "crisis" and "decay." This rhetoric is troubling both because it purports only to describe what it produces and because it shares with the discipline it criticizes a sense of "après moi le déluge."

Many readers might find Carty's statement that "international law is now assumed to be a complete system of law" (p. 10) difficult to comprehend. If Carty means normatively and territorially "comprehensive," his insistence upon absolute comprehensiveness seems too strong. Why not "comprehensive enough"? Gaps might merely offer the opportunity for further work. Perhaps he thinks that unless the system is absolutely complete, the theory of the state—the subject that will interpret and construct law—cannot be sustained. This may be true, although Carty does no more than hint at this relationship by vaguely associating "completeness" with "positivism"—a somewhat misplaced association, given his broader claims. Nevertheless, if comprehensiveness must be absolute to sustain the theory of the state, one wonders why we should not simply conclude that the international legal order is not yet finished.

These difficulties illustrate a common reaction to internal criticism. Why is the critic so insistent upon the absoluteness of the discipline's own claims when other scholars and practitioners are content to see the glass as half full? Carty might respond by elaborating the consequences of adhering to a framework that is flawed in this way—that seems erected upon the stilts of mutually unsustainable referents between state theory and jurisprudence—but he does not.

This question suggests another. To one used to thinking of law as the product of some human agency, it seems important to know who is assuming
international law to be one or another sort of system. I have never met an
international lawyer or scholar who made the sort of assumptions Carty
imputes to "international law." They seem to acknowledge and bemoan its
incompleteness as a matter of course.

Carty might have responded by restricting his critique to the texts and
materials of the discipline, or simply to the historical doctrines and texts that
he studies, situating himself with others responding to gaps in the discipline's
tools. On the other hand, he might have extended his critique by demonstrat-
ing that others rely upon claims that they explicitly deny, directly criti-
tiquing contemporary doctrinal work. Instead, he suggests that the claims
about completeness that he criticizes characterize the work of certain 19th-
and early 20th-century European scholars who continue to "influence" his
contemporaries.

To substantiate this claim, Carty devotes part of each of the first chapters
to demonstrating the continued doctrinal validity of positions associated
with these schools. For example, in chapter 2 he argues that Article 38 of
the Statute of the International Court of Justice must be seen "in the wider
context of a broad attempt, following the first world war, to 'institutionalise'
relations among States" (p. 14). He claims that the approach to sources
taken by 19th-century writers "has had an influence which is not taken on
board by Article 38" (p. 14), a claim he supports by tracing the roots of
contemporary doctrine about treaties to "certain late nineteenth century
discussions in Germany" (p. 15). This is an interesting insight of the sort
that one happily finds throughout Carty's text. Its relationship to his critical
project, however, is somewhat obscure.

He might be arguing that the vision of Article 38 is insufficient to the
needs of modern theory unless supplemented by a respect for general custom
incompatible with its positivist tenor, but he does not tell us enough about
contemporary international legal theory to make this case. He stops after
identifying some perplexing similarities between the historical school's ap-
proach to treaties and certain minority tendencies today. Having "illustrated"
the importance of these early schools, he criticizes the tendency of all con-
temporary theory to differentiate the subjective and objective dimensions
of custom and concludes that "international law is nothing more than the
way that those who call themselves international lawyers look at international
relations" (p. 21).

This conclusion is provocative and telling, unsettling not merely the pos-
itivist tenor of Article 38, but also those strands of contemporary doctrine
that challenge and supplement that emphasis. At the same time, this con-
clusion seems to be an extension of the historical school's legal theory.

To criticize contemporary international law's continued separation of the
objective and the subjective, Carty must read out of contemporary literature
precisely the qualifications that might reasonably be traced to the historical
school. Carty does not deal with the explicit rejection and qualification of
Savigny's and Kelsen's work within both modern German jurisprudence and
20th-century international legal scholarship. Contemporary German legal
literature treats the historical school both as one "factor" to be taken into
account in the interpretive process and as a description of law's general function as an expression of culture. The school's dogmatic claims have been both balanced against the insights of the pure theory school and relativized within a framework provided by the jurisprudence of interests and values. Carty might have developed a more direct assault on contemporary theory by showing that the relative influence accorded the historical school is incompatible with the more rigid doctrinal distinctions that it either defends or denies. In this way, he might have turned his own ambivalence about these materials against the discipline itself—reading it as a tension between its doctrine and theory.

Carty's ambivalence about the theoretical materials on which he bases his internal critique is familiar to critics who try to exploit a discipline's oppositions and ambivalences. But using one part of the discipline against another has a frustrating tendency to plunge the critic into self-contradiction. Having studied the historical school, Carty wants to establish the authority of his critical tools within the discipline and then use them against the discipline as a whole. The difficulty is that disciplines rarely give so much authority to their own tools.

Carty is much more convincing in close doctrinal work. Chapters 3 and 4 develop his criticism of general customary law and the law relating to territory. His analysis of 19th-century European treatises is broad ranging and reliable. He traces the origin of notions of normative and territorial completion in an emerging theory of national statehood. He grounds doctrines about general custom and jurisdiction in the imagination of 19th-century state theory, contending that they are the elaboration of a theoretical hypostasis rather than the functional elaboration of a set of new interactions among new state entities. This is Carty's most original insight.

If the basic thrust of Carty's argument seems sound, however, it is certainly easy to misunderstand. I do not think Carty would claim that nationalism demanded a particular approach to jurisdiction and custom. This seems too idealistic and Carty is silent on the mechanism of theory's tyranny. On the other hand, if he claims only that doctrines arose as creative responses to legal problems generated by nationalism, he sacrifices much of his critical bite, for other less "unrealistic" doctrines might accomplish the same thing. Carty tells us little about mechanisms of influence except in his choice of verbs. These doctrines "express," are "rooted in" or are "a projection of" a theory of the state.

After extending his critique of state theory and self-determination doctrine in chapters 5 and 6, Carty concludes by "applying" his insights to U.S. policy in Latin America, the Falkland Islands dispute and the Israeli invasion of Lebanon. Carty indicates that these sections resulted from the "prodding" he received "to work out the more positive implications of a general line of argument to which I have myself reacted rather negatively" (p. x). Unfortunately, these analyses emphasize his weakest points and abandon his strongest criticisms.

Rather than continuing a systematic critique of the doctrinal and theoretical foundations used to analyze these problems—extending his criticism
into contemporary literature—he brings along only his conclusion that states live in a "state of nature." Separated from his earlier dialectical analysis, this seems commonplace. Much modern international legal theory, after all, claims that but for international law it would be a state of nature out there. Having just spent an entire book demonstrating the “decay” of scholarly attempts to construct a legal system on the basis of some image of a state by articulating the continuing relationship between legal and state theory, it seems very odd that Carty should abandon jurisprudence and assert the authority of state theory so insistently. The resulting analysis combines a somewhat exaggerated formalism about the law with the panache of vigorous realism—both ill-suited to the development of the “ideal discourse” Carty advocates.

Taken as a whole, I found Carty’s short book a good, stimulating read. His analysis of 19th-century international legal scholarship is interesting and well-done. Most fascinating, however, is his attempt to generate a dialectical critique within the international law tradition. Carty situates himself in our midst and weaves a complicated critique by opposing various strands of doctrine and theory he finds in our collective consciousness. If anything, he should have pressed his critique further. The discipline could use more such imaginative work.

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With the publication of his landmark treatise, *De jure belli ac pacis*, in 1625, Hugo Grotius laid claim to the title of Grand Master of public international law. His impact upon its subsequent development was extraordinary, and his influence in one form or another continues down to the present day.

Peter Haggenmacher, in a massive study of Grotian theory and the doctrine of the just war, claims that Grotius has often been misunderstood and, without question, wrongly perceived. For one thing, Haggenmacher asserts, Grotius’s seminal work was badly translated owing to the difficulties of coming to grips with a reputedly dead language. For another, the “baroque luxuries” of his citations confused more than they clarified.

Haggenmacher states at the beginning of his huge tome that *De jure* was not a study of natural law or of international law, but rather a treatise on the law of war. According to the author, the medieval commentators were caught up in theorizing about the right of legitimate defense. Thus, they were the precursors of the idea of the just war.

Thomas Aquinas is given credit for being the first classical contributor to the development of international law. It is with Aquinas, Haggenmacher asserts, that the theory of the just war begins its long journey to the modern day. Yet the claim is also made that “Grotius invokes entirely a foundation of Germanic and feudal ideas, supposing a kind of contract between government and people, equally submitted to a common law.” (The author’s style tends to be ponderously academic and occasionally bewildering.)
Haggenmacher concludes that Grotius did not himself believe that he was creating a new juridical system. In 1625, he wished merely to formulate a law of war. Grotius did not truly conceive of international law in the modern sense, and "in reality only completed and crowned the scholastic tradition of the Ius belli." His central intention was to place the tradition of the law of war upon a firm base and to determine objective rules of conduct. He actually owed much to his immediate predecessors.

The author then goes on to declare in a somewhat contradictory statement that no one has conceived more clearly than Grotius of an international law operating in "an autonomous and homogeneous juridical sphere." The Grotian contribution is described as that of "a general theory of extranational juridical conflicts." It was the genius of Grotius to provide a capstone for the past rather than to construct a signpost for the future. Thus, for Haggenmacher, the Grotian vision turns out to be "essentially static"; he left to his successors the delimitation of the basic principles underlying the modern rules of world order.

Like many dissertation writers before him, Haggenmacher finds it difficult to leave anything out of his richly detailed and overlong study. His book is divided into two parts, with 2,172 footnotes in part 1 and 996 in part 2, for a grand total of 3,168 footnotes (surely something of a contemporary academic record). Because of the wealth of detail found in this enormous treatise, distinctions and analyses are blurred rather than refined, or even defined. The author's rare attempts at humor (calling Thomas Aquinas "the angelic doctor") are misplaced. His style would be considered heavy in any language.

Haggenmacher has produced a highly technical treatise with extensive citations in almost every Western European language. His cautious, scholarly approach is encyclopedic in much of its treatment. There are contained within it really good nuggets of interpretation and information, which, unfortunately, have to be carefully extracted from an unwieldy mass of material. A book half the size would probably have had twice the value. Haggenmacher has given the reader everything that can be found on the subject and much more than one would really want to know or can meaningfully absorb.

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Confrontation or Cooperation? International Law and the Developing Countries.

Professor Anand is one of a small number of Third World scholars who devote a lot of thought to the relationship of the newly independent countries to international law, particularly as regards their cultural heritage in this field and their contribution to the progressive development of the international legal system into an order that acknowledges and helps to overcome current injustices. This book is a collection of articles that appeared in various publications between 1970 and 1983.

Anand's study of the Influence of History on the Literature of International
Law shows that international law has always had to respond to the objective necessities of the day and describes how this has affected the thinking of legal scholars. Anand cites as a prominent example the emergence of the concept of freedom of the seas in reaction to claims made by Spain, Portugal and England to the exclusive control of sea spaces. He also shows how European international law came to predominate, at the expense of other regional systems, as a result of colonial conquest and imperialist domination in the 19th century. The last part deals with the transformation of international law since 1945 in response to greatly changed circumstances, in particular the emergence of more than a hundred new states with basically non-European cultural backgrounds.

The article entitled Maritime Practice in South-East Asia until 1600 AD and the Modern Laws of the Sea mostly deals with the general evolution of the law of the sea but also contains an interesting description of the legal situation and practices in the Indian Ocean prior to its being brought under the control of European maritime powers (pp. 56–60).

Soeverignty of States in International Law is a masterly presentation of the notion of sovereignty from its inception as a principle of municipal law designating the ultimate source of power to a concept of international law defining the relationship among independent states. It includes an interesting analysis of the Communist conception, according to which sovereignty only defines the position of states with respect to capitalist countries and hardly affects relationships among Communist countries (pp. 91–95). The current attachment of newly independent states to a rather absolute view of sovereignty is explained, as well as its impact on current international relations, especially within the framework of the United Nations. While acknowledging that sovereignty is still the basis of international law, the author pleads for a more cooperative approach to international relations, which would take due account of the interdependence of all members of the international community.

Anand's article on the "New International Economic Order" is a classic statement of the case for replacing the current international economic order, which was conceived by industrial nations for their own principal benefit, with a more just system. The 1974 Charter of Economic Rights and Duties of States is seen as a major step in this direction, and, while acknowledging that it is not binding in law, the author credits it with great persuasive value (pp. 115–16). A strong case is also made for producers' cartels (p. 122). Since the article was written, events appear to have moved in a somewhat different direction. Instead of waiting for improbable transfers from the industrialized world, developing countries are seeking closer cooperation among themselves in a new spirit of self-reliance, whereas producers' cartels, as well as other agreements to regulate the market for raw materials, have proved unable to cope with increasing surpluses resulting from overproduction or the collapse of demand, or both.

The article Confrontation or Cooperation? The General Assembly at the Crossroads relates the progressive emergence of a majority of Third World countries among the members of the United Nations and their attempts, during the 1970s, to impose their views by means of confrontational tactics in the
form of majority votes in the General Assembly. Some apparent successes achieved in this way may appear rather hollow when it comes to implementation, and the author himself pleads for more cooperation. In this he has been vindicated to some extent by the recent trend towards seeking consensus rather than imposing solutions by majority votes.

In *Development and Environment: The Case of the Developing Countries*, the author provides a vivid description of contemporary environmental problems and the potentially fatal results that disregarding them might produce. The dilemma of developing countries, which face both an acute need for industrialization and the imperatives of environmental conservation, is then pointed out. The author urges a compromise by which developing countries would be allowed to adopt less stringent standards of environmental protection in view of the fact that together they do not produce the amount of pollution found in the industrialized world. The article was written before the new emphasis on agricultural development became fashionable and before the disastrous environmental impact of many agricultural practices was fully realized.

In *The Politics of a New Legal Order for Fisheries*, the author mainly relates the reasons for and the stages of the emergence of the concept of the exclusive economic zone. He then shows that the legal existence of such a zone does not protect coastal states in the developing world from depredation of the living resources of their share of the seas, and urges them to cooperate both in exploiting their exclusive economic zone and in protecting it from encroachment from outside.

In his essay on *Mid-Ocean Archipelagos in International Law: Theory and Practice*, Anand defines the various types of archipelagoes before considering the early claims of the Philippines and Indonesia, and, more recently, of other archipelagic states. The evolution of legal thinking on archipelagoes at the UN Conference on the Law of the Sea up to 1976 is then analyzed.

After a brief glimpse at early instances of collective military forces in Anand's essay on an international police force, the author relates the failure of the implementation of the collective security system provided for by the UN Charter and then describes the various instances in which UN forces have been assembled on an ad hoc basis. He then presents the arguments put forward by those who advocate a permanent UN force and shows the tremendous obstacles such a project would have to overcome. The author concludes that such a force cannot be conceived under current conditions and suggests that the method of improvising on a case-to-case basis may still be the best.

All the articles are well thought out, beginning, in most cases, with a clear statement of the facts and, where needed, the historical evolution, before tackling the various legal and political problems at hand, in an attempt to reach a well-balanced and reasonable conclusion. Some pieces such as those on sovereignty and archipelagoes are brilliant presentations of complex issues and would make excellent reading for students and nonspecialists who would like to acquaint themselves with the subject.

**Dietrich Kappeler**  
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As the author states (p. 6), there is no work in Soviet doctrine devoted especially to unilateral legal acts by states in public international law. Consequently, Western literature (Pfluger, Biscottini, Jacqué, Suy, Venturini, Di Vignano and others) is used almost exclusively and the judgments and advisory opinions of the PCIJ and the ICJ are also taken into consideration.

To one's relief, no quotations from the "classics" of Marxism-Leninism or from current Soviet leaders are offered in Kalamkarjan's book. There is no party jargon whatsoever. Passages from decisions by the PCIJ and the ICJ are quoted as sources of doctrinal inspiration, without any attacks or innuendo. In these respects, this short work is agreeable to read and is superior to the publications of most Soviet writers in the field of international law.

Kalamkarjan deals with four categories of unilateral international legal acts of states: recognition, promise, renunciation and protest. Sometimes he commits amusing errors such as referring to Shabtai Rosenne as a "Dutch scholar" (p. 69)—evidently because he published his monograph on the ICJ in Leiden (if such "criteria" apply, the present reviewer is also a Dutch scholar!). The book contains no bibliography, which is even more astonishing as it was published under the auspices of the Soviet Academy of Sciences. Western names are reproduced in Russian texts as they are pronounced—in this respect there are also inaccuracies when, for instance, Rubin is quoted as Rabin.

The work, which is probably the product of a junior academic, is strongly compilative. The author sometimes criticizes opinions voiced on individual issues by some writers. But frequently his criticisms, or the positions he takes, are not sufficiently justified, explained or documented.

This is particularly well illustrated by a short passage in which Kalamkarjan enters into a discussion of whether an act of renunciation by a state may include its own independence (pp. 88–89). Quoting, on the one hand, Pfluger (1936), who maintained that there are subjective rights of an absolute character that a state may not renounce under any circumstances and, on the other, Suy (1962), who thinks that there are no limits to renunciation, he sides with the latter. He cites the possibility of joining another state on the basis of federation or autonomy (though the possibility of total submergence is not mentioned). "The main requirement in this case [he adds] is the necessity of a free expression of the will of the state."

However, one would expect that in the case of such a very fundamental decision—even if an authentically elected government represented the ma-

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1 Incidentally, E. Suy, in his Actes juridiques unilatéraux en droit international (1962), at pp. 168–69, did not develop this most important question, basing himself exclusively on the 1931 advisory opinion of the PCIJ in the Austro-German Customs Union case. But it is hard to deny that, since then, a whole era has passed and, in particular, ample historical experience has been amassed on how lethal such a carte blanche may be for the fate of smaller states (and peoples) confronted with the imperialistic aspirations and reckless manipulation of totalitarian powers.
jority of the population—it would be the people themselves that would decide in a totally free, preferably internationally monitored, plebiscite. After all, they are guaranteed the right to self-determination by the UN Charter and the UN Human Rights Covenants. Otherwise, one would have to accept what happened in the case of Estonia, Latvia and Lithuania in 1940, and in the almost forgotten case of Tannu-Tuva in 1944, by decisions of their “democratically elected” governments. Tuva, incidentally, was not even granted (until 1961) the status of an autonomous, let alone a union, republic within the USSR. Leaving the little-known case of Tuva aside, in the case of the Baltic states, not more than a few percent would have voted, in a free plebiscite, for incorporation into the USSR. This, even more so, as the large-scale terror and mass deportations, etc., demonstrated by the Soviets in Eastern Poland, “democratically” incorporated by them into the USSR in the autumn of 1939, were well-known in the Baltic countries.

If, say, the Government of Bulgaria (which was, allegedly, recently voted in by 99.91 percent of the total electorate, while the votes against represented only one-tenth of a thousand²) decided to ask to join the USSR, this would be perfectly in order, according to Communist doctrine.³ When, on the other hand, the people of Micronesia decided in plebiscites, declared by UN observers to have been free and fair, on free association with the United States or on Commonwealth status, the Soviet delegate to the Trusteeship Council spoke of “virtual slavery.”⁴ Of course, one has to bear in mind the absence, in this case, of the application of the principles of “socialist internationalism,” which, according to Communist doctrine, would change the situation radically.⁵ This “dialectical” aspect, as well as “socialist internationalism” itself, is, incidentally, not referred to by the author, for which he should be lauded rather than blamed.

What is most striking in the work under review is the minimal number of concrete examples given. Because there are not many cases concerning promise and renunciation, those that exist should have been collected and analyzed all the more. But in the sphere of recognition, and particularly protest, such cases are innumerable. Ample use should have been made of at least the pertinent acts of the author’s own government.

This would help, for instance, to clarify some “grey areas,” such as whether the TASS declarations (zayavlenia TASS) published by the Soviet press and containing, e.g., condemnations, should be placed, for all practical purposes, on an equal footing with similar protests by the Soviet Government. One would like to hear a Soviet academic opinion as to why, for example, in one

³ Such initiatives were allegedly demonstrated by the Bulgarian party leadership in the past, but apparently rejected by the Soviets as “premature.” However that may be, Todor Zhivkov, referring to the USSR, promised that his country will act with it “as one organism, which has one set of lungs and one blood system”; compare my System of the International Organizations of the Communist Countries (1976), at p. 152.
and the same issue of Pravda, there is, side by side on the same page, a declaration by the Soviet Government protesting repression of Communists in Indonesia; and a declaration by TASS protesting American "undermining" of the SALT II Treaty.

By and large, the main shortcoming of the present work seems to be the fact that a topic that requires a much more detailed and deeper treatment was squeezed into some 130 pages, which is pathetically little. One wishes that the author would continue his studies and come up, in the nineties, with a comprehensive monograph in the field.

**Richard Szawowski**

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In the second volume of his treatise on treaty law, A. N. Talalaev presents views on a widely debated topic—the impact of treaties on nonsignatories. At a time when scholars in some countries are claiming that the provisions of the 1982 Convention on the Law of the Sea may be enjoyed by nonsignatories because they have passed into customary law, and those in other countries that the obligations established by the Convention have become universal *jus cogens*, Talalaev's monograph merits attention as an indication of trends in Soviet thinking on this debate.

Of course, the major part of the study is a restatement of the widely known provisions of the Vienna Convention on the Law of Treaties, but the book contains much of a novel character, for the author is liberal with commentary from Soviet authorities and practice. At the outset he states his creed that no state can gain rights or become bound to obligations against its will (pp. 66–67). He proceeds to reject the frequently heard argument that law is changing on this score because of Article 2(6) of the UN Charter, which seems to many to bind nonmembers to the obligation to live by its provisions.

To Talalaev, this paragraph must be interpreted as his senior colleague, G. I. Tunkin, and the Austrian scholar, A. Verdross, have argued, namely, that it does not go so far—rather, it is designed to require the United Nations as an entity and also its members to encourage nonmembers to act in accordance with the principles of the Charter. In this view, the obligation is placed on the Organization’s members—not on nonmember states. Consequently, there is no reason in Talalaev’s view to argue that Articles 34–38 of the Vienna Convention have weakened the sovereign rights of states. He holds firmly to the position taken at the outset by declaring again that no state can force a third state either to adhere to a treaty or to refrain from expressing its agreement with a treaty’s provisions.

To this basic rule of sovereignty, there is an exception recognized by

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6 *Cf.* Pravda, June 12, 1985, at 4.
many, including scholars of socialist states. It is the aggressor state. Under this exception, incorporated into the Vienna Convention as Article 75, an aggressor state can be bound by provisions to which it has not agreed. Talalaev cites the limitations placed on Germany by the peace treaties ending World War II, and the forced cession by Japan to the USSR of the Kurile Islands and southern Sakhalin by the agreements made by the Allies at Yalta and Potsdam. Of course, the author does not indicate that Japan has since argued that it is time to rectify a mistake in geography whereby the Habomai group of islands near Hokkaido was included wrongly within the Kuriles chain.

As to the extension of treaty privileges to nonsignatories, Talalaev admits that there are two views competing among scholars: (1) privileges can be conferred without a nonsignatory's consent; and (2) consent is required for extension of privileges. Following his penchant for sovereign choice in all matters of law, Talalaev indicates his preference for the second view, but he adds that he is willing to accept a presumption that unless a state rejects in writing rights conferred upon it as a nonparty to a treaty, the rights have been conferred effectively.

On the much discussed question of the effect upon customary law of codification, a matter recently discussed in the Judgment of the International Court of Justice in *Nicaragua v. United States*, Talalaev is clear. He has no difficulty in supporting a position like that later accepted by the Court, namely, that customary law norms remain in force after codification, independently of the treaty codifying them. As to the more difficult question of whether a specialized treaty's provisions can become obligatory for all states as custom, Talalaev reminds his readers that the Soviet delegation at Vienna took the position that this transformation can occur only if a nonsignatory signifies its acceptance of the norm. If that happens, in Talalaev's view, it would be incorrect to say that it is the treaty that binds the third state. Rather, it is the state's acceptance of the treaty norm as custom. As examples, he gives the Hague Convention on the Laws of Land Warfare, and various treaties on international rivers and sea routes (pp. 69–70).

On the broader question of a multilateral convention's impact on the whole world, Talalaev offers some qualifications to his conclusion that the convention binds all states—whether signatories or not. His qualifications are that the convention must have been signed by a preponderant majority of states; it must relate to a matter of worldwide concern; and it must include many customary law norms. Further, he seems to be concerned primarily with signatories who subsequently do not ratify. For these states, he argues that by their signatures they have consented to the existence of the norms, so that subsequently those states that would bind the nonratifier need not meet the usual requirement for proof of custom: they need not prove long-repeated unity of practice to establish the existence of the norm (p. 71).

Talalaev presents some of the Soviet diplomats' favored topics as candidates for this extension of multilateral conventions to the whole world. He speaks of treaties on disarmament and international security, of nonproliferation and nontesting of atomic weapons, and of the prohibition of bacter-
iological warfare. He is a realist, for he adds that, unfortunately, this extension to nonsignatories has not come about, but he thinks it ought to be made, and he cheers himself by adding that the refusal of statesmen to accept his view is not without advantage. If it were to be accepted quickly and widely, there would be no further need for struggle, and in his view, struggle is necessary until all states are bound by adherence. Even while awaiting such a turn of events, he will not let the matter lie. He suggests that nonsignatories have a moral duty to adhere to the principles enunciated by such treaties in their state practice. He then adds, perhaps wryly, that although there are many moral obligations that conform fully to norms of international law, that conformity does not alone convert morals into law.

Talalaev applies his thinking to the rejection by the United States of the 1982 Convention on the Law of the Sea. He analogizes the situation to the situation that has come into being since demilitarization and neutralization of the Antarctic by the Treaty of 1959, to which 32 states have adhered. He says all the world must respect the status of the Antarctic. He notes also the declaration by the Organization of African States in 1963 making Africa an atomic-free continent, a declaration that, in his view, all states must respect. So also, in his view, the Law of the Sea Convention “cannot and must not be ignored by any State, including the U.S.A.” (p. 77). In support of his view, he cites the Soviet Government’s declaration that the U.S. determination to mine the seabed is counter to the interests of the preponderant majority of states.

In Talalaev’s study there is therefore to be found an expression of the often-repeated Soviet view that states are sovereign and, consequently, masters of their own destiny; but as law is developed in directions favored by Soviet diplomacy, Soviet scholars tend to move toward an expanded rule. One can but remember that when the USSR stood in the minority, its scholars sought always to keep the door open to permit refusal to accept an undesirable norm, but as it has moved with its neighboring socialists and the Third World into the majority, attitudes have changed. States are now being pressed to accept widely sponsored new law, which some Westerners have called “soft law,” in the expectation on the part of Soviet scholars that as acceptance is broadened, “soft law” will become “hard law” to which all states must conform—even nonsignatories.

JOHN N. HAZARD
Board of Editors


Professor Reuter’s well-known book is now available in a revised second edition.1 Its 287 paragraphs and complementary notes give an overview of the many facets of the law of treaties. The book also reproduces the 1969

1 See the review by H. W. Briggs at 68 AJIL 163–64 (1974).

Chapter 1 deals with the "conventional phenomenon" and has, in the main, not been altered. The author first depicts the historical evolution of treaties, with an emphasis on the periods between 1815 and 1914, between the two world wars and after 1945. There follows an interesting examination of a treaty's nature as a juridical act and a norm (and the implications of such a distinction, for instance, in respect of interpretation) and as a traité-contrat and a traité-loi. Reuter elaborates in some detail on his definition of a treaty, i.e., a manifestation of concordant wills imputable to two or more subjects of international law and destined to produce legal effects according to the rules of international law (para. 63). The definition appears sufficiently wide to accommodate unwritten and informal contracts and even gentlemen's agreements.

The second chapter continues with the conclusion and entry into force of treaties. The author explains the complexity of these rules as resulting from differing purposes of treaties, the specific nature of the state organs that conclude treaties and the varying number of parties. Further sections on the capacity of states to conclude treaties and on reservations have been revised and enlarged and now cover, for instance, the 1982 Law of the Sea Convention and the 1977 Anglo-French Continental Shelf arbitration.

The partly revised chapter 3 concerns the effects of treaties and contains important passages on treaty interpretation. They benefit greatly from the author's experience in the preparation of the 1969 Vienna Convention as a member of the International Law Commission and of the French delegation at the Vienna Conference. Thus, he correctly argues what even a literal interpretation of Article 31 of the 1969 Convention must surely disclose, namely, that that provision envisages a single combined operation of all the methods and elements mentioned therein. The section on the effects of treaties on third states draws attention to some implications of the 1974 Nuclear Tests Cases; it also studies the effects of treaties qua customary law and in the context of the succession of states. Last, the chapter analyzes the relationship of a treaty to other juridical norms, i.e., to other treaties and other sources of law, among the latter, jus cogens.

In the fourth chapter, on the nonapplication of treaties, the final section on international responsibility, namely, the consequences of a breach of treaty under Article 60 of the 1969 Convention, has been substantially revised.

In dealing with the subject, the author has emphasized the argumentative interpretation of the 1969 Convention and its travaux préparatoires; the subsequent state practice and case law stay somewhat in the background. As such, and in view of the author's clear structure and lucid style, the book indeed serves as an excellent introduction for newcomers to the subject. Beyond this, the book has become a classic and remains a valuable and stimulating starting point for scholarly work on the law of treaties.

Mark E. Villiger
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L'Intervento davanti alla Corte Internazionale di Giustizia. By Angelo Davi'.

This book by Professor Angelo Davi' is an interesting and important study of third-party intervention procedures in disputes before the International Court of Justice. Davi' ably analyzes the relevant articles of the Statute of the Court, as well as its Rules and case law. The book will stimulate discussion and inquiry into the role of intervention procedures in developing the Court's dispute resolution potential and international norm-making power.

The author notes that intervention before the Court is possible under two articles of its Statute: (1) Article 63, which provides for "interpretative intervention" or "intervention arising out of a multinational treaty"; and (2) Article 62, which provides for the so-called intervention arising out of "a legal interest which might possibly affect the intervening party." Article 63 permits third-party states to intervene and essentially to offer amicus briefs to the Court regarding the interpretation of the multilateral treaties to which they are also parties. Article 62 deals with what American civil procedure would probably call intervention of right. That is, it involves disputes between two parties to which a third party is essential by virtue of having a claim that would be prejudiced by resolution of the dispute between the first two parties.

Since 1922, Article 62 petitions were actually filed only in the S.S. Wimbledon\(^1\) and Nuclear Tests\(^2\) cases. However, the Court did not reach the Article 62 intervention issue until 1981 and 1984 when it decided the two Libyan Continental Shelf\(^3\) cases. In three earlier instances, i.e., the Eastern Greenland\(^4\), Fisheries\(^5\) and Acquisition of Polish Nationality\(^6\) cases, states had made known their intentions to intervene under Article 62, but actually did not.

Article 63 fared somewhat better. In the S.S. Wimbledon and Haya de la Torre\(^7\) cases, the Permanent Court of International Justice and the International Court of Justice, respectively, decided in favor of the admissibility of a "declaration of intervention" under Article 63, which requires the registrar of the Court to notify all states that are parties to a multilateral convention whose construction is in issue in proceedings before the Court. Such

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\(^3\) Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, 1981 ICJ REP. 3 (Judgment of Apr. 14); Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, 1984 ICJ REP. 3 (Judgment of Mar. 21).
\(^6\) Acquisition of Polish Nationality (Ger. v. Pol.), 1923 PCIJ, ser. B, No. 7 (Advisory Opinion of Sept. 15).
\(^7\) Haya de la Torre (Colom. v. Peru), 1951 ICJ REP. 4 (Order of Jan. 3).
states then may intervene as a matter of right if they agree to be bound by
the decision of the Court regarding the interpretation of the treaty.

The introductory part of the book is followed by an analysis of the Court's
two recent judgments denying applications to intervene under Article 62
filed by Malta and Italy in Continental Shelf (Tunisia/Libya) (1981) and Con-
tinental Shelf (Libya/Malta) (1984). This is followed by an exposition of the
author's "integrated" or "unitary" concepts of intervention procedures un-
der Articles 62 and 63.

The two Libyan Continental Shelf decisions are extremely important be-
cause the Hague Court, for the first time in its more than 50-year history,
took a position on major questions relating to intervention under Article
62. These issues were left open by the Permanent Court at its inaugural
sessions in 1922 and in the Rules of Court as adopted to the present time.
Lack of clarity in the Rules was due to a divergence of opinion among the
judges at the 1922 meeting that has continued to be unresolved.

Article 62 presents a jurisdictional peculiarity unique to international
courts. It is also a peculiarity different from the situation regarding Article
63. It relates to jurisdiction over the parties. International courts generally
have jurisdiction only by consent of the sovereign states that bring disputes
to them and only to the extent to which those states grant the courts jurisdic-
tion.

Under the Article 63 multilateral treaty interpretation provision, the ju-
risdictional requirement is more easily met. Under Article 63, the issue is
the interpretation of the multilateral convention, with the third-party inter-
venor having an interest as a cosigner of the convention. It is interesting to
speculate on the stare decisis effect that the decision of an international tribunal
could have on the interpretation of a multilateral treaty. As some states
signatory to the treaty may have civil law systems and other states may have
common law systems, the stare decisis effect of a decision would be open to
some dispute. Davi' does not seem really to address this question. In any
event, the interest of third-party states in having a uniform interpretation
of the multilateral treaty would seem on policy grounds to make the inter-
vention fully justified, at least to the extent of submitting what is essentially
an amicus brief.

The Article 62 situation concerning intervention is different. Two models
are possible. The first would deny a third-party intervention on grounds
that jurisdiction of the Court only exists by consent of the parties submitting
the dispute. If the parties initially submitting the dispute did not consent to
the intervention of the third party, then the Court would have no jurisdiction
over the third party. The corollary of this view would be that the judgment
of the Court would have no effect on the party that sought to intervene and
whose intervention was denied by virtue of the failure of the initial parties
to consent to it. The alternative model would be to permit the third party
to intervene and then make the judgment of the Court binding upon it. The
Court in its Libyan territorial waters decisions took the first view.

Professor Davi' wants to make Articles 62 and 63 subject to the same
theoretical framework. That is, he wants the Court to be tough about ac-
cepting position briefs and appearances even in the Article 63 amicus mul-
tilateral treaty interpretation situation. Although this might serve the goal of creating a logically consistent framework, this result would not seem justified on policy grounds.

The book is tightly organized and fully discusses the relevant case law. It examines separate histories of Articles 62 and 63, although it does not use that history to justify separate theoretical treatment of these articles or different policy goals that might have been intended. In fact, the histories do justify such separate treatment.

The book has a detailed and useful English summary at the end. The translation is understandable but in some places extremely literal. It would have been worth the effort to have additional time spent in its preparation by someone whose first language was English, in order to make it more understandable and interesting to non-Italian, non–civil law lawyers.

The overall treatment by the Court and by Davi' of intervention issues has been restrictive. John Miller has cogently placed the issue in its proper perspective as follows:

Encouraging states to intervene more often and more actively, and opening the Court to intervention by persons other than states will not make the Court more active. Only the build-up of a docket of contentious cases which affords reasonable opportunities for intervention can do that. But a more active participation by third states and an extension to non-states of the right to participate could make the Court more relevant in international litigation, and enable it to serve more effectively the causes of international peace and justice.8

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Having in mind the highly developed law of procedure governing the process of legislation in constitutional states, the author of this Freiburg dissertation looks for corresponding international procedural law that regulates the establishment of (substantive) international law. In the author's opinion, the codification conferences convened by the UN General Assembly in performance of its task of encouraging "the progressive development of international law and its codification" (Art. 13(1)(a) of the UN Charter) constitute an especially important way of "setting international law"—a way appropriate to the current problems of the international community (p. 35). The work's subject is how law is "made" in those conferences.

In the first part ("International Lawmaking as a Procedural Problem"), Limpert gives, among other things, a detailed description of the conferences' preparation by either the International Law Commission (ILC) or another UN body, depending on the General Assembly's assessment of the codification task as a "nonpolitical" or a "political" one. The drafting of the 1969

Vienna Convention on the Law of Treaties and the 1982 Convention on the Law of the Sea is used to exemplify these two different forms of preparation. Limpert modifies the traditional view of international law scholars who hold that codification work “should be undertaken not by government delegates but by international lawyers working with a full measure of independence and on a purely scientific basis.” He pleads that the ILC be entrusted with “highly political codification projects” as well, because he considers its character—besides being scientific—as being political (pp. 121 ff.).

Continuing to use the examples given above, the author now describes in detail the procedure of both conferences (pp. 140–200). He contrasts the concentrated handling of a clearly delimited subject matter in Vienna with the “temporarily anarchic” procedure (p. 196) of the Law of the Sea Conference, which was burdened with the task of codifying all maritime international law and with irrelevant problems such as that of a “New International Economic Order.” Limpert examines as the three typical elements of the latter conference’s procedure the “overall package deal approach,” the decentralized and informal procedure, and the consensual procedure.

In the second part (“International Lawmaking Procedure as a Problem of International Law”), the author examines the rules of international law regulating the codification conferences’ procedure, as well as the influence of the current negotiations on international law and, finally, the consequences of unilateral acts of participating states during the negotiations.

Limpert succinctly develops the main problems of procedure in today’s codification work under the auspices of the United Nations, but does not add much that is new to the large literature on the ILC\(^2\) and on the Vienna and the Law of the Sea Conferences.\(^3\) His description, though not novel, is

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1 Hurst, A Plea for the Codification of International Law on New Lines, 32 GROTIUS SOC’Y, TRANSACTIONS 135–53 (1946).
worth our attention just because of the author's original question: Which norms of international law do determine the codification process?

Here the author cannot offer much more than Bernhardt did about 30 years ago; he still has to recognize that international procedural law is of a "quite fragmentary character" (p. 216). There are only the rules of the Vienna Convention on the Law of Treaties regarding the adoption of the text of a treaty and the invalidity of treaties, and the principles of the sovereignty of states and of legal protection for bona fide acts; that is all. These few rules, indeed, leave wide gaps that states can fill, especially by agreement on rules of procedure for each conference, including codification conferences as well as all the other bilateral and multilateral treaty negotiations. Limpert explains this modest result (rightly, the reviewer thinks) as deriving from the opinion of governments that international conferences are a diplomatic subject matter that should remain without a detailed legal order. Astonishingly enough, the author—while stressing the importance of formalized procedure for the formation of "right" rules (pp. 17, 248)—agrees with this opinion (pp. 216 ff.; compare pp. 244 ff.); accordingly, he abstains from proposing any further developments or improvements in international procedural law. What the reader now knows in regard to the different procedures discussed in the first part is that everything is equally permitted. Also, the second part (pp. 201-45) is very short compared to the first (pp. 20-200) and, while barely mentioning all the material in the first part, does not seem to exhaust its subject. For instance, the author could have examined more carefully the procedure of the Law of the Sea Conference (constituting a model for future codification conferences) in the light of the traditional concept of sovereignty. Furthermore, he might have dealt with specific situations in the course of codification to which the Vienna Convention rules apply or do not apply, which would make the further development of those rules necessary. It might also have been helpful and have broadened the basis of some of his statements if the author had continuously taken into consideration historical conferences and other UN codification conferences, like the Hague Peace Conferences of 1899 and 1907, as he did in the chapter on voting procedures (pp. 129-33).

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This is an important book, with an elegant research design. For Axelrod, the fundamental problem is to understand how cooperation can emerge among self-seeking actors who lack centralized authority. This formulation has long been the crux of international relations theory, particularly "Realism," but Axelrod’s approach breaks new ground and produces powerful answers to basic questions about international cooperation.

Axelrod relies on mathematical game theory, which he employs with great sophistication. Yet this book is fully accessible to nonspecialists. Axelrod writes clearly, in plain English, and always remains focused on the problem of how cooperation can emerge among egoists.

He starts by exploring a well-known game, the Prisoners' Dilemma, which represents many (but not all) of the obstacles to cooperation. In this game of strategic choice, there are only two players, each facing a single decision, to “cooperate” or to “defect.” Each player must choose without knowing what the other will do. The payoffs for each player depend on the combination of both players' choices. The dilemma lies in the pattern of payoffs. In this game, if both players cooperate, each will do better than if they both defect. But what if only one chooses to cooperate while the other chooses to defect? In that case, the Prisoners' Dilemma rewards the defector with the highest possible payoff (even higher than the reward for mutual cooperation). The disappointed cooperator suffers the worst payoff, even worse than he would get if both players had defected. In colloquial terms, he is a “sucker.” Cooperation still pays—but only if both players cooperate. This payoff structure creates powerful incentives to defect. In fact, for each player, defecting offers the best individual payoff no matter what the other player does.

If the players could make binding promises, then each would surely promise to cooperate if the other did also. But, by the rules of this game, there is simply no way to make enforceable threats or commitments, and no way to be sure what the other player will do on a given move. The result is a profound tension between individual rationality and collective rationality. If each player does what is best for himself, the result will be worse for everyone. Many, including Axelrod, see powerful analogies between this stylized game and the real world of international affairs, which also lacks centralized authority and where the narrow pursuit of national self-interest often produces results inferior to mutual cooperation.

The world of the Prisoners' Dilemma, with all its incentives to defect, is surely inhospitable terrain for the growth of cooperation. But that is precisely where Axelrod seeks to find it. Axelrod builds on the well-known proposition that cooperation in a Prisoners' Dilemma may be individually rational if the game is played repeatedly and if the end point is unknown. With that in mind, Axelrod sponsored a computer tournament and invited game theorists to submit their favorite strategies for an iterated Prisoners' Dilemma. The submissions specified what choice ("defect" or "cooperate") should be made in any game situation. Each strategy was then paired off with every other to see which performed best overall.
No single strategy—even the winner—can perform best under all hypothetical conditions. If all other players are “meanies” who continually defect, it pays to defect along with them. Under these circumstances, cooperation is fruitless and any attempt to cooperate will only yield a lower score. If, on the other hand, some other players are willing to cooperate, it may well pay to reciprocate. Whether it does pay depends upon whether the game is likely to continue and whether future payoffs from mutual cooperation are highly valued, compared to the immediate gains from defection.

In the tournament itself, the winning strategy was actually the simplest: “Tit for tat.” Using this strategy, a player cooperates on the first move and, from then on, replicates the opponent’s previous move. Tit for tat is initially generous, rewards an opponent’s efforts to cooperate, punishes defection immediately and stands ready to resume cooperation as soon as the other side proffers it. Because Tit for tat never defects first, it never outscores any opponent. But it scores quite well against a wide variety of other strategies—so well, in fact, that no other strategy had a higher overall score. One of Axelrod’s striking findings is that Tit for tat can succeed even if relatively few players use it, as long as they have a sufficiently high chance of interacting again. (Remember that it always pays to defect if you expect to meet a player only once. Cooperation pays if potential cooperators are sufficiently likely to interact and if future payoffs are not highly discounted.)

Using the tournament results and formal game theory, Axelrod draws the implications for individual choice: “do not be envious of the other player’s success; do not be the first to defect; reciprocate both cooperation and defection; and do not be too clever” (p. 21). Tit for tat succeeds in no small part because other players readily understand it and see that defection does not pay over the long haul. Axelrod also draws larger social implications, noting, for example, that cooperation can be fostered by making players’ interactions more frequent so that long-run considerations dominate.

Axelrod also draws important implications for diplomacy, particularly for U.S.-Soviet relations. But surely these implications must be tempered by a recognition that they derive from highly stylized games. The preferences in some U.S.-Soviet interactions may not replicate a Prisoners’ Dilemma. In some areas, the superpowers see little opportunity for joint gains. Also, U.S. and Soviet preferences may change over time, especially after turnovers in leadership. The payoffs themselves may be manipulated in bargaining. Moreover, unlike the contestants in the computer tournament, both superpowers are very much concerned with making threats, showing unshakable precommitments to specific choices and discovering the preferences and strategies of the other side. Even the assumption of a two-person game may be oversimple at times, especially when NATO policies are germane to superpower relations. Finally, in many cases, it is difficult to understand the diplomatic implications of a Tit-for-tat strategy. Axelrod himself refers to the 1979 Soviet invasion of Afghanistan, which, he says, “presented the United States with a typical dilemma of choice.” Even if we assume that the lessons of a Prisoners’ Dilemma game are relevant here, what would constitute a meaningful “tat” response?
There are obvious difficulties in drawing practical lessons from theoretical findings. Indeed, Axelrod's most recent work deals directly with such questions. But the inevitable gaps between game theory and diplomatic interaction should not obscure Axelrod's genuine achievements. *The Evolution of Cooperation* is a fascinating book and a significant contribution to the study of international relations.

CHARLES LIPSON
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This is a well-written book that serves as a thorough introduction to functional theory and the ideas of its critics. The author has succeeded in distilling a number of important ideas into a short, readable text and in raising questions of significance to the lawyer involved in international organization.

Dr. Eastby assesses the impact of international organizations on the international political process in the light of the functional theory of David Mitrany. Mitrany's initial contention is taken to be that "social and economic co-operation between states will (and should) erode the 'ubiquitous' yet 'anachronistic' place held by territorial states in the modern world" (pp. 1–2), and that territorial nation-states no longer make their members happy and threaten to "warp the very civilization which they were meant to enhance" (p. 4). This crisis of the international system can be solved by "a devaluation of the State in favor of organized activities tailored to perform observable and specific functions" (p. 19). This should be done through "international organizations, both governmental and non-governmental, [which] are the primary means of international co-operative activities" (p. 89) and which, Mitrany argues, "are preparing the ground for the dissolution of territorial political government" (p. 88).

The author reviews and assesses what he considers to be the most important discussions of this theory and attempts to test it empirically by applying it to the performance of the United Nations Environment Programme (UNEP). The critique is divided into three parts. In chapter 2, the "Evaluation of Functionalism by American Political Science" is examined by reference to the writings of Hans Morgenthau, Inis L. Claude and James P. Sewell. Their principal critiques relate to functionalism's assumptions that political accord may be built on the basis of economic accord and that the parts of a whole can be created, organized and dismembered solely according to the criteria of need and efficiency. Moreover, they note the fact that within the United States both the rights of the states and economic individualism have prospered and continue to prosper. There is also the humani-

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tarian perception that the rationalism inherent in Mitrany's vision raises questions as to whether a functional world can be a human world. In chapter 3, "The Reformation of Functionalism," the writings of Ernest Haas are explored. Particular attention is given to Haas's empirical criticism that there has been a failure to demonstrate that a regularized process of growth is inherent in functionalism. In chapter 4, Eastby conducts a "Re-evaluation of functionalism" through the work of Reinhold Niebuhr, with whose thoughts he aligns himself. It is at this point that Eastby questions functionalism's relationship to material and spiritual needs by suggesting that "it cannot be demonstrated that functionalism necessarily makes individuals happier" (p. 89). Furthermore, he challenges functionalism's assumption that people are irreversibly committed to trading their economic and political rights for economic security and doubts whether a universal society is attainable, or even desirable.

The work concludes with an examination of functional practice by reference to the UNEP. Eastby concludes that the practice of this organization neither validates conclusively nor invalidates Mitrany's argument, but suggests that he was not wrong in thinking that his theory needed to be both descriptive and prescriptive. UNEP was perhaps not the best organization on which to have focused: a study of the European Economic Community or the International Labour Organisation might have produced a very different conclusion, either way. What is more arguable is that international organizations have actually strengthened the notion of state sovereignty and that international habits of cooperation are developed by states with a view to reinforcing their internal legitimacy. A functionalist might argue that the speed with which the International Atomic Energy Agency sponsored, and states signed, two treaties on Emergency Notification and Assistance within 6 months of the Chernobyl accident\(^1\) indicates the willingness of states to cooperate where their mutual interests allow. The cynic would argue that this predominantly reflects the desire of states to protect their own nuclear industries, and thus to safeguard the production of their domestic energy supply and enhance their industrial infrastructures, and that it is motivated by a desire to strengthen, and has the effect of strengthening, the internal legitimacy of the state and the barriers between states.

Eastby argues that functionalism may also be challenged on other grounds. It is possible that humankind may wish to remain committed to the nation-state and that the spiritual and material realms of the individual cannot be neatly separated, as functionalism suggests. He also questions whether we should be seeking to settle for a purely economic determination of the interests of the spirit. He concludes that Mitrany's argument has considerable sense but that it is questionable whether "interdependence" is transforming interstate relations: the processes of state making (or "nation-building") and

\(^1\) 1986 Vienna Convention on Early Notification of a Nuclear Accident and 1986 Vienna Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. Both Conventions were opened for signature on Sept. 22, 1986, and are reprinted in 25 ILM 1370 and 1377 (1986).
international organization continue unabated. The author sees this as a paradox, which it is not. The two processes are not mutually exclusive, but mutually dependent, as the state and the organization serve each other.

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Four members of the University of Glasgow School of Law, Tom Campbell, David Goldberg, Sheila McLean and Tom Mullen, have assembled a collection of essays on human rights. Although not always persuasive, this book is an interesting and welcome addition to the literature on this vital subject.

Chapter 2, “Constitutional Protection of Human Rights” by Tom Mullen, begins with a brief discussion of the debate in the United Kingdom over whether to adopt a bill of rights and empower the courts to invalidate acts of Parliament not in conformity with it. Mullen then examines U.S. jurisprudence of constitutional protection of human rights, cogently and succinctly criticizing various approaches to constitutional interpretation, with a view to determining what lessons can be drawn from the U.S. experience with judicial protection of human rights. Interpretivism, tradition, conventional morality, subjectivism and process-based theory are in turn found wanting. Interpretivism, the approach favored by the Reagan administration (“jurisprudence of original intent”), is difficult to apply, given that human rights provisions are often vague and general, and the legislative intent may be ambiguous and impossible to determine precisely. Moreover, such an approach precludes the evolution or growth of constitutional protection of human rights, and may not always be consistent with maximum protection of human rights. Tradition and conventional morality are too majoritarian to be sufficiently protective of human rights. Mullen rejects subjectivist legal realism as unnecessary and inferior to objective analysis. Process-based theory, which inquires whether the political process has malfunctioned, i.e., interference with participation or representation in the political process by means of restricting voting rights, or freedom of expression, and discrimination against minorities, is not as value-neutral as it purports to be; procedural rights, e.g., freedom of expression, can and should be considered substantive values, not merely “means” towards the end of ensuring the proper functioning of the democratic process. Counterarguments can certainly be made with respect to some of Mullen’s criticisms, but he does succeed in pointing out that all the conventional theories of constitutional interpretation have serious flaws, although he does not consider an approach that would utilize elements from all the rejected theories, an approach fairly descriptive of the practice of constitutional interpretation.

Mullen argues that interpretation of human rights provisions should be
based on objective moral reasoning, which is designed to result in a rational informed consensus. Considerations of space do not permit a detailed discussion of Mullen's sophisticated and complex arguments relating to the potential objectivity of moral reasoning; suffice it to say that he concedes that the theories of objective moral reasoning referred to “are too open-ended to prescribe particular unarguably correct decisions” (p. 30) and, at best, such theories only ensure greater rationality in judicial decision making. This reviewer seriously doubts that moral reasoning can be made objective, but one can agree with Mullen that moral analysis cannot be absent from human rights cases. A less controversial analytical technique is the concept of the core (discussed in greater depth in ch. 3), which entails asking what the purpose of a particular right is. Citing allegedly incoherent U.S. case law relating to freedom of speech and the right to abortion, he argues that core analysis will result in clearer and more coherent decisions. Of course, core analysis does not provide easy answers, given that the precise contours of a “core” or the purpose of a right may not be self-evident.

Mullen is clearly sympathetic to the adoption of a bill of rights in the United Kingdom, but he does not give a conclusive opinion as to whether such a course of action is appropriate.

Esin Örüçü, in chapter 3, “The Core of Rights and Freedoms: The Limit of Limits,” argues in favor of applying “core” analysis to human rights, or, in other words, each right should be seen as possessing an irreducible minimum, an essential content that is inviolable and thus not subject to limitation or derogation. Concomitant rights are necessary to effectuate the “core” right, e.g., the right to receive a passport is concomitant to the right to travel. Essential concomitant rights, like the core, are inviolable, but the circumjacence of a right is subject to limitation and derogation. This concept of the core is derived from the Basic Law of the Federal Republic of Germany and the Turkish Constitution of 1961. (The latter was superseded by the 1982 Constitution.) In both countries, the core concept generated a well-developed but incomplete body of case law, although a tendency to narrow the core was significantly greater in Turkey, where political violence was endemic in the late 1970s.

The concept of the core is a valuable one, as it seeks to check the infringements on human rights made by limitations and derogation. It is especially useful in the latter context, in that it serves as a reminder to policymakers that restrictions on derogable rights pursuant to a state of emergency must be limited and consistent with a democratic society. The concept is not incompatible with derogation, given that a valid state of emergency does not, as a matter of international law, entitle the state in question automatically to suspend or limit derogable rights; all such emergency measures must be justified by a showing of strict necessity. Örüçü’s essay would have benefited from discussion of some specific cases involving “core” analysis; defining the core of a right so as to avoid making it too broad or too narrow will be a difficult and controversial process.

In chapter 4, “Human Rights in a State of Exception: The ILA and the
Third World," Anthony Carty critically reviews the International Law Association (ILA) Minimum Standards of Human Rights Norms in a State of Exception. He criticizes the ILA's emphasis on treating political rights as nonderogable as irrelevant to Third World countries outside of Latin America, arguing that human rights violations in states lacking liberal democratic constitutions may be less severe than in states with such constitutions, contrasting Algeria with post-1976 Argentina. He goes so far as to assert that the ILA's emphasis on political human rights is dangerous inasmuch as it would authorize criticism and intervention by Western countries. Instead of applying Western concepts of political rights to non-Western societies, he argues that it is preferable to interpret human rights obligations in light of the traditions and political culture of individual countries, applying sociological and cultural anthropological analysis.

Although the ILA's insistence on the nonderogability of political rights may appear to be an academic exercise with respect to the Third World, given the frequency of coups and the durability of authoritarianism in many such states, it is not for lawyers concerned with human rights to acquiesce in or place an imprimatur on such authoritarianism, which facilitates persistent and severe violations of human rights. The presence of a liberal constitution does not immunize a state from authoritarian takeovers, which may produce gross violations of human rights, as in Argentina, but, to the extent that such a constitution reflects the political culture of the country, it is possible to hope for a return to democratic rule, as was indeed the case in Argentina in December 1983. (In contrast, Algeria remains mired in authoritarian rule.)

Carty's strictures regarding Western criticism of the lack of political rights in many Third World countries are particularly unconvincing; such rights are incorporated in the International Covenant on Civil and Political Rights, and it is rather late in the day to argue that criticism of a state's human rights violations is impermissible intervention. (His assertion that one-party states are permitted by the Covenant is questionable.) Carty is correct in stressing the gap between the liberal democratic rhetoric of human rights lawyers and the realities of political life in many Third World countries; nevertheless, democratization is the most certain means of terminating gross violations of human rights, rather than the amorphous alternative anthropological and sociological framework that he proposes.

Noreen Burrows, in "International Law and Human Rights: The Case of Women's Rights," contends that much recent international legislation pertaining to women's rights has been one-sidedly focused on eliminating discrimination and facilitating female entry into and participation in traditionally male-dominated spheres of life, and has not sufficiently taken into account the different functions performed by women, i.e., reproduction, child care, housework and subsistence agriculture in many parts of the world. Greater recognition must be paid to the woman's role in the family and household, the unequal burdens of which necessitate acknowledgment of specific women's rights. Such rights are not inconsistent with the antidiscrim-
ination approach, given that certain spheres of life, undervalued by men, will still be occupied by women.

As with international law in general, enforceability is a serious problem for international human rights provisions regarding women. Implementation of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, like that of the International Covenant on Economic, Social and Cultural Rights, is progressive; even worse, international human rights instruments often enjoy only weak enforcement mechanisms, i.e., reporting requirements and/or complaints by one state against another. The 1979 Convention only provides for reports; the strongest mechanism, permitting complaints against a state by its nationals, is not utilized.

Burrows's thesis that international law has not recognized the need for "women's rights," as opposed to simply prohibiting discrimination, is overstated and is contradicted by her references to provisions of the 1979 Convention guaranteeing maternity rights, e.g., rights to maternity leave and to special protection for pregnant women in dangerous work. Nevertheless, this criticism is substantially justified, although certain aspects of the problem may not be amenable to legislative action, i.e., legislation mandating greater male participation in child care and housework is unrealistic and inappropriate. (Of course, inequitable sharing of such duties could be deemed a ground for divorce in states lacking no-fault divorce.) Burrows is quite correct in asserting the need for stronger enforcement mechanisms, but in a world of nation-states jealous of their sovereignty, the obstacles to achieving this are great, albeit not insurmountable with regard to every state.

In chapter 6, "The Right to Reproduce," Sheila McLean argues for recognition of the right to reproduce, the core of which is the individual's "liberty to make free choices about whether or not to reproduce" (p. 101). However, this core is not absolute insofar as states may legitimately restrict abortion to protect the lives of viable fetuses. Tracing the historical evolution of the right to reproduce, she points out, paradoxically, that limited recognition of this right, i.e., the legalization of birth control, proceeded hand in hand with its violation on a massive scale, i.e., widespread involuntary sterilization of the feeble-minded, mentally ill and mentally retarded in the United States, under the influence of the eugenics movement and with the blessing of the U.S. Supreme Court in its infamous decision in Buck v. Bell.1 Although involuntary sterilization on this scale has fallen into disfavor since World War II, U.S. case law has not gone so far as absolutely prohibiting involuntary sterilization of mentally defective individuals, despite the clear recognition of the right to reproduce in abortion and birth control cases.

This reviewer does not take exception to McLean's assertion of a right to reproduce, but her definition of the core of the right should be stated in a somewhat narrower and more qualified fashion, considering that she does not believe that it is illegitimate for the state to restrict abortion where the fetus is viable. Moreover, an absolute prohibition of involuntary sterilization

1 274 U.S. 206 (1927).
would not be a desirable or humane public policy; rigorous judicial control, both procedurally and substantively, will preclude a return to the "bad old days" of *Buck v. Bell*.

Professor Campbell's chapter on "The Rights of the Mentally Ill" makes the interesting counterlibertarian argument that civil commitment of the mentally ill on the ground of danger to others (police power) is discriminatory insofar as dangerous individuals who are not mentally ill and not charged with a crime are not similarly subject to detention, with the limited exception of quarantines. Adopting an avoidable suffering model of human rights, he expresses greater sympathy for *parens patriae* commitment (danger to self). Such detention is consistent with the rights of the mentally ill, in contrast to police power commitment, which is pursuant to the public safety. However, he concedes that paternalistic commitment on welfare grounds may be abused, and he proposes that nonvoluntary treatment in cases of *parens patriae* commitment be permitted only for the relief of "extreme avoidable suffering" (p. 145). Relief of suffering should be given priority over self-determination in appropriate cases.

Campbell's thought-provoking analysis is not persuasive with regard to its opposition to police power commitment as discriminatory, to the extent that such commitment is predicated on overt acts manifesting a very real danger to others, and is accompanied by rigorous procedural safeguards. His "avoidance of suffering model" is more convincing and is a welcome antidote to the excessive libertarianism that characterizes much of the legal writing on the subject. No doubt, some will consider talk of a "right to be treated against one's will" (p. 142) to be newspeak, but we see on our streets every day the tragic results of excessive libertarianism in this area. Campbell's model is not inconsistent with procedural due process or, in some cases, tightening up criteria for involuntary treatment. He correctly views human rights as entailing "positive duties of states to provide for the welfare of their citizens" (p. 144).

Sheila McLean, in "The Right to Consent to Medical Treatment," chapter 8, argues that requiring informed consent as a prerequisite to medical treatment logically flows from the right of self-determination and personal autonomy. Subject to certain exceptions, it is not disputed that therapeutic procedures require the consent of the affected patient, but whether such consent must be preceded by reasonable disclosure has been the subject of lively controversy in the medical and legal communities. McLean contends that, without disclosure, consent is morally and legally dubious, as such consent is not an exercise of real choice. She argues that disclosure should encompass all known risks and potential benefits, being limited neither to such disclosure as is customary, nor to what a reasonable patient would expect, i.e., "material" risks. According to this point of view, the landmark case, *Canterbury v. Spence*, did not go far enough insomuch as it did not require full disclosure. Courts in other common law countries have been much more deferential to physicians, rejecting the concept; the common

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2 414 F.2d 772 (D.C. Cir. 1972).
trend toward treating cases alleging lack of consent as negligence actions has made it more difficult for plaintiffs to prevail in this type of case.

Consent to medical treatment should certainly be preceded by disclosure, but the full disclosure standard proposed by McLean would be impracticable, given the plethora of hypothetical risks in any medical procedure. The *Canterbury v. Spence* standard of requiring disclosure of risks that a reasonable patient would wish to be informed of is more reasonable and is thus to be preferred. McLean does not discuss the “therapeutic privilege” exception to informed consent, which permits such disclosure to be omitted where it is likely to have a detrimental effect on the patient’s health; in some cases, nondisclosure might be appropriate as necessary to prevent the patient from acting irrationally to the detriment of his or her health. Also, it is not clear that a patient should not be allowed explicitly to waive informed consent.

“The Right of Public Assembly and Procession” under British law is discussed in chapter 9 by Jim Murdoch. He convincingly argues that the absence in the United Kingdom of a written constitution places such rights on a far weaker footing than in countries where such rights are enshrined as part of the supreme law of the land. The lack of a bill of rights has resulted in insufficient judicial sensitivity to human rights; in this context, public order is given substantially greater weight than the right to public protest, and the balance is almost always struck in favor of public order or convenience. Murdoch does not argue that the right of public protest should be absolute, but he points out that U.S. cases evince greater concern than in the United Kingdom for protecting the rights of public assembly and procession, making the scales more evenly balanced. While the British judiciary has been somewhat more sympathetic to public processions, given that they can be viewed as consistent with the right of passage on the streets, statutes and local bylaws have restricted this right. The “heckler’s veto” can put the organizers of an assembly or procession in the dock for breach of the peace, notwithstanding their intentions—certainly a deterrent to controversial demonstrations. More attention to practice would no doubt make the picture less bleak, but Murdoch is right in arguing that human rights should not be left to the mercy of the local authorities, or a majority of Parliament, or even the courts, insofar as they have created common law crimes impinging on the right to public protest.

In “Human Rights and the Criminal Process,” Gerry Maher argues that in the United Kingdom, debate regarding the criminal process has been impoverished by a lack of reference to human rights, a consequence of utilitarian and positivist views that are almost exclusively concerned with efficiency, i.e., accuracy of fact-finding.

As an example of this attitude, Maher cites the Thomson Committee on Scottish criminal procedure, which recommended that the police be empowered to detain individuals for up to 6 hours for questioning without having to arrest and charge them formally, as opposed to the widely ignored law at the time, which required that arrested individuals be charged simultaneously. Public ignorance benefited the police insofar as individuals who had not been formally arrested and charged stayed in police custody; the
committee recommended legalizing this practice without giving adequate consideration to the right to liberty.

Another example involves the discussion of the right to silence contained in the report of the 1981 Royal Commission on Criminal Procedure in England and Wales, which recommended against restriction of the right on purely utilitarian grounds, i.e., to avoid an increase in false confessions. Future utilitarians may come to different conclusions regarding this right, which is more strongly supported by a human rights rationale.

Maher argues that the human rights approach is preferable to ad hoc balancing; the criminal justice system possesses the awesome power to deprive an individual of his liberty or even his life, and so human rights have a very important role to play in the criminal process.

Maher's critique of utilitarian, instrumentalist views of the criminal process is incisive and very timely, given the current popularity of such modes of thought, which can be said to underlie opposition to the exclusionary rule. Although this book was published in 1986, Maher's essay does not mention the Police and Criminal Evidence Act of 1984, a codification of the law of arrest, search and interrogation in England and Wales that, inter alia, provides for detention without charge for up to 96 hours, and for incommunicado detention under certain circumstances. It would be helpful if Maher had compared British criminal procedure with that of a jurisdiction that takes a less utilitarian and more human rights-oriented approach.

Elspeth Attwooll, in chapter 11, “The Right to Be a Member of a Trade Union,” asserts that the core of the right to trade union membership is “joining and continuing to belong to any combination of any type in support of economic interests held in common with other types of workers” (p. 226). Essential concomitant rights would include the right to withdraw labor, and the right to engage in political activity in support of common economic interests. Of course, recognition of this right presupposes a right to establish trade unions as well as autonomy for such organizations.

Attwooll strongly emphasizes the latter, criticizing reforms enacted by the Conservative Government that, inter alia, require that secret balloting be used in union elections, strike calls and referendums regarding political funds. In a similar vein, she also denies a right not to join trade unions, likening them to professional membership organizations in which it is necessary to practice the profession. Attwooll provides discussions of the evolution of trade union rights under British law, and ILO case law relating to such rights.

Attwooll gives too much weight to the rights of trade unions and too little to those of union members and nonunion workers. The analogy to professional organizations is inapt because such quasi-public organizations regulate their members and are encharged, by law, with the responsibility of denying entry into the profession to those who are not deemed qualified. To require accountability of union leaders to their rank and file does not necessarily impinge upon trade union rights. Of course, restrictions on union autonomy to assure “democratization” may be so unreasonable as to render such objectives pretextual.
A few general criticisms of this book can be made. First, some of the chapters pay little or no attention to international human rights law, and thus ignore relevant case law of the European Commission on Human Rights and the European Court of Human Rights. Second, the concept of the core, one of the themes of the book, is not fully developed or always carefully applied. On a less important note, it would have been useful to provide the customary terse biographical note on each contributor and to indicate the date the papers were prepared; in at least two cases, an important pre-1986 development was not referred to in the text.

Nevertheless, notwithstanding the above caveats, this book is a valuable addition to the literature on human rights, discussing relatively obscure rights, e.g., the right to consent to treatment; and if it is not always persuasive, then, at the very least, it is provocative and stimulating. An American reader cannot fail to be struck by a theme found in many of the essays: U.S. case law evinces greater respect for human rights than UK case law, presumably because of the American tradition of human rights as fundamental norms, rather than as liberties that can be abridged by a majority of the legislature. It is to be hoped that this book will stimulate interest in the adoption of a bill of rights in the United Kingdom; that would be a fitting event to mark the tercentenary of the Glorious Revolution.

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This collection of essays, edited by two Dutch legal scholars from the Europa Institut of the University of Utrecht, concerns the negotiating process, outcome and legal implications of the 1980–1983 Madrid follow-up meeting to the Conference on Security and Co-operation in Europe, which culminated in the 1975 Helsinki Final Act. The nine essays, written by Dutch scholars and diplomats, focus on aspects of the meeting relating to human rights and humanitarian concerns. The volume results from an initiative of the Helsinki Group of the Netherlands Committee of Lawyers for Human Rights, the Dutch branch of the Geneva-based International Commission of Jurists. It contains much useful information not easily available elsewhere and provides the American reader with a Western European perspective on human rights and the Helsinki Accords. It is essential reading for all interested in the Helsinki process.

The editors note that the Madrid meeting "disclosed signs of some development and progress" in the area of human rights and cite new commitments on human rights and in the humanitarian field in the Concluding Document. Later meetings, in Ottawa in 1985 and Bern in 1986, concerning human rights and human contacts in the context of the Helsinki process,
have not, unfortunately, given reason for continued optimism. However, the recent successful conclusion of the Stockholm Conference on Confidence and Security-building Measures and Disarmament in Europe augurs well for a reduction of international tensions and may create a better climate for progress in human rights and humanitarian concerns. Considering the international situation at the time of the Madrid meeting—the invasion of Afghanistan, the declaration of martial law in Poland and the shooting down of the Korean airliner—it is remarkable that a Concluding Document was agreed on at all.

Thirty-three European nations and the United States and Canada signed, in Helsinki in 1975, the Final Act on Security and Co-operation in Europe. It is not a treaty, but a political document dealing particularly with European security and cooperation in humanitarian and other fields. Although most of the attention focused on the Helsinki process has related to human rights, the provisions on security and cooperation in other areas are also of great importance. It was decided at Helsinki to have follow-up meetings among the signatories to permit an ongoing exchange of views on the implementation of the Final Act. The first meeting was held in Belgrade in 1977–1978 and led to no substantial results. The Madrid meeting, which lasted from September 1980 to September 1983, was the second follow-up meeting and equaled in length the original meeting, which had led to the Final Act.

The first four chapters of this volume treat general aspects of the Madrid meeting and East-West relations concerning human rights. The next five chapters are case studies of particular aspects of human rights within the Helsinki context: trade union freedom in socialist states, the right to work in East and West, working conditions of journalists in Eastern Europe, the jamming of foreign radio broadcasts and the boycott of the 1980 Moscow Olympic Games following the invasion of Afghanistan. Annexes include the Concluding Document of Madrid, a number of proposals submitted at Madrid on human rights and humanitarian matters, a 1950 UN General Assembly resolution on interference with radio signals and the agreement relating to cooperation between sporting organizations in the USSR and the Netherlands.

The first chapter, on “Détente and the Concluding Document of Madrid” by Arie Bloed, points out the divergent Eastern and Western conceptions of détente and the increasing realization by Westerners that their “idealistic view” of détente does not fit in with the Eastern conception or with reality. Bloed provides a short summary of the main aspects of the Concluding Document. The criticisms of human rights in the Soviet Union and in Eastern Europe by Western delegations, voiced frequently during the Madrid meeting, are not reflected in the Concluding Document, but disillusionment with the Helsinki process is evidenced by clauses voicing concern over failures of implementation of the Final Act. The Document notes, however, the significance of human rights and stresses the determination of the signatory states to promote and encourage human rights and fundamental freedoms. New elements in the Document are the inclusion of provisions on trade union freedoms, free access to embassies and consulates, and some improved
agreements on family reunifications and marriages between citizens of different states. The inclusion of the provision on trade union freedoms is exceptionally significant in view of the situation in Poland. A provision strongly desired by the West concerning the right to form Helsinki monitoring groups was not included because of Eastern European opposition. The ongoing nature of the Helsinki process was reaffirmed by the decision at Madrid to organize the Ottawa conference on human rights and fundamental freedoms in 1985, mentioned above, and a meeting of experts on human contacts in Bern in 1986. Although it does not relate directly to human rights, the decision taken at Madrid to organize the Stockholm Conference on Security in Europe, now successfully concluded after lengthy negotiations, is of importance in the context of the creation of a more positive climate between East and West—necessary for any substantial progress in the humanitarian field. Finally, the participating states agreed at Madrid that the third follow-up meeting should begin in Vienna in late 1986.

Harm J. Hazewinkel of the Dutch Ministry of Foreign Affairs prepared the second chapter on “The Madrid Meeting 1980–83: An Eyewitness Account.” He refers to the Madrid meeting as “one of the more remarkable international meetings of the second half of the twentieth century,” not because of the results but because of the way the results were attained. Ample evidence is provided of the excruciatingly slow negotiations, constantly complicated by international events. The Soviet invasion of Afghanistan not long before set the unfavorable stage for the meeting. Persons interested in conference diplomacy will find this detailed account of the lengthy negotiations useful. One can only sympathize with the delegates, roasting in the hot weather of Spain and enduring mutual recriminations, successive international crises including the Polish situation, arrests of dissidents in the USSR and the downing of the Korean airliner, and the inordinately long negotiations. The West’s insistence that the Final Document contain references to human rights and Eastern European efforts to avoid such references stretched out the proceedings. In the end, neither bloc achieved all of its objectives, but the previously cited results of the meeting ensured that the Helsinki process would, at a minimum, continue to involve exchanges on human rights and human contacts.

The chapter on “Some Aspects of the Socialist View of Human Rights” by Arie Bloed and Fried van Hoof of the Europa Instituut provides a useful summary of the divergent views of human rights evidenced at every stage of the Helsinki process. The term “socialist” in the title refers only to the socialist countries of Eastern Europe and the Soviet Union. Extensive references to socialist literature in German and Russian authenticate this essay on Soviet views.

Chapter 4 on “Human Rights and Non-Intervention” by Arie Bloed and Pieter van Dijk mainly duplicates treatment of the subject developed elsewhere, particularly by Louis Henkin.¹ Bloed and van Dijk find that the Ma-

drid meeting did not lead to any breakthrough in the continuing controversy between East and West over the relationship between human rights and nonintervention. Both sides stuck to their traditional conceptions. Slight movement could be detected in the Eastern view since the USSR showed some flexibility regarding exceptions to nonintervention that the East was willing to accept. The Soviet view has been that only gross and massive violations of human rights such as apartheid, fascism, colonialism, genocide and racial discrimination may be discussed at the international level. At Madrid, "unemployment" was added to the list. "Although this was clearly introduced to legitimize the Eastern attacks on the West in this field, it showed at the same time that the list of Eastern exceptions to the non-intervention principle is not limited" (p. 71). The authors make the thoughtful suggestion that a reporting system on implementation of human rights in the participating states be adopted as part of the Helsinki process. Such a system would be similar to those set up under international treaties such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination and procedures for supervision of international labor conventions. Bringing up concrete cases of alleged human rights violations in the Helsinki process is not useful, according to Bloed and van Dijk. It resembles procedures for interstate complaints provided for in some international treaties where there has been explicit acceptance of the procedure by signatory states. They point out that "the socialist States have always taken a very reserved attitude towards complaint procedures. It should definitely not be assumed, therefore, that a similar procedure is implicitly provided for in the Fourth Basket of the Final Act" (p. 73). But Eastern states have complied with obligations for reporting required by international treaties that they have accepted. The authors consider that the section of the Helsinki Final Act providing for "a thorough exchange of views on the implementation of the provisions" can be analogized to the reporting procedures of other international instruments. They suggest that future follow-up meetings consider the possibility of procedural arrangements for the presentation of reports on the implementation of the human rights provisions. Such reports would be general statements on the overall implementation of the Final Act. The formalization of such a procedure would have a favorable effect on the overall climate during future negotiations and "in this way the participants would at any event undoubtedly remain within the scope of international law and the commitments as laid down in the Final Act" (pp. 74–75). The approach of some Western delegations, which consists of lengthy accusations of violations of the human rights of specific individuals by the socialist countries, is extremely irritating to Eastern countries and does not advance human rights, according to Bloed and van Dijk.

Although it is clear that such violations cannot in any way be justified and therefore are not to be tolerated, one may still wonder whether the approach chosen by some delegations in Belgrade and Madrid is so efficient after all, at least if one assumes that it really was prompted by humanitarian and not by general political motives [p. 75].
Standing up publicly for individual subjects of other states, "even though this may result in an improvement of their personal conditions, need not by any means have a positive effect on the situation of the population as such in the country concerned" (id.).

The authors' view that "silent diplomacy" is a more effective method of dealing with human rights violations in Eastern countries under the Helsinki process is highly controversial. To some observers, such a suggestion would deprive the Helsinki process of its most important value as an international forum where individual violations may be publicly aired in the presence of Eastern European delegations with full media attention. And, certainly, individual dissidents who have been aided by public criticism of human rights violations will not agree with the authors. Nevertheless, the suggestion of a more formalized reporting system under the Helsinki process, as a method of replacing the polemic nature of most of the human rights exchanges at Helsinki conferences, deserves serious consideration. Perhaps, the time has arrived for a different approach.

The most original essays are the chapters by Ger P. van den Berg, senior lecturer in East European law at the University of Leiden, on "Trade Union Freedom in Socialist States and the Madrid Meeting; with Special Reference to the Soviet Union," and "The Right to Work in East and West" by van den Berg and René M. A. Guldenmund. This information is not easily obtainable elsewhere. The chapter on trade union freedom in socialist states contains detailed analyses of Soviet legislation on trade unions, but, more interestingly, it also reports on the diverse views of Soviet legal scholars concerning trade union freedom in the socialist system. This carefully documented, technical study is of particular interest to all interested in labor and Eastern Europe.

The chapter on "The Right to Work in East and West" is the only chapter that deals with obligations of the West under the Helsinki Accords. Eastern Europeans have frequently criticized the West for its failure to implement the right to work and cite extensive unemployment in the West as a violation of human rights. The authors undertake an analysis of the right to work as a human right, including a survey of international provisions, consideration of the content and legal nature of the right to work, legal implications of the right, beneficiaries and addressees of the right and the obligations implied in the right. They note that given

the great importance Western delegations attached to the human rights issue, the discussions on the right to work were definitely not a shining example of a sound participation of Western States in the legal debate. Instead of a well prepared, clarifying discussion on the basis of a clear-cut Western legal concept of the right to work, the issue led to a puny, confused argument of embarrassing insignificance [p. 114].

Replies of Western delegations to accusations that the right to work was violated in the West were "rather superficial and unconvincing" (id.). West-

2 The "right to work" in this context does not, of course, mean the same as the narrow sense in which the term is normally used in the United States. It refers internationally to the right to freely chosen employment.
ern countries do not take the right to work seriously as a human right or as a standard for internal policy. The authors maintain that the Western approach does not accord with international obligations that a number of Western countries have accepted, and that Western states have not yet adopted an integrated approach to human rights.

The remaining chapters on working conditions for journalists, the jamming of foreign radio broadcasts and the boycott of the 1980 Moscow Olympic Games are of less interest since the information contained in them is more easily available elsewhere. The chapter on working conditions for journalists draws extensively, for example, on the semiannual reports of the U.S. State Department on the implementation of the Final Act.

A number of important events concerned with human rights and the Helsinki process have taken place since the 1983 Madrid meeting reported on in this volume, in particular, the two meetings in Ottawa and Bern and the successfully concluded Stockholm Conference on Security in Europe. Nevertheless, the essays in this volume are not dated, since they concern ongoing problems that will continue to arise in the Helsinki process. The student of that process will be pleased to find a volume that reports on the results of the second review meeting and includes valuable case studies. The New York-based Helsinki Watch Committee, the U.S. State Department and the U.S. Commission on Security and Cooperation in Europe provide valuable occasional information for persons interested in the Helsinki Accords, but the bringing together of information in this single volume is an important and welcome addition to the literature on the Helsinki process and human rights. It is to be hoped that the Dutch group of human rights lawyers will provide us with a future volume on events subsequent to the Madrid meeting from the Western European perspective.

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Israel Yearbook on Human Rights. Volume 15, 1985. Edited by Yoram Dinstein. Published under the auspices of the Faculty of Law, Tel Aviv University. Pp. 311.

Volume 15 is unique in the series because the major portion of its text is devoted to reproducing the papers presented at the Conference on "Affirmative Action" (Equality, Discrimination and Preferential Treatment) held at Tel Aviv University in December of 1984 (pp. 9–112). A distinguished group of scholars from the United States, England, Australia and Israel deal with some of the controversial aspects of affirmative action, as this legal and social concept is implemented and enforced within the legal systems of these states, which in turn has universal ramifications. In numerous instances there is a direct application to international human rights protection. Thus, Professor Yoram Dinstein begins the symposium by advancing the position that the prohibition against discrimination in the exercise of human rights is an
integral part of customary international law (p. 9). Moreover, the UN Charter, in Articles 1(3), 13(1), 55(c) and 76(c), provides that human rights and fundamental freedoms must be respected without distinction as to race, sex, language or religion. Several of the contributors review the series of UN conventions, particularly the Covenant on Civil and Political Rights, that prohibit discrimination and thereby serve as the foundation for the subsequent application of affirmative action. Special attention is directed to the International Convention on the Elimination of All Forms of Racial Discrimination. The total effect of the series of regional and international human rights conventions is that the prohibition against discrimination emerges as a general, procedural principle that cuts across all substantive human rights and is currently accepted as positive law.

This norm of nondiscrimination is carried forward by Professor Miriam Benson in her analysis of Equal Pay for Work of Equal Value (pp. 66–87), with reliance on the binding force of international treaties. Thus, a review of the applicable instruments, with particular emphasis on International Labour Organisation (ILO) Conventions, reveals the universal application of the norm, especially by the Court of Justice of the European Communities. In the process of enunciating the Community law of nondiscrimination, recourse has been made by the Court to applicable ILO Conventions and also to the European Social Charter, as can be seen from its expanding corpus of case law. Accordingly, Community law has become a significant source of remedies that have been invoked by individual complainants.

The objectivity of the volume is assured by Professor Farrokh Jhabvala, who presents an in-depth analysis of The International Covenant on Civil and Political Rights as a Vehicle for the Global Promotion and Protection of Human Rights (pp. 184–203). Despite his "affirmative-sounding" title, negative conclusions are advanced. He contends that substantive human rights codified in the series of conventions have yet to be implemented by states parties. Rather, assertions of state sovereignty have prevented the establishment of universal human rights norms. In fact, the original intentions of the treaty drafters, i.e., to establish a uniform floor of international human rights standards, have not been realized by the efforts of the United Nations. So extreme is this variation in the degree of respect shown toward human rights norms by UN members—and so ineffective have those human rights codified in the Civil and Political Covenant proved to be when invoked by individuals—that Jhabvala adopts an even more extreme position when he concludes that these human rights treaties "not being truly universal or binding . . . achieve this [goal of standard setting] no differently from declarations of the UN General Assembly" (p. 201). Indeed, he maintains they exert no greater impact than declarations of the UN General Assembly—a position not shared by this reviewer. Because of the socioeconomic contexts of the states parties in which human rights must function, the majority of UN members are unable to implement these Western-oriented guarantees.

The remedy, therefore, is to place greater emphasis on increasing the effectiveness of the Human Rights Committee and, simultaneously, to improve the monitoring system, pursuant to the Covenant on Economic, Social
and Cultural Rights. Within this context, the original distinctions between civil and political rights on the one hand, and economic guarantees on the other, must be minimized and a uniform system of implementation perfected by the Human Rights Committee, accompanied by an expanded role of assistance from UN organs. Hence, Jhabvala believes that resources must be directed toward a more rigorous enforcement of existing conventions rather than drafting additional, specialized instruments.

The articles section of the Yearbook concludes from a different perspective, since Professor Leo Gross presents Some Observations on the United Nations Draft Code of Offences Against the Peace and Security of Mankind (pp. 224–73), an area in need of additional codification. The application of international criminal liability against individuals, and eventually against governments, continues to grow in importance. Beyond question, there is a need to define and codify those offenses (e.g., apartheid, colonialism, damage to the human environment and international terrorism, including violence against diplomatic agents) that constitute a continuing threat to the peace and security of mankind.

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This volume forms part of the “OPUS” series from Oxford University Press, whose purpose is to “provide concise, original, and authoritative introductions to a wide range of subjects in the humanities and sciences. [Books in the series] are written by experts for the general reader as well as for students.” Those who seek an erudite, technical treatise will be disappointed by Lawful Rights, but it does succeed well in its less profound goal of offering a general introduction to human rights law to the nonspecialist. The book begins with a simple allegory of a mythical primitive society and examines how such a society gradually develops a system of government and rights as it gains in social complexity. Part I of the book, “What Lies Behind the Code,” follows this development through contemporary notions of sovereignty and public international law. Part II, “How the Code was Made, and How It Works,” describes the development of international human rights law, including the establishment of principles such as the norm of nondiscrimination and the possibility of derogating from rights in states of emergency; it concludes with a brief survey of national and international procedures to enforce human rights norms. Part III, “What the Code Says,” summarizes the substantive rights protected under the major international human rights texts, while a useful appendix contains excerpts from nine global or regional human rights instruments.

Sieghart emphasizes that Lawful Rights is about what he terms the “code” of international human rights law rather than about the philosophy of human
rights per se (e.g., p. x), but he also strives to place the substance of that law in the everyday language of political science and morality.

[The international code of human rights has a clear bias] in favour of the kind of society that displays a specific coherent set of civilized values: tolerance of diversity; plurality of belief, ideas, and culture; reasonableness and rationality; the peaceable resolution of conflicts under the rule of law; and, above all, respect for the dignity, autonomy, and integrity of every single one of its individual members [p. 42].

The prose is informal and generally effective in conveying to the reader the broad outlines of what international human rights law contains and how it should work. There is, for example, a good rebuttal of the common theoretical argument that torture may be justified in order to prevent the explosion of a terrorist bomb (pp. 112–14)—although Sieghart neglects to note another telling point, i.e., that not a single specific example of such a “justification” for torture has ever been put forward by any government.

While it is inappropriate to subject an introductory work such as this to an overly detailed or academic critique, a few observations are nevertheless in order. The book does adopt a particularly Western, if not to say English, perspective throughout, as in its description of the requirements of the “rule of law” (pp. 88–89); its distinct preference for “human” rights over “peoples’” rights (pp. 161–66); and its almost condescending description of the “special soil” and “well-established roots” necessary for democracy (p. 155). There is some confusion in equating the effectiveness of international remedies to protect human rights with the issuance of legal or legalistic opinions by an international body, which results in a rather unfair summary dismissal of the work of the UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities (see generally pp. 95–104). The definition of the “code” itself excludes such basic texts as the Conventions against racial discrimination and discrimination against women, although inclusion of the European Social Charter is welcome.

In general, however, the book’s analysis is sound and most of its opinions well taken, for example, in its emphasis on the objective nature of any inquiry into whether or not a human rights standard has been met (pp. 73–75); the need to interpret narrowly a government’s discretion to restrict certain rights; and the necessity of actually reading the legal texts that set forth those standards (p. 107)—this last requirement is a task dispensed with by too many lawyers and politicians.

Sieghart’s earlier book on The International Law of Human Rights remains an important tool for the international legal scholar and human rights practitioner; Lawful Rights is a valuable addition to the literature aimed at the more general or less interested reader. In a time when majority rule seems to lead as often to repression of dissenters as it does to a more generous

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1 See, e.g., pp. 114–15 (freedom of movement) and pp. 140–43 (free exchange of information and ideas).

expression of the will of the people, one might be satisfied if the only message remembered from *Lawful Rights* is that of its closing paragraphs:

In the last analysis, all human rights exist for the benefit of individuals who are weak, and who need protection from oppression, persecution, exploitation, and deprivation by those who are strong. If their weakness derives (as it usually does) from some difference which distinguishes them from the dominant group they will see themselves, and be seen by their oppressors, as a minority, regardless of how many of them there are.

In that sense, therefore, all human rights exist for the protection of minorities. And that thought may provide a fitting conclusion to this book [p. 168].

And to this review.

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With the emergence of the United Nations as a world forum for debating differing conceptions of fundamental values, the concept of human rights has come to eclipse the prior normative paradigms of Western legal and political discourse.\(^1\) From one perspective, Western efforts to focus the attention of international legal and political forums on human rights can be viewed as a highly leveraged investment strategy.\(^2\) Exposing the human rights violations of a caricatured Eastern expansionist menace represents a relatively cost-free rhetorical investment in the West's own security. At the same time, since governmental suppression of dissent is viewed as ultimately threatening the stability of the West's Third World client states, policing the human rights abuses of those states helps secure a more stable environment for Western investments. There is a litmus test for the proposition that the West's focus on human rights in the expansionist East and the as yet unannexed Third World has as much to do with interest as with values. The proof is the West's continued exclusion of the Fourth World, the indigenous tribal peoples of the Americas, Australia and New Zealand, from full participation in the evolving discourse of international human rights law. The

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\(^2\) See generally the varied set of readings contained in *Social Change: The Colonial Situation* (I. Wallerstein ed. 1966) on the impact of Western colonization on Third World nations.
fundamental values articulated in the new emphasis on human rights have so far not been permitted to challenge the order of interests maintained by the imperialist Western powers in the homelands of those peoples that the West has not yet decolonized.\(^3\)

Despite the efforts of Western governments to contain application of this new discourse of human rights to the East and decolonized Third World, Western tribal nations have increasingly demanded access to international forums to expose and protest the abuses of their colonial masters. Not only do such activities speak to contemporary Western tribalism’s renascence and resilience, they also directly challenge long-held European-derived legal conceptions on tribal status and rights that have dominated international theory and practice for half a millennium.

These European conceptions of Indian status and rights derive from the Doctrine of Discovery. That doctrine, best articulated by Chief Justice Marshall in 1823, was used to draw two inferences. First, the discovering European nation possessed “the sole right of acquiring the soil from the natives . . . a right with which no Europeans could interfere.” Second, “[t]hose relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.”\(^4\)

Those inferences have been tenaciously defended by the West to this date. Thus, Canada has asserted that “[i]nternational, American and Canadian law do not recognize treaties with North American Native People as international documents confirming the existence of these tribal societies as independent and sovereign States.”\(^5\) The controversy over that position has made itself felt in the United Nations. Chapter XI of the UN Charter, “Declaration Regarding Non-Self-Governing Territories,” provides that member states that have assumed responsibility for administering territories whose peoples have not yet attained a full measure of self-government must ensure just treatment of dependent peoples. Annual reporting to the United Nations of conditions in such territories is required. Belgium took the lead in arguing that chapter XI should be applied not only to overseas colonies or protectorates, but also to indigenous peoples within the boundaries of the member states themselves. Its position was opposed by Latin American and other states and essentially rejected by General Assembly Resolution 1541 in 1960.\(^6\)


\(^5\) Barsh, supra note 3, at 97.

Indigenous peoples have begun to challenge these Eurocentric conceptions of their international status. Within the United Nations itself, perhaps the most significant event in the movement was the conference sponsored by the UN Non-Governmental Organizations and held at Geneva in 1977 on Discrimination against Indigenous Peoples of the Americas. It adopted a Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere (reprinted in the appendix, p. 121). It called for the recognition of indigenous nations meeting the requirements of nationhood as nations and subjects of international law. It also called for a more qualified recognition of other indigenous groups. Another conference in 1981 on Indigenous Peoples and the Land was attended by indigenous representatives from five continents. Since that time a working group has met annually, its activities being directed towards issues of self-determination, land and other rights defined in UN declarations and covenants.

Indian Rights—Human Rights: Handbook for Indians on International Human Rights Complaint Procedures, published by the Indian Law Resource Center in Washington, D.C., represents an important milestone in this struggle of Western indigenous peoples to express their vision of the fundamental values to be incorporated into international legal discourse. Designed as a step-by-step manual on international procedures for protecting human rights, it seeks to provide Indian people with the grammar and syntax of international human rights law.

The Handbook is a significant contribution to the broad international law reform movement of indigenous peoples. It represents an effort to encourage Indians to test the applicable extent of international human rights law in protecting their rights as tribal peoples. Designed to “help Indians make informed decisions about human rights procedures” (p. vi) in terms that nonlawyers can understand, Indian Rights—Human Rights carefully explains the basic facts about contemporary international human rights law, the most important human rights complaint procedures and how indigenous peoples might go about utilizing this material in order “to begin serious human rights work at the international level” (p. vii). Along with step-by-step instructions for preparing a formal complaint, the book’s appendix reprints the major human rights documents of international law, including the UN Charter articles on human rights, the international Human Rights Covenants and the human rights instruments adopted by international bodies such as the Organization of American States (OAS). In further fulfillment of their prefatory promise that for “most Indian victims of human rights violations, this handbook will be all that is needed” (id.), the editors at the Indian Law Resource Center have also provided an address list of the major international human rights organizations.

Because the Handbook is written as a self-described manual for Indian leaders and individuals, the discussion on human rights law is short on jurisprudence and analysis, and long on explication and application. There are brief remarks on the “meaning” of human rights, short legal histories on the adoption of the important international human rights instruments and lightning-quick asides on the Realpolitik dimensions of human rights
law. For instance, in their introductory remarks on the limited protections offered by human rights procedures, the editors state that “those who successfully use the international human rights laws and procedures will not win court orders and international police action against an abusive government. Rather, the most that can usually be expected is public attention and political pressure against the government” (p. 5). While noting that publicity and pressure “ha[ve] often helped stop human rights violations” in the past, the editors warn that there is no “guarantee that human rights laws and procedures will resolve any particular human rights problem” (id.).

While the book pays careful attention to explaining the practical procedures for drafting a complaint that meets the formal requirements for communications to bodies such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) or the OAS Inter-American Commission on Human Rights, the Navajo grandfather who sits down with Indian Rights—Human Rights (or his Guatemalan brother who uses the Spanish version of the Handbook, Derechos Indios—Derechos Humanos) might be better served by a bit more information about those instances where human rights law, combined with publicity and pressure, helped stop human rights violations. While Indian Rights—Human Rights is careful to point out which countries are bound by which human rights instruments, and which complaint procedures might prove most useful as vehicles for Indian human rights concerns, very little is offered in the way of precedents and examples that inform the reader of past instances where human rights law has proven effective or ineffective in preventing or stopping abuses. If the life of the law is experience, then Indian Rights—Human Rights could have provided its users with a bit more life. We are told, for instance, that in a case involving the human rights of Indians in Canada, the UN Human Rights Committee issued a decision based upon a complaint filed under the Optional Protocol to the International Covenant on Civil and Political Rights (p. 38). The decision in the case helped persuade the Canadian Government to reform those laws that discriminated against Indian women (id.). That is all we are told, although it certainly would have provided the reader with a better context for understanding the import of this 1981 case, Lovelace v. Canada, had it been made clear that Canada was advised by the Committee that it had violated the Human Rights Covenants with respect to its treatment of Sandra Lovelace, an Indian woman who protested a provision of Canada’s Indian Act that denied Indian status and resultant benefits to an Indian woman who married a non-Indian. Indian men who married non-Indians were not similarly treated. Other instances where indigenous peoples have used or are currently using international human rights procedures to publicize their complaints and pressure their colonial governments would have added immeasurably to the utility of the Handbook.

But this is only a small fault in a purposefully small but important book. Indian Rights—Human Rights achieves what it sets out to do: inform Indian

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people of an important body of developing law that may be of use in securing their own goals (even their own survival) as a people. Just as important, the book serves as a useful primer on how Indians can go about contributing to that development process. It is a contribution that the West has sought to block now for half a millennium, but one that must be rapidly incorporated into human rights discourse if the West's indigenous nations are to survive into the next millennium.

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If the 100 years that started in 1900 are the century of the common man, as they have been described, they are also tragically, as Heinrich Böll has observed, the century of the refugee. Although refugees have been known throughout history, the wars, revolutions, repression and unmitigated disasters since the beginning of this century have driven more than 100 million people from their homes and countries in every continent. Their plight has become a daily newspaper story. "When large numbers of refugees cross a border," a commentator has observed, "the international limelight too often fastens on the receiving countries; their actions are subjected to minutely critical scrutiny, while the sending countries, the real sources of the problem, remain happily in the shadows."¹

While the UN human rights agencies have been striving to achieve and to implement normative law to "prevent and eliminate conditions which precipitate the massive exodus which results . . . from human rights abuses," a body of international and municipal law has emerged over the past 60 years designed to establish and protect the rights of refugees in the receiving countries. It is this body of law dealing with the rights of refugees that Goodwin-Gill, Legal Advisor in the Office of the UN Commission for Refugees, has surveyed with "critical scrutiny," following in the wake of earlier works such as The International Protection of Refugees by Weis, The Status of Refugees in International Law (2 vols. 1966, 1972) by Grahl-Madsen and his own previous study, International Law and the Movement of Persons Between States (1978).

His stated purpose is "to show that refugees are a class known to and defined by general international law . . . that states are bound not to return refugees to territories where they may be persecuted . . . and that the international community . . . has the . . . legal standing to protect refugees." The international law that Goodwin-Gill has described is far more complex and much less universal than the principle asserted by Grotius that

¹ Martin, Large-Scale Migrations of Asylum Seekers, 76 AJIL 598, 599 (1982).
² 48 AJIL 193 (1954).
"those exiled or banished from their own country [have] the right of dwelling in a foreign country," and than Vattel's commentary that the earth was designed to feed its inhabitants; and he who is in want of everything is not obliged to starve, because all property is vested in others. . . . Extreme necessity revives the primitive communion, the abolition of which ought to deprive no person of the necessaries of life. . . . The same right belongs to individuals when a foreign nation refuses them a just assistance."

In a sense, the vast movement of millions of people between countries speaks to the demographic force of the Grotian-Vattelian concept. Thus, one sees in the last century the 1.2 million Greeks who were expelled from Turkey; the 1.5 million White Russians who fled the Soviet Union; the interchange of 14 million Hindus and Sikhs with 6 million Moslems between Pakistan and India; the flight of 650,000 Palestinian refugees from Israel; the pouring into the United States of 800,000 Cubans; the movement into Somalia and the Sudan of 1.2 million Ethiopians and into Pakistan and Iran of nearly 4.5 million Afghans; the approximately 1 million Vietnamese resettled in the United States, China, France and other countries; the estimated half million Salvadorans who have seeped into the United States through Mexico; and the hundreds of thousands of Banyarwanda Tutsis and Hutus in Uganda, Burundi and Rwanda who have fled into neighboring countries in Africa.

In this context, Goodwin-Gill has succinctly traced the international instruments that have provided the legal basis for defining the rights of refugees and that culminated in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. He also reviews the application of these instruments by the UN Commissioner for Refugees and the nations that have acceded to the Convention and Protocol. As Goodwin-Gill has detailed, the international legal framework for refugees has necessarily been built upon the foundations of national sovereignty and territorial supremacy and, as others have noted (Keely, Refugee Policy (1981)), in a European context following the First and Second World Wars.

Goodwin-Gill reviews the insistence by the states participating in the process upon "fairly restrictive criteria for identifying those who are to benefit from refugee status." What has emerged, interstitially and incrementally, has been both a broadened definition of refugees protected by international agreements and a more inclusive application of the agreement to those who are not strictly regarded as "statutory refugees." He notes that the statutory definition that a refugee is a person outside of the country of origin who is unable or unwilling to return there owing to a well-founded fear of being persecuted upon the ground of race, religion, nationality, social group or political opinion is "essentially individualistic." The determination of who is a refugee contemplates a "case by case examination of the subjective and objective elements." The work also includes a useful thumbnail summary

of the procedures available under municipal law in the major receiving
countries, including the United States.

Withal the protection afforded to refugees, Goodwin-Gill concludes that
"[r]ecent experience has . . . emphasized the inadequacy of the existing
legal framework to cope satisfactorily with refugee crises, particularly where
large numbers are involved." He points to the need, expressed in the proposal
by the special rapporteur of the UN Commission on Human Rights for a
"New International Humanitarian Order,"5 for an examination of the rela-
tionship between human rights and mass exoduses, and he favors the pro-
posals of the Federal Republic of Germany for the adoption of guidelines
to prevent "new flows."

Quoting Sadruddin Aga Khan, Goodwin-Gill observes that while making
a major contribution to an understanding of existing refugee law, "concen-
tration on these issues . . . may detract from that other and higher objective
which is the recognition for everyone of "the right to belong—or alternatively
to move in an orderly fashion to seek work, decent living conditions and
freedom from strife'".6

DAVID CARLINER
Of the District of Columbia Bar

International Law and the Superpowers: Normative Order in a Divided World. By
xiv, 202. Index. $30.

The fundamental thesis of this book is that there are, as the title indicates,
normative—if largely implicit—rules governing the interaction of the United
States and the Soviet Union that can be inferred from a careful analysis of
the behavior of the two superpowers in a variety of "crisis situations." The
cases chosen by the author to test this methodology involve the concept of
aggression as it relates to forcible extraterritorial interventions by the su-
perpowers.

Professor Dore's analysis suffers from a basic failure to distinguish between
the descriptive and the normative. In his words, "the major problem is the
extent to which it is possible to abstract rules from observing and analyzing
superpower conduct in trouble situations and crisis management" (p. 28).
The answer is that it is, of course, possible to abstract rules of the sort:
"when superpower A does X under Q circumstances, superpower B can be
expected to do Y." Such a rule is, however, purely descriptive. It reveals
nothing about what either superpower, or anyone else, believes is right, or
ought to be done or not done, in any given situation.

The author, however, fails to consider this distinction, and thus finds
himself in a conceptual blind alley of his own making. Having properly dis-
carded "case law" as a source for the content of the normative "rules" he
wishes to find, he is left with a "behaviorist" approach that is reduced, by

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his own admission, to extracting these rules purely by analyzing the superpowers' past behavior (pp. 25–29). But the only way such an analysis could be made to yield anything of normative significance would be forcibly to insert an "ought" in the final product, which would produce the empty conclusion that the superpowers ought to resolve "trouble situations" the way they always have in the past. In avoiding the trap of positing this conclusion as a normative rule of superpower behavior, Dore finds himself reduced to the descriptive observation—itself of questionable value—that "only such action will be taken by either power in a crisis situation as will be tolerated by the other power" (p. 37). How is this different from saying "either power will do anything it can get away with"? And once we say that, what happens to the search for a system of "normative" rules?

In this light, it is clear that the "norm of mutual noninterference in bloc affairs," which the book posits as the "fundamental principle of superpower coexistence" (p. 129), is not a "norm" at all in any meaningful legal sense, but simply describes a reality of power relations between the superpowers. Neither the United States nor the Soviet Union acknowledges, implicitly or explicitly, any particular normative obligation not to interfere in the other's "bloc" (a term with which Dore never quite comes to grips, a notable omission considering its importance to his argument); it is merely that each superpower recognizes that the risks of interfering, in most cases, outweigh the potential benefits. Where that risk-benefit calculation changes, as it did, for example, for NATO member Portugal in 1974 when Soviet-backed forces attempted to seize power and very nearly succeeded, this "fundamental principle" may be "violated" at will. President Ford, in a statement that Dore quotes, but whose profound implications for his own argument he ignores, said it best when asked about U.S. assistance to anti-Allende forces in Chile: "I am not going to pass judgment on whether it is permitted or authorized under international law. It is a recognized fact that, historically as well as presently, such actions are taken in the best interests of the countries involved" (pp. 73–74).

Superpower policymakers do not need to be told that threatening the other superpower's vital interests is dangerous; they need to know what the other superpower perceives its vital interests to be, what actions on their part will be seen as threats to those interests and what responses can be

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1 As a statement of history, this proposition is self-evident, as the superpowers have not gone to war; as a prediction, it is equivalent to saying that there will never be a war between the superpowers, obviously an overbroad and unsupported assertion.


3 The Conference on Security and Co-operation in Europe: Final Act, 73 DEP'T ST. BULL. 323 (1975), 14 ILM 1292 (1975), which is sometimes cited as codifying such a rule, is considerably more limited in scope than Dore's posited norm and is, in any event, by its own terms not legally binding.

4 How, for instance, would Dore's "bloc" approach apply to the current situation in Nicaragua? Is that country a wayward member of the U.S. "bloc" in which the Soviets have improperly interfered, thus giving the United States the "right" to take countermeasures? Or is it now a new member of the Soviet "bloc" in which any U.S. interference will be viewed as improper?
expected if such actions are taken. To begin to formulate meaningful answers to those questions requires a far more sophisticated analysis than Dore has provided here, taking into account a host of factors he neglects such as domestic political determinants; the balance of military power at the strategic, regional and local levels, and shifts in those balances over time; intra-alliance politics; ideological and cultural biases; and many others—including an analysis of those normative rules that really do influence superpower behavior, i.e., internal ones deriving from the basic imperatives of preserving and expanding power and influence on the world scene without undue risk of war.5

The author’s misplaced effort to force his essentially descriptive analysis into a normative framework, which requires him to generate “rules” that are formally reciprocal and neutral, produces some very distorted substantive propositions. For instance, while he presents a competent exegesis of the Soviet theory of peaceful coexistence, he fails to draw the conclusion his own description compels: that since “peaceful coexistence,” in Soviet terms, means nothing more or less than the eventual destruction of the capitalist order without (unnecessary) resort to violence, a “modus vivendi” between the socialist and capitalist systems is ex hypothesi impossible. According to the very Soviet theorist upon whom Dore most heavily relies, Grigorii Ivanovich Tunkin, at the root of relations between capitalist and socialist states lies the class struggle between the bourgeoisie, the dominant class in capitalism, and the proletariat, the dominant class in socialism. This struggle is irreconcilable and must end with the extinction of one of the two social orders—namely, capitalism—and its replacement by the other system—namely, socialism.6

To speak of a “modus vivendi” emerging from this struggle is a fundamental contradiction in terms and a distortion of Soviet legal and political thought. Even more troublesome is the manner in which the author continually equates U.S. and Soviet international political practice. Although he acknowledges once or twice (e.g., p. 75, with respect to the “Johnson Doctrine” and the “Brezhnev Doctrine”) the greater intolerance and repressiveness of Soviet behavior, he is constantly forced by the exigencies of his own theoretical framework to draw strained parallels between the actions of the two superpowers in “crisis situations.” There is something seriously wrong with an analytical approach that blandly lumps together the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1968, on the one hand, with U.S. actions in the Korean War and the Cuban missile crisis on the other, as examples of “the emerging law of interbloc reciprocity.” When Dore concludes on the basis of this type of analysis that “[i]ndividual member states of the existing blocs cannot voluntarily withdraw their membership or escape bloc jurisdiction over internal or external policies of theirs that are deemed to affect bloc solidarity” (p. 76), he has taken his morally neutral, scrupulously evenhanded approach far past the point of usefulness into the

5 An excellent description of such internal norms in the Soviet case is found in H. ADOMEIT, SOVIET RISK-TAKING AND CRISIS BEHAVIOR 317–25 (1982).
realm of unreality. No matter what formal similarities may exist, the basic reality of the Warsaw Pact is completely different from that of the Organization of American States, not to mention NATO. To conclude otherwise would be to believe that the OAS invariably follows U.S. dictates, or that the peoples and Governments of the German Democratic Republic, Czechoslovakia and Poland had a real say in the decision to deploy Soviet nuclear weapons on their territories.

Perhaps the most striking example of the distorted results that this book’s analytical framework can yield is its discussion of the Cuban missile crisis. In Dore’s view, the outcome of the crisis, inter alia, “implies that the power to decide on the use of nuclear weapons is to be restricted to the ultimate policymakers in each bloc,” and that what was unacceptable to the United States was that “[t]he missiles in Cuba created the possibility of Cuban participation in any such future decision-making” (p. 130). Thus, the “norm” inferred from the examination of this “crisis situation” is formally neutral and reciprocal, as required by the book’s methodology. Unfortunately, it happens to be wrong. It was not the possibility of Cuban participation in nuclear decision making that disturbed the U.S. Government, but the fact that the deployment of Soviet missiles in Cuba represented a sudden and significant enhancement of hostile nuclear striking power, radically increasing the direct physical threat to the security of the United States. U.S. policymakers had in fact no reason to think that the Soviets would allow Castro any participation in their nuclear decision making, whether or not Soviet missiles were on Cuban territory. The posited rule also stands up rather poorly against NATO’s dual-key system for nuclear decision making.

The author attempts to buttress the normative significance of his study of “crisis situations” by examining certain pieces of international “legislation” such as “the 1963 Test Ban Treaty, the 1967 Space Treaty, the 1971 Seabed Treaty, the 1974 [UN General Assembly] definition of aggression, and the Helsinki Final Act of 1975.” Unfortunately, however—and inexcusably for a study whose stated aim is to elucidate the development of normative rules in the U.S.-Soviet relationship—he neglects the most important joint efforts of the superpowers themselves to place their relationship on an explicitly rule-governed footing, failing to discuss the Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics or the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War.

Stylistically, this 135-page book is mercilessly padded, with frequent announcements of what points are about to be made and unnecessary summaries of the points that have just been made. Thirty-two pages of the 135 consist of an adaptation of the author’s previously published law review
article on arms control in the oceans and outer space, the relevance of which
to the book as a whole is inadequately explained.

Notwithstanding the book's shortcomings, the author's goal—to bring
some legal sense to the perilous relations between the nuclear superpowers—is a noble and worthwhile one. With additional research (in particular, greater consideration of the relevant contributions of the political study of international relations), further reflection on fundamental concepts such as the distinction between descriptive and normative rules, and tighter editing, this study could form the nucleus of a significant contribution to the literature.

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World Polity. Conflict and War: History, Causes, Consequences, Cures. By James

The author tells us that he has been a public servant, a university professor,
a political aspirant, a stock broker and a concessions negotiator for an oil
company. Perhaps he could have written a fascinating book about his career.
Instead, Speer chose to write what he calls "the most thorough statement
of the causes of international conflict yet published" (p. 2). This he brackets
with a highly compressed and inevitably idiosyncratic "Summary of Interna-
tional History," and a plea for a world federal government. None of these
is satisfactory in its own right. Put together, they tend to work at cross-
purposes.

The Summary of International History covers several civilizations, and
thus several millenniums, in fewer than 50 pages. Space is wasted on peculiar
dgments: "The political thought of Plato and Aristotle was . . . never
able to rise above the level of the city-state" and "Mercantilism foreshadowed
state socialism" (pp. 9, 13). One page goes to Cromwellian England and
capitalism's remarkable career over several centuries gets no more than a
page in all. Speer's history is political and intellectual, while social and eco-
nomic history is treated as background, or not at all. Speer reveals the point
of the exercise only at its conclusion. It permits him to make an argument—
he calls it a descriptive generalization—about international history, namely,
that violence, conquest and integration characterize all international systems,
with the result that each such system becomes a unified entity in yet another,
larger system. As Speer sees it, this process has brought us now to the pos-
sibility of global war and global government.

The long second part on the causes of conflict is organized along the lines
of Kenneth N. Waltz's famous Man, the State and War (1959). It is not "the
most thorough" study of this subject available. R. J. Rummel's five-volume
Understanding Conflict and War (1975–1981) comes to mind as a candidate
for this distinction. It may be the most eclectic. It is certainly one of the
most superficial, consisting mostly of quotations from and references to sundry authorities. Again, the point of the exercise turns out not to be what
Speer claims. In the guise of a survey, he gives us an argument.
Speer holds that anarchy is the basic cause of war and that it gives play to other causes. Although he defines anarchy as a condition of no rule (p. 113), he treats it as a condition of war. This makes anarchy a shorthand description, rather than a general explanation, of the way things are. He also calls anarchy an ailment, the prescription for which is federal government. Logically, the conditions of rule and peace would go together in Speer's system of paired alternatives, but he recognizes that rule per se neither insures peace nor protects other, pluralist values. Hence, much of part III is devoted to the virtues of federal government as the only acceptable form of rule on a global scale.

Part III also makes the case that the global situation is rapidly deteriorating. The worse things are, the more obvious it is that something must be done. Yet the worse things are, the harder it is to do anything on the scale required. Speer finesses this dilemma by citing opinion—opinion polls and select elite opinion—to the effect that a world federal state is desirable. He provides few clues, however, on how opinion would be converted into action. He does venture to say that "probably a terrible crisis will be necessary" (p. 310). Yet, in the end, he betrays an optimism so characteristic of this genre of writing and so much at odds with his assessment of the current situation. "And, really now, which is more incredible—a governed world or a gone one?" Or is it more incredible that these are the only alternatives?

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At a time when symptoms of major global malfunction intrude hourly and when respect for the international law of peace seems everywhere on the decline (not least in Washington), it is remarkable to hear a voice that is "cautiously optimistic" (p. xi) about the evolution of a peaceful world order under law. Yet such is the soothing essence of this small but spirited volume. Urging us to comprehend "that humankind is experiencing an erratic and turbulent evolutionary movement toward a more rational world order" and "to view the historical glass as half-full rather than half-empty" (p. xii), former Nuremberg prosecutor Benjamin Ferencz, no Pollyanna, encourages us to believe that there is "no cause for despair" (p. 95), "no reason to lose heart" (p. 97). To the contrary, he writes, "[a]lthough the lights of progress flicker and grow dim from time to time, the trend toward an integrated, coordinated and more humane world is clearly discernable [sic] to the penetrating eye" (p. 95). We should take hope, he argues, and find inspiration in the "total picture" of the past four thousand years of human accomplishment (p. 91)—in the "significant progress" of the past four decades especially (p. 95)—and from this affirmative stance try to understand
and act upon the "common sense" requirements of "a more enlightened international order [that] will be able to enrich all of humankind" (p. 97). The "common sense" requirements Dr. Ferencz proposes are of two kinds. The first, "What Should Be Done" (pp. 43–70), includes the following:

1. Improve International Law—by making international legal norms at once more rigorous and more responsive to the common inclusive interest;

2. Increase the Judicial Role—and other modalities for the peaceful, third-party settlement of international disputes (including creation of an international criminal court); and

3. Enforce International Law—via UN reform, control of national arms, effectively coordinated economic and military sanctions (including a properly empowered UN peace force), and expanded "caring and sharing" relative to the world's natural and human resources.

The second, "What Can Be Done" (pp. 71–98), also divides three ways:

1. Settle by Compromise—the major tensions of contemporary international affairs—the nuclear arms race and existing rancorous conflicts in the Middle East, Iran-Iraq, South Africa, Namibia, Central America, Afghanistan, Kampuchea, Korea and Berlin;

2. Educate and Organize for Peace—by mobilizing world opinion (through formal and informal communication networks as well as through classrooms) and by creating an independent, nongovernmental "Permanent Council for Peace" composed of "dedicated, knowledgeable and distinguished world citizens" who would propose solutions to the world's most vexing problems and who "could go over the heads of governments to reach the eyes, ears, hearts and minds of people everywhere"; and

3. See the Total Picture—by understanding the essential interconnectedness of all of global life and the progressive as well as regressive dimensions of global history.

Ferencz's enthusiasm for these prescriptions is infectious. It is hard to imagine how anyone could dissent from them.

Of course, one can respond skeptically, even cynically, to everything Ferencz is about, pointing up the frailties of the international system and the formidable behavioral and structural obstacles that otherwise impede civilizational progress. The author's "common sense" assessments of "What Should Be Done," embodying a kind of wishful thinking or sense of geopolitics that—typical of international lawyers—tends to exaggerate the role of law and adjudication in the modern world, themselves invite no small questions about feasibility and probability even while inviting praise. Indeed, even his assessments of "What Can Be Done" do not escape major doubts of this kind. It is already bad enough that the two superpowers seem incapable of freeing the world's peoples from nuclear terror, but when a country such as the United States, with its long tradition of respect for the rule of law (at least domestically), not only turns its back on, but ridicules, the World Court,
as lately it has done to the dismay of many, even reviewers as sympathetic as this one find ample room for despair.

Yet it is precisely this kind of demoralization against which Ferencz aims his principal fire. And his essential point—the power of positive historical thinking—is well taken. "To focus . . . on the shortcomings of nations without [acknowledging] those areas of social interaction where significant progress has been made," he asserts, "is to paint a bleak and distorted picture [that] erodes the public confidence needed to stimulate the improvements that are required . . . to make the international system more effective" (p. 95). Agreed. Unless or until this historical-reformist viewpoint is taken seriously to heart, opening the way for an aroused citizenry to secure the political credibility it needs to pursue a "common sense" world order agenda of the sort Ferencz prescribes, that agenda never will be realized—or at least not fast enough to avert the ultimate catastrophe nobody wants.

All this said, however, one is left still to ask whether the world's leaders will take this viewpoint seriously to heart. And this question, in turn, raises two friendly criticisms—one stylistic, the other substantive—that suggest hurdles far larger than Ferencz appears willing to acknowledge.

First, by too frequent lapses into "man-made" language (e.g., "man" and "mankind" in lieu of, say, "humanity" or "humankind"), Ferencz inadvertently reveals not only how difficult the struggle really is, but how exclusionary even the message can be. And for a message that needs all the converts it can get, not least to resist the condescending criticism with which self-styled "realists" doubtless will greet Ferencz's idealism, surely this sort of impropriety ought to be avoided. It tends to alienate and annoy, not to persuade (as does also, it must be added, the too frequent misspellings and punctuation errors of the publisher).

Second, Ferencz's monograph, a guide in the sense of a set of laudable goals that serve to direct our thinking, but no guide in the sense of a map of how to get us from the crisis-ridden "here" to the common-sense "there," would have proved far more convincing had at least some small attention been given to the transition steps needed to make Ferencz's prescriptions reality. As those directly and indirectly associated with the erstwhile World Order Models Project have made abundantly clear, it is not enough simply to observe, however accurately, that what mainly is needed is political motivation and will. The compromises and retreats, the long and hard gives-and-takes required—these in particular must be addressed, conscientiously and repeatedly, if a peaceful and just world order is ever to be realized.

One hopes that Ferencz will correct these deficiencies and give us the further benefit of his intrepid thinking in a "Common Sense Guide to World Peace—Part II." In the meanwhile, for the present volume, we owe him a vote of thanks for making the dream of "world peace through world law" more credible.

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This book is based on papers presented by a number of distinguished political scientists, physicists and defense experts at a conference convened by the UCLA Center for International and Strategic Affairs in Los Angeles in 1984. It shows that, skillfully edited, proceedings of conferences on timely topics can result in interesting and informative books. Verification is critically important to the success of arms control, and many studies have been written on this topic. A distinguishing characteristic of this book is its focus on the political context of verification in the United States, and its useful explanation of the Soviet perspective.

The leadoff chapter, by James Schear of the Harvard Center for Science and International Affairs, is a complex assessment of the strengths and limitations of cooperative measures for verification between the superpowers. He suggests as simplistic the traditional view that the Soviets resist effective verification because of their obsessive secrecy, while the United States emphasizes it because of its more open society. The Soviets are not as obstinate, or the United States as open, as they are often portrayed. Schear also observes that unrestricted on-site inspection is not the panacea, as is so often argued in this country, but should be kept in perspective as part of a balanced series of tools, including national technical means of verification.

The book's most interesting chapter, by Allan Krass of Hampshire College, concentrates on the Soviet perspective on verification. He points out that, in negotiations, the Soviets have stressed reaching agreements in principle before developing verification provisions. The United States, on the other hand, has emphasized verification as a starting point and seeks to push the Soviets as far as possible on this point. Krass details the evolution of the Soviet posture regarding on-site inspection as evidenced in discussions on a comprehensive test ban and the Peaceful Nuclear Explosions Treaty (negotiated by the United States in 1976 but not ratified), and in more recent Soviet proposals on chemical weapons control. He concludes with the pointed comment that

verification has often served as a surrogate issue that is somehow easier to argue about than the more fundamental conflicts over military-strategic doctrine that are the real sources of disagreement. As a result, verification has been asked to bear too great a burden, and in the inevitable distortions of political debate, the Soviet perspective on verification has not been given an honest and objective hearing in the U.S.

Warren Heckrotte, a physicist at Lawrence Livermore National Laboratory who served as a member of the U.S. negotiating team, provides an excellent historical analysis of U.S.-Soviet negotiations to stop underground nuclear testing. He suggests that a considerable evolution of the Soviet position on verification has occurred, and that an agreement to prohibit testing
is within reach if the United States wants it. The correctness of the author’s view has been clearly evidenced by the 1986 Soviet moratorium on underground testing and subsequent Soviet proposals for on-site inspections.

William Durch’s paper on verification of antisatellite weapons limitation suggests that U.S.-Soviet agreement in this area would yield obvious mutual benefits, but that there is little reason for optimism about any such agreement beyond the often discussed “rules of the road” legitimizing certain types of activities in space.

Dean Wilkening’s chapter on “air breathing” weapons strikes a similarly pessimistic note regarding the difficulty of monitoring deployment of cruise missiles, but correctly notes that their long flight times (unless deployed close to borders) do not make them a destabilizing first-strike weapon.

The book’s only paper by a non-U.S. citizen is written by a Canadian government official, F. R. Cleminson, and concentrates on verification problems relating to chemical and biological weapons. Biological weapons are given an unfortunately short treatment, but Cleminson does suggest a two-phase treaty for chemical weapons, concentrating respectively on reduction and destruction of existing stocks, and on nonproliferation.

Michael Krepon, of the Carnegie Endowment, provides a penetrating look at the political environment shaping the verification and compliance issue in the United States. He anticipates the apparent successful effort of the Reagan administration to use this issue to scuttle the unratified SALT II restraints. The following chapter, by Mark Lowenthal and Joel Whit, also discusses the political context and calls for the depoliticization of verification and its return to a proper perspective as a component of arms control.

The final two chapters include a lengthy description from public sources of the complex array of national technical means available to the United States to monitor Soviet adherence to arms control agreements (by Jeffrey Richelson of American University), and a careful look at the Standing Consultative Commission (SCC) (by Dan Caldwell of Pepperdine University). Caldwell argues cogently that the SCC operated “quietly and effectively” during the Nixon, Ford and Carter administrations as a problem-solving body. He observes that, in the current hostile climate, the SCC is more useful than ever; it has set a pattern that could be emulated in other agreements (such as on biological weapons), and it could have a role in crisis prevention and management.

Verification is currently being used as a weapon by those in this country who have a visceral dislike for the Soviet Union and a deep distrust of arms control as a major component of our national security. The result has been much confusion in the public and an often incoherent U.S. negotiating posture. Perhaps it is time for a broad national debate on verification, on both its limitations and its realistic contributions to arms control agreements with the Soviet Union. This book is an excellent source of information and ideas, and can contribute to this process.

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Article 51 enunciates the rules for protection of the civilian population in time of war. The issue Dr. Fischer addresses in his book is whether or not this article applies to the use of nuclear weapons. This question arises because Article 51 does not specifically identify nuclear weapons as subject to the prohibitory restrictions it imposes on military operations.

The international law problems connected with the use of nuclear weapons have been discussed for some time, notably in the context of the ruling by Judge Toshima Kozeki of Tokyo District Court. Examining this case, Richard A. Falk pointed out that the answer to the question of legality (or illegality) of the use of nuclear weapons depends on one's "mode of thinking." One approach relies on "the intrinsic legal character of the weapon, either outlawing or permitting it." The other, "the contextual mode of analysis," views the outlawing or admissibility of the weapon in question in the context of its use.

It is the contextual mode of thinking that underlies Fischer's analysis. Accepted as a dissertation by the Law Faculty of Ruhr-Bochum University, Fischer's work earned him the highest academic accolade and the university prize for excellence.

The book consists of three parts. It opens with a detailed examination of technical aspects of nuclear weapons and their effects when used. Showing great familiarity with these questions, Fischer emphasizes the inescapably indiscriminate nature of nuclear warfare. Moreover, because the scope of its effects cannot be precisely determined or restricted, danger to the civilian population is inherent in the use of nuclear weapons.

This finding is a steppingstone to the next phase of analysis where he evaluates the implications of two intertwined factors in the use of nuclear weapons. First, he examines how the policies of nuclear weapons states affect the probability of their recourse to nuclear weapons. Then he considers the potential impact of nuclear military strategies on the degree of danger to the civilian population. Within this framework, he suggests that a mutual nuclear deterrence policy, based on the principle of equality, SALT I and SALT II, is the essential condition for world stability and the maintenance of peace. Whichever policy or strategy endangers this stability eo ipso increases the danger of nuclear warfare. Accordingly, Fischer includes among such destabilizing elements not only the policy aimed at nuclear superiority, but also any other intended to make the nuclear deterrent of the adversary not...
ineffective. This clearly encompasses, although the author does not say it explicitly, the Strategic Defense Initiative of the United States. Among military factors, those improving the precision of nuclear weapons, as well as strategies assuming victory in nuclear warfare, aggravate the danger of recourse to nuclear weapons. Applying these criteria to the United States and the USSR, Fischer finds their nuclear policies and strategies converging, as both seek a military decision before a political settlement. Under these circumstances, the question whether Article 51 applies to nuclear warfare becomes of paramount importance in international law.

It is in part II of the book where Article 51 and especially its sections 4 and 5, defining and prohibiting the types of indiscriminate attacks against civilians, are analyzed in detail. It is from the context of these two sections and their relation to the effects of nuclear warfare that Fischer derives the prohibition of the use of nuclear weapons. But, as he points out, the illegality of nuclear warfare can also be derived from other international treaties, e.g., the St. Petersburg Declaration, the Hague Agreement of 1907 and the Geneva Convention on Poison Gas. Moreover, international customary law has banned indiscriminate operations against noncombatants and civilians since the 19th century. Yet, as Fischer sees it, it is important that the efforts under international humanitarian law to protect civilians have now been accepted by the community of nations and codified in Protocol I, signed in December 1977.

However, the United States explicitly declared that its signature was subject to the understanding that Protocol I does not apply to the use of nuclear weapons. To defeat this notion (and also a like objection of the United Kingdom), Fischer reviews the historical process leading to Protocol I, to show that from the beginning the purpose of the conferences was to formulate international rules that would regulate nuclear warfare as well as conventional warfare. To further support his position that Protocol I is part of international law, he engages in an extensive literal and conceptual interpretation of the U.S. (and UK) declarations. In the end, Fischer concludes that the U.S. reservation (and also that of the United Kingdom) is without substance and could not change anything regarding the international validity of Protocol I, and the prohibition of the use of nuclear weapons. The Protocol entered into force on December 7, 1978. Yet Fischer recognizes that the effective application of Protocol I ultimately depends on the policies and conduct of the nuclear weapons states. Therefore, as he mulls over this question, he admits that the effectiveness of the prohibition will depend on the scope and nature of any reservations.

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5 For a contrary view, see Weinberger, U.S. Defense Strategy, 64 FOREIGN AFF. 675 (1986). The Secretary maintains that, inter alia, competitive strategies and further research on projects including the Strategic Defense Initiative are necessary to make the U.S. nuclear deterrent more credible and secure vis-à-vis the USSR.

6 The industrialized countries that had ratified Protocol I by the end of 1985 are Austria (1982), Denmark (1982), Finland (1980), Norway (1981), Sweden (1979) and Switzerland (1982). Yugoslavia ratified Protocol I in 1979, the Holy See in 1985. The only nuclear weapons state to ratify this Protocol, though with reservations, was the People's Republic of China, in 1983.
that the United States might deposit upon the ratification of Protocol I. Still, Fischer contends that even if, as a result of any U.S. reservations, some sections of Article 51 cease to be valid as international treaty law, the prohibition of indiscriminate attacks by nuclear weapons would remain legally binding in accordance with the international customary law of war.

In part III, Fischer summarizes the implications of Article 51, assuming its unrestricted validity, as follows: (1) the use of nuclear weapons as an instrument of war is "out" ("ausgeschlossen"); (2) their indiscriminate deployment against civilians is inadmissible; and (3) "first strike" nuclear strategy is prohibited. (Why the author suddenly deviates from terminology used earlier when he referred to the effects of Article 51 is nowhere explained.)

But Fischer is clearly pessimistic about the prospects that the nuclear weapons superpowers would give up or even agree to the restricted use of nuclear weapons in armed conflicts. And he reminds the reader that if these countries continue to insist on technologically oriented strategies and ideologically fixed policies of national security, it will certainly signal that they do not care either about the population of their adversary or about their own, or ultimately about the survival of mankind.6

Whether one accepts Dr. Fischer's conclusions obviously depends on one's "mode of thinking." Nevertheless, it must be recognized that his thorough, well-balanced analysis of essential aspects of nuclear warfare is an important contribution to international law studies in this field. His documentation of both sides of the issues is excellent. But the lack of an index is definitely annoying, particularly in view of the literally hundreds of concepts, opinions and sources to which Fischer refers throughout his book.

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The purpose of this relatively short book by Professor Singh of the University of Delhi was apparently to provide an analysis of legal issues concerning various uses of force by nation-states in self-defense or while pursuing other individual and/or collective objectives. The book is divided into the following topics: self-defense, collective security, achievement of individual objectives (including attention to self-help), achievement of collective objectives (including attention to the use of force in response to human rights

5 This may be a moot issue as far as the United States is concerned. According to this writer's information, the administration does not intend to present Protocol I for ratification, not even if all the other parties to Protocol I acquiesce in the U.S. reservation that the Protocol does not apply to nuclear weapons.

6 But cf. Weinberger, supra note 3, at 681: "We do not, in fact, plan our retaliatory options to maximize Soviet casualties or to attack deliberately the Soviet population. Indeed, we believe such a doctrine would be neither moral nor prudent."
deprivations and to promote self-determination), illegal force "ab initio" and force recognizably illegal "at a subsequent stage." Although several notable contexts are addressed, including the Israeli evacuation mission at Entebbe, the Israeli destruction of an Iraqi nuclear installation, the Soviet downing of the KAL airliner, the Soviet intervention in Afghanistan, the Iran-Iraq war, the Falklands/Malvinas fray, the Grenada action and the emergence of the new state of Bangladesh, it is admittedly Bangladesh that forms the primary focus for contextual analysis. As Singh notes, the book is based largely on his Ph.D. thesis, which addresses the same general topic.

Despite a too frequently halting and disjointed style and a flawed use of the English language, the book is worth reading for its treatment of the issues concerning India's use of force in the pre-Bangladesh context. It provides a sufficient counterargument to the critics of India's use of force, while addressing claims to use force in self-defense and to promote human rights and self-determination. The author rightly adds, with respect to Pakistani acts of genocide, politicide, crimes against self-determination and violations of other human rights, and more generally, that governmental elites that use force even against their own people in violation of human rights law and/or the precept of self-determination commit a violation of Article 2(4) of the UN Charter. Such a violation, the author aptly recognizes, can justify responsive uses of force, where reasonably necessary and proportionate, to serve community expectations or objectives and overall purposes of the international "system" documented in the Charter.

The work is also useful in providing the conclusions of an Indian writer concerning several other notable examples of the use of armed force. These are interspersed among various chapters and, as there is no index, they often have to be gathered by a thorough reader undaunted by an occasionally clumsy use of logic and repetition. Such a reader will discover citable statements about various incidents and the general propriety of the use of armed coercion and countercoercion. Singh, for instance, is among the writers who recognize the legality of the Entebbe evacuation mission and other efforts at self-help; the propriety in certain circumstances of humanitarian intervention, self-determination assistance and, more controversially, "preemptive" self-defense; the permissibility of state-sponsored force against the illegal Government of South Africa; and the illegality of the U.S. use of force in Grenada in 1983.

Curiously, he condemns outright the U.S. claims concerning politicide, human rights and self-determination in the Grenada context, but he is unable to overcome a stated caution concerning the facts needed in order to condemn the Soviet interventions in Czechoslovakia and Afghanistan and what most recognize as an illegal use of force by the Soviet Union when it downed a KAL airliner attempting (most importantly) to leave Soviet airspace. Such caution seems all the more inappropriate when it is realized that the author makes several conclusory points throughout the work about general normative issues and other specific contexts, often without supporting footnotes. Indeed, Singh offers a seemingly inconsistent approach to issues of self-determination and human rights in Czechoslovakia (1968) and South Africa.
or Bangladesh (1971). His analysis of Afghanistan is closer to his recognitions concerning illegality in South Africa and Bangladesh, but one wonders whether he is needlessly inhibited by older positivist notions of authority and "the state" (there are quite a few references to Kelsen), as opposed to expectations about the authority of governments documented in Article 21 of the Universal Declaration of Human Rights and so many post-1970 developments. In any event, most of the legal works cited are from the 1950s and 1960s; hardly a newer work cited is dated beyond the early 1970s and citations to relevant journal or law review articles are scarce.

Again, the work is primarily useful for its treatment of the pre-Bangladesh uses of force and for the series of conclusions by an Indian writer with respect to other relatively recent uses of force, conclusions that are too often unavailable in American libraries.

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This is the first volume of a projected three-volume treatise on substantive and procedural aspects of international criminal law. It naturally invites comparison with an earlier work1 on the same subjects, also edited by Professor Bassiouni. While this work takes full account of the many developments in international criminal law since the earlier treatise was published in 1973, it is far more than a revised edition of that work.

The earlier volumes suffered from uneven quality, since each chapter had been prepared by a different author, and were generally disjointed and unintegrated. These defects are almost completely absent from the present work, though it, too, is the product of a collaborative effort among several authors. Indeed, the degree of cohesion and integration that the editor has succeeded in creating from such diverse materials is itself a considerable achievement; Bassiouni might appropriately be listed as a coauthor of the whole work rather than merely its editor.

As the title implies, this volume is concerned with the substance of international criminal law. Taking the structure of a continental penal code as a model, the editor has organized it into a "General Part" and a "Special Part," the first covering the theory of international criminal law, the status and prospects of codification efforts, and the problem of state criminal responsibility; and the second covering individual crimes.

The "General Part" is by far the stronger of the two. While Bassiouni’s theories naturally predominate and serve to tie these chapters together, the views of the other authors admirably round out his discussion of international criminal law theory. In particular, Daniel Derby’s "realist" approach provides a useful counterpoint to some of the more optimistic essays.

The "Special Part" includes chapters on crimes against peace, war crimes,

1 A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Bassiouni & V. Nanda eds. 1973).
genocide, apartheid, slavery, torture, human experimentation, piracy, air hijacking, hostage taking, narcotics control and crimes against cultural property and the environment. The content of these chapters is generally of high quality, as would be expected in light of the qualifications of the authors. The beginning student should use this part of the work with care, however, since some of the chapters present individual, and even idiosyncratic, opinions rather than a comprehensive treatment.

For example, in one of the chapters on war crimes, Yves Sandoz makes the startling assertion that Article 85 of Additional Protocol II to the Geneva Conventions, on "grave breaches," effectively prohibits destruction of merchant ships, fishing boats and passenger vessels, even though part IV, section I of the Protocol (which Article 85 is intended to implement) expressly excludes naval warfare from its scope of application. The suggestions of Sandoz and his colleague at the International Committee of the Red Cross, Michel Veuthey, on the possible impact of the Additional Protocol on nuclear and chemical weapons also seem contrary to the basis on which it was negotiated, at least in the view of eminent authorities. Even where controversial, however, the "Special Part" of this volume is always stimulating and provocative, and hence valuable.

The work's value as a reference is enhanced by the frequent inclusion of treaty texts, UN reports and other primary sources as appendixes to individual chapters. This value would be even greater if the work had included a table of cases and treaties cited, an omission that could be remedied in later volumes. One also hopes that later volumes will show more careful proofreading. Typographical errors are a major irritant in some chapters where they are so numerous that they discourage direct quotation of important passages in the text.

In general, however, this volume offers both the consistency, organization and cohesion typical of a single-author treatise, and the diversity of views of a collaborative work. If volumes II and III maintain the high standard of volume I, no library dealing with international criminal law will be adequate without this work.

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This book deals with some of the UN criminal justice programs and activities from 1946 to 1985. It is the first to describe cohesively and systematically the wide-ranging and disparate involvement of the United Nations in this broad field over such a long period of time. Because of its breadth, it is more than "a guide" but less than a comprehensive review of all the


UN activities and programs in the field. Nevertheless, the author, in relatively few pages, has provided an incisive overview of some of the most substantial aspects of criminal justice policy activities and programs in the last four decades.

The author is a distinguished Spanish jurist who served as a judge and then as a professor of criminal law at the University of Salamanca. His association with UN programs spans almost four decades. His work as chief of the Section of Research and International Treaties in the Division of Narcotic Drugs was followed by his directorship of the Section of Social Defence, which later became the Crime Prevention and Criminal Justice Branch. Since 1979, he has served as a member of the Committee on Crime Prevention and Control, and in 1984 was elected chairman. He is therefore uniquely qualified to write this book.

The book is divided into three main chapters: chapter 1, "Overview," chapter 2, "Machinery" and chapter 3, "Main Subjects of United Nations Criminal Policy." Each chapter is divided into headings, describing in summary a selected variety of aspects dealing with the subject matter of the chapter. It is to that extent an excellent starting point for the researcher in this field.

Chapter 1 describes in a few pages the overall program of the United Nations in criminal justice with emphasis on policymaking. It does not sufficiently underscore that the United Nations does not have a comprehensive program in criminal justice, and that whatever has taken place in this area lacks overall vision. This is evident in the lack of coordination among the various UN structures (p. 41). In the human rights area a number of bodies consistently deal with criminal justice questions, but their activities are not coordinated with other bodies working in the same or related fields. The Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and what is now the Centre for Human Rights have dealt over the last 40 years with such questions as genocide, apartheid, torture, cruel, inhuman or degrading treatment or punishment, the death penalty, extrajudicial executions, incommunicado detention, arbitrary arrest and detention, and a variety of other human rights issues that relate to the administration of criminal justice and to its abuses of human rights. These important activities carried out at the Geneva UN headquarters are seldom coordinated with the activities of the Crime Prevention and Criminal Justice Branch, which until 1980 was in New York, and is now in Vienna. Similarly, there is no coordination between the Geneva-based structures and the Vienna-based structures concerned with narcotics, namely, the Commission on Narcotic Drugs, the International Narcotics Control Board and the Division of Narcotic Drugs, which had earlier been

2 See also Bassiouni, The United Nations and Other International Organizations Active in the Field of Criminal Justice, 6 NOUVELLES ETUDES PÉNALES 92 (1985).
3 See, e.g., UNITED NATIONS ACTIVITY IN THE FIELD OF HUMAN RIGHTS, UN Doc. ST/HR/2/Rev.2 (1983).
based in Geneva. More incongruous is that the Division of Narcotic Drugs is in the same Vienna buildings as the Crime Prevention Branch, but there is seldom any meaningful cooperation between these two organs of the Secretariat. Formally, this cooperation and coordination is supposed to exist, but in reality it does not. The author is well aware of that and has frequently voiced his concerns about this problem. In addition, there are a number of activities and programs conducted by the International Labour Organisation in Geneva regarding slavery and slave-related matters. They, too, are carried out with little or no cooperation from the Crime Prevention Branch. Finally, there is practically no cooperation between the human rights, ILO and narcotics structures and the Committee on Crime Prevention and Control. The geographic separation of these operating units, and their distance from New York headquarters, is one of the main impediments to effective cooperation, particularly in light of budgetary constraints that prevent closer contacts between their administrators and staff.

Among these structures, programs and activities, the author deals primarily with the Crime Prevention Branch and the Committee on Crime Prevention, and only secondarily with the Division of Narcotic Drugs and the ILO, with respect to some of the slavery matters, but not with the human rights structures, programs and activities. Furthermore, he avoids criticism of the painfully obvious lack of coordination.

The problems of crime and the concerns about crime prevention and the improvement of criminal justice systems' capabilities to respond to these problems are evident in almost every part of the world. But for some UN member states, this is an "internal" matter in which the United Nations should not be involved (see p. 1 n. 1); for others, it is one of the most important issues of our time. Indeed, crime and its economic, social and political costs affect almost every country and cut across so many issues, whether they be human rights, women's status, juvenile issues, economic development, population, transnational trade or many other areas covered by UN programs and activities. Unfortunately, only very few of these programs include a crime prevention and criminal justice component, even though it may be highly relevant. The absence of an overall UN vision in this respect has precluded the development of an overall UN program, but the author diplomatically skirts this subject.

Of late, the United Nations has come to recognize that international and transnational crime affects the quality of life throughout most of the world. This has been particularly evident in the recent UN concerns about combating illicit traffic in drugs and related offenses such as money laundering and, in particular, international terrorism. But international crime also affects other basic international concerns, some of which have a bearing on

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4 But see F. ADLER, NATIONS NOT OBSESSED WITH CRIME (1984).

international peace such as aggression, genocide, crimes against humanity and apartheid. The book does not, however, deal with these issues, even though they are concerns of the United Nations. This may be due to the fact that international criminal law issues are still dealt with in part by penalists and in part by publicists who do not always seem to come together. The author's orientation is that of a penalist with a strong penchant toward criminology, and that explains why a major segment of international criminal questions and human rights, which are treated by the United Nations, are left out of this book.

The author's description in chapter 2 of the UN machinery omits discussing, as stated above, various UN structures, programs and activities. However, his descriptions of the Committee on Crime Prevention and Control, and of the Crime Prevention and Criminal Justice Branch, are adequate and laced with specific examples of programs and activities. However, they are free of serious critical assessment even where it is warranted, as regards coordination and cooperation in programs and activities, limited resources and lack of adequate and sufficient scientific, technical and support staff. This is probably due to the author's desire to support these structures, particularly at a time when the lack of an overall UN program in this field and the current budget-cutting mood may result in curtailing even further the already limited programs, activities, staff and resources of the Crime Prevention Branch. That would, indeed, be a tragic outcome and, in some respects, its prospects make the book more important, since it highlights the many accomplishments of this organ, which has always had so little to work with. The author has, to this reviewer's personal knowledge, been a longtime constructive critic of all the shortcomings mentioned above.

In chapter 3 the author deals with "Main Subjects of United Nations Criminal Policy." He lists various subjects in which the United Nations has been involved, including a number of human rights and international criminal justice aspects. However, in the subsequent substantive description, he focuses only on a few of them, omitting most significantly the international criminal justice and human rights programs and activities (see pp. 47–130). This chapter contains the author's perceptions of the history and development of criminal justice policy as reflected by the activities related to the Committee on Crime Prevention and Control, the Crime Prevention and Criminal Justice Branch and the United Nations Congresses on Crime Prevention and the Treatment of Offenders (see, e.g., p. 107). However, as with all historical perceptions, they are always subject to the writer's selection of those facts that he may view as more important than others. Thus, the role of nongovernmental organizations (NGOs), though mentioned at different times throughout the book, is still treated as if it were secondary to the three main bodies on which the author focuses (see, e.g., pp. 6, 9, 56, 6


Perhaps it is because he wishes to give these UN bodies the lion's share of credit for the accomplishments he describes. But it is noteworthy that the NGOs in the field of criminal justice have, since the 1950s, provided the most significant scientific contributions to the work of the seven UN Congresses on Crime Prevention and the Treatment of Offenders, which are held at 5-year intervals, as well as to the work of the Committee on Crime Prevention and Control and the Crime Prevention and Criminal Justice Branch. In fact, these organizations and their individual members, who have served as consultants to these bodies, have probably produced the bulk of the scientific reports that have been the basis of the work product of these three structures. Presumably for political reasons known only to the United Nations, these facts are neither emphasized nor publicized.

The author's selectivity can also be seen in the rather scant treatment he gives to the UN congresses, which have provided so far the most significant body of reports, studies and resolutions in the field he covers (see pp. 20–27). These have been the basis of almost all the resolutions and action programs adopted by ECOSOC and the General Assembly in this field. In the few pages he dedicates to the congresses, the author emphasizes more the particulars of where a congress took place and how many participants attended and what their qualifications were, than the wide variety of subjects discussed (usually five main agenda items per congress), and he fails to give adequate recognition to the numerous Secretariat reports, governmental reports and NGO contributions (see p. 10). This is not to say that he does not mention some of the most visible results of some congresses such as the Resolution on Torture adopted by the fifth congress in 1975, and the

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8 See also Bassiouni, Report on the Scientific Activities of the International Association of Penal Law (AIDP) and its International Institute of Higher Studies in Criminal Sciences (ISISC) with the United Nations and Council of Europe, 6 NOUVELLES ETUDES PÉNALES 101 (1985).

9 The International Penal and Penitentiary Commission entered into an agreement with the United Nations to cede its functions, and that is how the United Nations became involved in the field of criminal justice; see GA Res. 415, 5 UN GAOR Supp. (No. 20) at 37, UN Doc. A/1775 (1950). The Commission then became the International Penal and Penitentiary Foundation. See López-Rey at 6–9.

10 See Bassiouni, supra note 8. The four major associations in the field of criminal justice have contributed to every congress a number of reports dealing with at least one, if not more, of the five agenda items of the congresses and organized a joint preparatory colloquium on one of the main congress topics for every congress since 1955. These organizations are the International Association of Penal Law, the International Society for Criminology, the International Society of Social Defence and the International Penal and Penitentiary Foundation. The work of other NGOs such as Amnesty International and the International Commission of Jurists, and of members of the Alliance of NGOs on Crime Prevention and Criminal Justice in New York and Vienna, is hardly mentioned by López-Rey except for a reference to the Alliance (p. 63) and the International Institute of Higher Studies in Criminal Sciences (Siracusa) (p. 94). The Institute also contributed significantly to the work of the Crime Prevention Branch and to the sixth and seventh congresses.

11 The resolution was adopted by ECOSOC and then by the General Assembly as the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in 1984 the General Assembly adopted a resolution incorporating the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46. The original text of the Con-
work of the earlier congresses of the 1950s concerning the Standard Minimum Rules for the Treatment of Offenders.\textsuperscript{12} However, that does not cover the bulk of important resolutions adopted by these congresses. Also worthy of mention is the fact that the UN Congresses on Crime Prevention and the Treatment of Offenders, unlike other UN congresses, have not been marred by political considerations and ideological conflicts between states. Until recently, in fact, most of the participants in these congresses have been experts either in their individual capacities, or as members of their governmental delegations, or as members of intergovernmental and nongovernmental delegations. This may well be the reason why these UN congresses have been much more fruitful than others.

The author describes some bodies and activities with a certain amount of license. For example, his description of the UN-affiliated institutes is, to say the least, overly generous (see pp. 28–31). One of those institutes, UNAFEI, has conducted an intensive training program and conducted some valuable research in the Asian region, and HEUNI has been very active in Europe; however, ILANUD, in Costa Rica, has yet to make a measurable contribution to Latin America and UNSDRI, the Interregional Research Institute, which has existed for quite some time in Rome, has yet to reach its fullest potential. All of these institutes are promising, but they, too, need to be integrated into an overall program, and their efforts to be coordinated.

Probably because of the author's personal involvement in many of the issues, he also has a tendency to mix his own views and personal assessments and preferences about certain policies and measures with other, more objectively descriptive material (compare p. 31). Surely, that insight is valuable and helpful, but it manifests itself more frequently where it appears that the author has a personal interest. While he mentions his work as one of the chiefs of the Crime Prevention and Criminal Justice Branch, and that of the last chief, Minoru Shikita, with whom he worked closely in the last few years, it would have been appropriate for him also to have mentioned the other

directors who have contributed significantly, in particular the late William Clifford and Gerhard O. W. Mueller.

Since the book is the first of its kind, it is a tribute to the author that he could say so much in 142 pages. Its uniqueness makes it a landmark contribution in an area largely ignored by the scholarly literature. One hopes, however, that the reader will not look at it as the definitive book on UN work in this field, which was not the author's intention, though at times one has the impression that he would have liked to embark on such a broad endeavor. Nevertheless, as the author states in the introduction, there are approximately four thousand documents on matters concerning criminal policy, and it would indeed be an enormous undertaking to synthesize this vast material, let alone to derive from it a UN "policy."

The greatest merit of this book may ultimately lie in the fact that, in this cost-cutting era of the United Nations, and particularly because criminal justice has never been high on the agenda of those deciding on the priorities of UN work, it may lead a number of influential persons to rethink the need for the United Nations to have a comprehensive criminal justice program. Such a program should not be limited to maintaining a Committee on Crime Prevention and Control (which meets only for 10 days in the 2 years following the 5-year UN congress cycle), a Crime Prevention and Criminal Branch with only a handful of staff, and the periodic Congresses on Crime Prevention and the Treatment of Offenders, which regrettably resolved that they may be held less often in the future.13

A true UN vision of what an overall criminal justice program should be would include the various issues of crime, crime prevention and control, criminal justice policy planning and implementation, and the administration of criminal justice as these relate to the many UN programs and activities in the various areas that affect or are affected by these issues. But, alas, this is not yet the case.

This lengthy review reflects the need to make more information available to the general public and to improve UN structures, programs and activities in the field of criminal justice.

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The international law of state responsibility has been debated extensively since the turn of the century,1 and the International Law Commission (ILC)

1 E. de Vattel, Le Droit des gens (1887); D. Anzilotti, Teoria Generale della responsabilità dello stato nel diritto internazionale (1902), reprinted in D. Anzilotti, Corso di diritto internazionale (1928); 3 K. Strupp, Handbuch des Völkerrechts—
has been concerned with it since 1946. Collective responsibility, however, has existed in one form or another throughout history. Tribes, villages, city-states and other forms of collectivities have long known and practiced some type of collective responsibility (pp. 33–45). However, the practices of such collectivities throughout history do not fit into the more contemporary categories of the law of international responsibility, in particular the distinction between civil and criminal responsibility, theories of fault and risk, and national and international acts that give rise to responsibility. Even sophisticated early legal systems, such as the Greek, Roman and Islamic ones, are not helpful with respect to these contemporary legal distinctions. These and other practices, however, form a historical basis for what is intended to be a rational doctrine of state responsibility that would be both an effective deterrent to wrongful conduct and an adequate basis for compensation for its harmful results.

The author appropriately begins, in chapter I, with a brief introduction on the development of the various concepts of international state responsibility. Though limited in its coverage (13 pages), it sets the basis for the ensuing development of the author’s thesis. However, rather than moving from that premise to historical precedents, the author, in chapter II, briefly discusses the evolution of the concept of international state responsibility through the work of regional and international organizations. In this chapter, he deals with the efforts of the League of Nations and the United Nations, and the work of the ILC from 1956 to 1981, but does not go into detail (pp. 18–32).

Chapter III retraces early concepts of collective responsibility in “primitive society”: “Assyria and Babylonia,” “Persia,” “China,” “India,” “Rome,” “Greece,” “Japan,” the “Old Testament,” “Islam,” “Ireland,” “Russia” and “Eskimos.” This historical background to the evolution of the customs and practices of earlier legal systems deserves more description and discussion than the author provides (pp. 33–45). It would have been important here for the author to establish a link between the evolution of customary practice and the “modern” concept of state responsibility, in particular that of the criminal responsibility of states, as included in Article 19 of the ILC’s draft principles of state responsibility.3

A significant portion of the debate concerning state criminal responsibility under international law derives from the difficulty of assessing collective responsibility of a penal nature when, under most legal systems, a corporate body or collective entity cannot be held criminally responsible. Indeed, the

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4 Das volkrechtliche Delikt (1920); C. de Visscher, La responsabilité des États (1924); C. Eagleton, The Responsibility of States in International Law (1928); J. Personnaz, La réparation du préjudice en droit international public (1939). See also Münch, Criminal Responsibility of States, in 1 International Criminal Law 123 (M. C. Bassiouni ed. 1986); and Triffterer, Responsibility for Crimes of State, in 3 id. (1986).
concept of criminal responsibility, as it has emerged in contemporary Romanist-civilist legal systems, is one that does not recognize the notion of state or corporate or collective criminal responsibility, because it deems that criminal responsibility necessarily implies a penal sanction, and the function of a penal sanction is essentially deterrent, as well as rehabilitative. It is therefore difficult under that conception to see how a state, corporate entity or collectivity can be deterred or rehabilitated by the imposition of a criminal penalty, which, in the case of state criminal responsibility, could only be of a financial nature.  

While a number of common law-inspired systems have, in the last 50 years, evolved gradually to find a practical basis for imposing criminal penalties on corporate entities and collective bodies, it is also clear that the practical modalities that have developed do not rest on a doctrinal basis that distinguishes among the various concepts of “responsibility,” “fault” and “risk.”

The examples since the turn of the century in which reparations have been imposed upon a state, in particular those imposed upon Germany by the Treaty of Versailles after World War I, have clearly demonstrated that the punitive compensatory measures imposed by the victorious upon the defeated could not have been deterring, nor have they demonstrated that they are “rehabilitative.” They have, however, demonstrated the moral-ethical-legal dilemma of imposing upon an entire collectivity a responsibility and a financial or economic burden that also affect those who have not participated in the decision-making process that resulted in the violative act, as well as detrimentally affecting those who have opposed it. These examples also clearly highlight the dilemma of imposing long-term financial and economic burdens on future generations that could not be held accountable for the acts of the preceding one. But these questions are not discussed.

The author briefly discusses in chapter IV the concept of international crimes, but focuses only on some of the major crimes such as “crimes against peace,” “war crimes” and “crimes against humanity,” and in a separate chapter, “genocide” and “apartheid.” Although international crimes extend beyond these five, the author does not explain why he excludes the others. Clearly, whenever a state fails to carry out its international obligations to prevent, prosecute, punish or extradite the offender under the Hijacking Conventions, the Kidnapping of Diplomats Conventions or the Taking of Hostages Conventions, state responsibility arises. In this respect, the maxim aut dedere aut judicare applies and a state’s failure to act creates responsibility.

4 I. Brownlie, supra note 2.


7 For a listing of these and other international criminal law conventions, see M. C. Bassiouni, International Criminal Law: Digest/Index of International Instruments 1815–1985 (1985).

8 Bassiouni, Characteristics of International Criminal Law Conventions, in 1 International Criminal Law 1 (M. C. Bassiouni ed. 1986).
The list of offenses to which this duty applies extends beyond the crimes with which he deals, and he fails to explain why he so limited himself (pp. 33–98).

In chapter V, the author discusses international criminal responsibility of states after the two world wars. While there is indeed significant relevance in the experience following World War I, there is practically no relevance to his thesis with respect to the Nuremberg and Tokyo War Crimes Trials. In these two trials, it was the principle of individual criminal responsibility that prevailed, not that of state criminal responsibility. Indeed, in both of these trials the notion of state criminal responsibility was intentionally discarded.

In chapter VI, the author describes the post-Nuremberg evolution of international criminal law. Again, while he describes the role of the United Nations with respect to “crimes against peace,” “war crimes” and “crimes against humanity,” it is uncertain what the relevance of the discussion is, since none of the post-Nuremberg and Tokyo efforts have had any bearing on the development of international criminal responsibility of states, which has been rejected.

In chapter VII, the author describes briefly (16 pages) the international criminal responsibility of national organs, focusing on responsibility of heads of states and governments, using, in particular, the Genocide Convention and the Apartheid Convention. There is, however, no established principle of international criminal responsibility under either Convention (pp. 55–79). Nevertheless, under these instruments, as well as under the Nuremberg and Tokyo principles, there is no immunity for heads of state or senior government officials, and the defense of “obedience to superior orders” has been eliminated (p. 80). The impediment to the prosecution of the Kaiser after World War I has been removed by the legacy of Nuremberg and Tokyo, as well as by these and other subsequent international instruments. Such responsibility remains individual and not collective.

In the next four chapters, the author discusses aggression and the illegal use of force under international law. The evolution of the definition of aggression from 1946 to 1974 is, however, not one that sheds much light on the concept of international criminal responsibility of states (pp. 80–98). Indeed, the definition of aggression has clearly moved away from the concept of the judicial adjudication of state responsibility, establishing instead a po-

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9 H. Schacht, supra note 6; V. V. Pella, La Criminalité collective des États et le droit pénal de l’avenir (2d ed. 1925).
10 For example, Justice Jackson, Chief Prosecutor at the Trial of the Major War Criminals, Nuremberg, asserted in his opening statement: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” 1 Trial of Major War Criminals Before the International Military Tribunal 34 (1947). See also Trial of Japanese War Criminals, Documents 40 (1946); GA Res. 95 (I), UN Doc. A/64/Add.1 (1946).
11 See supra note 10.
12 J. Willis, Prologue to Nuremberg 98–113 (1982).
13 See M. C. Bassiouni, supra note 7.
Politically determined responsibility of states by the Security Council.\textsuperscript{14} As a result, one can conclude that there has been a regression in the efforts of the world community regarding state responsibility from the Treaty of Versailles to the present position.

In chapter XII, the author discusses the legal status of an international criminal jurisdiction and the evolution of the efforts to create an international criminal court.\textsuperscript{15} While the efforts of writers after World War I focused on the creation of an international criminal court, that court was essentially to have criminal jurisdiction over individuals.\textsuperscript{16} That is also clearly apparent in the work of the United Nations in the 1951 and 1953 draft statutes for the creation of an international criminal court.\textsuperscript{17} None of these attempts, however, have held states criminally responsible.

Finally, the author goes into the criminal prosecution of states and the criminal conduct of states, which he covers in the last two chapters, focusing on Article 19 of the draft articles on state responsibility.\textsuperscript{18} In these two chapters, the author could have articulated more clearly a doctrine or theory of state criminal responsibility in relationship to both international policy and traditional concepts of criminal responsibility. Since the author seeks to explain, support and enhance the work of the ILC, he should have carefully analyzed Article 19, particularly with respect to the distinction between "crimes" and "delicts," those violations deemed to fall under either one of these two categories, and the degree of specificity of Article 19 regarding the traditional principles of legality in criminal law, nulla poena sine lege, nullum crimen sine lege.\textsuperscript{19} He fails to do so. These two chapters are more descriptive than analytical.


\textsuperscript{16} See note 16 supra.

\textsuperscript{17} See Art. 19 of the draft articles on state responsibility, supra note 3; Report of the International Law Commission on its Thirty-sixth session, 39 UN GAOR Supp. (No. 10), UN Doc. A/39/10 (1984).

\textsuperscript{18} Bassiouni, Nuremberg Forty Years After, 18 Case W. Res. J. Int'l L. 261 (1986).
The subject of this book is timely, important and of significant contemporary relevance. The author has adequately described the efforts of the international community, but more analysis and searching inquiry would have been helpful in advancing the cause he advocates. International criminal responsibility of states, like any other aspect of international criminal law, requires significant grounding in both international law and criminal law in order to merge those two disciplines. To merge concepts of international law and policy with criminal law and criminal justice is indeed a difficult task. What is needed in the area of international criminal responsibility of states is a new doctrinal basis and theoretical approach to be applied to the various international crimes so that a more cohesive approach to this entire area can be developed.20

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In their series of workshops on various questions of contemporary international law, the Hague Academy of International Law and the United Nations University jointly organized in November 1984 a workshop on “The Future of the International Law of the Environment.” The meeting was a follow-up to a previous workshop by the Academy on “The Protection of the Environment and International Law” held in 1973 in the wake of the Stockholm Conference on the Human Environment. The communications (either in English or French) to the workshop, as well as summaries (both in English and French) of its discussions, are published in this volume edited by the General-Secretary of the Hague Academy, Professor René-Jean Dupuy.

The workshop was attended by an estimable group of primarily legal experts, 42 altogether. They included diplomats and international officials as well as university professors and members of the World Court.

Referring to the 1973 meeting, Dupuy outlines in his introductory statement the task of the 1984 workshop as follows:

We could draw up two balance sheets: a material balance sheet in the sectors where a receipt can be seen—numerous diplomatic instruments being concluded in the meantime—but also a spiritual balance sheet in the order of minds. Has the consideration of ecological solidarities really progressed substantially since that time? Posing such questions well shows that the prospects ought to appear quite naturally from the balance sheet we shall be led to draw up [p. 21].

Accordingly, the book is divided into three main parts: “The Review,” “The

20 See, e.g., Bassiouni, supra note 8, at 1–166.
Great Challenges" and "Avenues of Action," each containing communica-
tions of the participants and a summary of the respective discussions. The
book ends with thought-provoking conclusions by Dupuy.

The contributions appear to be somewhat uneven. This applies, in par-
ticular, to their length, but also, to some extent, to their substance. Although
this disparity might be seen as a certain weakness in the project, it does
provide it with a degree of flexibility. While briefer contributions may lack
depth, they may nevertheless raise interesting issues previously neglected or
open new avenues of approach to old problems. Reference may here be
made to, among others, the contribution by Elisabeth Mann Borgese on The
Protection of the Marine Environment in the Case of War, where she draws atten-
tion to the environmental damage resulting in 1983 from the bombing
of offshore oil wells in the Persian/Arabian Gulf. "Could one think of pro-
tocols, incorporated into the Regional Seas Action Plans, providing for relief
of environmental disaster, not only in case of peace but also in case of war?"
Mann Borgese inquires (p. 107).

Likewise of interest are the reflections of S. Van Hoogstraten on The
Future of Endangered Species. It is surprising to learn, for instance, that Hong
Kong and Japan together imported in 1978 raw ivory from the tusks of an
estimated 60,000–70,000 elephants and that as late as 1983 the total imports
of raw ivory into those two countries were as high as 754 tons. One would
also concur with Van Hoogstraten’s conclusion to his brief discussion of the
1973 Convention on International Trade in Endangered Species of Wild
Fauna and Flora that it is not only the trade in endangered species but
equally the protection of their natural habitat that requires our attention.

Some of the contributions offer comprehensive accounts of various activ-
ities in the environmental field. Pierre-Marie Dupuy (in Le Droit international
de l'environnement et la souveraineté des États) describes the present and emerg-
ing norms of international environmental law, including both the “hard”
and the "soft" law. Peter H. Sand reviews the promotion and development
of environmental law in the United Nations Environment Programme. Sand’s
contribution also includes tables on the participation of states in conventions
protecting the environment. In terms of information, the most impressive
contribution is that of Henri Smets (Indemnisation des dommages exceptionnels
da l'environnement causés par les activités industrielles). His discussion of liability
for exceptional environmental damage caused by industrial activities includes
data on numerous incidents in different parts of the world, whether on land,
at sea or in the air. Indemnification for damage is studied from different
angles with reference to both national and international law.

It is hard to avoid referring to well-known facts and data or repeating
views already put forward on earlier occasions. In the environmental field,
recent years have witnessed a multitude of writings and symposiums aimed
at the promotion of environmental regulation. The importance of the issue,
however, makes up for the occasional overlaps. Moreover, the volume also
provides a remarkable measure of information not readily available elsewhere
and draws attention to various problems of continuing relevance. An example
is the contribution by Eckard Rehbinder on Environmental Protection and the
Law of International Trade (with particular reference to the export of hazardous chemicals and transfrontier disposal of wastes). Also, the environment-development axis, although well recognized, has often been left to summary treatment, not infrequently by the representatives of developed economies. Therefore, it is of particular interest to share the “perspective” from developing countries as to environmental law offered by Asit K. Biswas (Environment and Law: A Perspective from Developing Countries).

An old question—and the subject of much discussion in the past—is treated in an innovative way by Johan G. Lammers in his contribution on “Balancing the Equities” in International Environmental Law. He inquires “whether and to what extent instances of pollution between sovereign States are . . . in international law subjected to a process of ‘balancing the equities’, i.e., to a process which gives due consideration to the interests of both the State of origin and the victim State of transfrontier pollution” (p. 153). He notes that an amazing number of principles and concepts have been proposed to govern the question of the prohibition under international law of transfrontier pollution. As an illustration of such proposals, he enumerates a total of 25 relevant principles ranging from absolute territorial sovereignty to absolute territorial integrity. The principle that, in his view, best governs instances of transfrontier pollution is what he calls the mitigated-no-substantial-harm principle. Under this principle, elements such as the exceptional sensitivity of the interests affected, questions of due diligence on the part of the state of origin and possible disproportion between the interests involved are to be taken into account in the determination of the prohibition of particular polluting activities. Lammers’s discussion offers an interesting introduction to an approach, which may, in a more pragmatic manner than many others, take us forward in the labyrinth of state responsibility for transfrontier pollution.

Other contributions, too numerous to discuss or even list here, are of similar interest. While the papers presented to the workshop correspond well to the high level of its expertise, the summaries of the respective discussions do not add very much to the volume. Apparently, spontaneous interventions make their point best at the very moment of the discussion; printed summaries may not fully reflect the colloquial atmosphere of the workshop. In addition, about one-fourth of those present seem not to have actively participated in the discussion.

This volume is further proof of the valuable work of the Hague Academy. Similarly, the United Nations University deserves recognition for its role in the organization of the workshop. The book provides ample source material in the environmental field, draws attention to a wide variety of legal questions and searches for new ways to tackle the problems of effective regulation of the world environment. It is a notable addition to the abundant, but hardly excessive, literature on international environmental law. It should be of use not only to specialists in international law but also to those who entertain a more general interest in international relations.

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"Where there is no vision, the people perish." So writes Arthur C. Clarke, space age author and conceptualist, in his foreword to Senator Spark Matsunaga's book The Mars Project.

Chronicling his legislative attempts to give Congress and the nation a vision beyond the cold war atmosphere, Matsunaga has given us a short, readable book. However, what at first glance seems like quick fare turns out to be a thought-provoking study that leads his readers to think and rethink their notions on the conduct of foreign policy. Drawing upon his heritage in both Eastern and Western philosophy, Matsunaga envisions the conduct of foreign policy from a broader framework than has been the case in the United States.

In the 3-year period from 1982 to 1985, Matsunaga introduced seven progressive space cooperation resolutions. Their texts are included in the appendixes. In a brief description of the process and import of congressional resolutions, the senator notes the difficulty of taking a document written "in dense legal language" and imbuing it with "life" and "flexibility"—definitely a challenge to any legislator. The first resolution he introduced called upon the President to initiate talks that would explore the potential for an international space station, free of weapons. It was followed by one that called for a renewal of the 5-year space cooperation agreement between the United States and the Soviet Union that had been negotiated in 1972 and renewed in 1977. The United States pulled out of this agreement when it came up for renewal in 1982, linking it to the imposition of martial law in Poland. In addition to establishing a framework for cooperation, the 1977 agreement called upon the parties to strengthen the legal order in space by encouraging further development of international space law.

The space cooperation resolution was introduced just 13 days before President Reagan's now famous—or infamous, depending on one's point of view—"Star Wars" speech. Matsunaga stresses the importance of this resolution as part of a broader foreign policy for the United States. He views cooperation as a component of a long-term policy that would be action-oriented rather than formulated in reaction to what the Soviet Union might do. In chapter 8, entitled "Beyond the Opposites," the senator combines his Eastern and Western heritages in a discussion of moral and dynamic equivalence. In their negative manifestations, both of these concepts result in a narrow, unrealistic, self-created view of the world. Thus, much of the debate that takes place over any major policy issue is polemical rather than reasoned. The debaters, following predictable ideological lines, confuse rather than shed light on the problem.

Describing the logic behind his resolution, the senator says,

It seemed to me that, from a legislative point of view, the space cooperation resolution was unique because of the special emphasis it placed on cooperation as a foreign-policy objective complementary to arms-control negotiations and weapons buildup. But in a nation managed by lawyers trained in adversary proceeding (myself included) and businessmen...
schooled in tense competition, the idea of a cooperation inspired a certain uneasiness. We admired it in principle, yet we were far more comfortable, innovative, and lively when involved in an adversarial situation [pp. 27–28].

For this reason, he introduced a companion resolution looking to international agreements on space rescue. The successful operation of the American, Soviet, French and Canadian COSPAS/SARSAT search-and-rescue satellite system has given proof of the advantages of cooperation.

Matsunaga is a voice of sanity in an area where sanity can be conspicuously absent. He recognizes that the new frontier of space offers us an opportunity to begin a new era in our relationship with the Soviet Union. He reminds us that in the late 19th century both Robert Goddard in the United States and Konstantin Tsiolkovsky in Russia had a scientific and human vision of space exploration that transcended political “realities.” Their destination was Mars, the very planet the senator would now have us explore together. In Senate Joint Resolution 46, of February 7, 1985, he proposed that NASA explore the possibilities for cooperation with the Soviet Union in the exploration of Mars. Both nations have Mars missions planned and both can contribute to, as well as gain from, a joint mission. In the endorsements that the senator received for his idea, the respondents spoke of the “complementary technical capabilities” of the United States and the Soviet Union.

The senator’s vision is inspired, in a legislative system that is generally uninspiring. One hopes that he can now attack the practicalities of his vision. The Soviet Union has been planning its exploration of the mysteries of outer space since the time of Tsiolkovsky. The United States, on the other hand, has difficulty with long-term planning in any policy area. Our year-to-year budget process is not conducive to the long lead times required for space missions. Neither is our system of government, where a change of administration seems to preordain a change in plans and programs, for either political, ideological or egoistic reasons. Thus, we cannot decide whether to commit our resources to manned or unmanned flights into space; when our ventures are scientific and when they are military; or even to what extent we are going to commit ourselves to outer space at all. The senator’s suggestion that the space program be under the aegis of the Air Force is interesting for its recognition of the fact that military and civilian uses and users are intertwined.

This brings me to my one area of disagreement with Matsunaga. He overemphasizes and overuses the term “democracy” in referring to the advantages of such a system in the exploration of space. Democracy is a political ideology and is, therefore, not the best term to use when attempting to achieve international cooperation. It disregards not only the Soviet Union, but also many other nations that are increasingly capable of utilizing outer space. We in the West—and particularly in the United States—need to learn once and for all that not every nation relates to Western law and Western concepts. We need to find some new terms that are more applicable to the global situation in which we must operate. It should also be noted that democracy has become the international “in” concept: every nation
wants to appear democratic. It is used by almost every government to describe itself, no matter how repressive its system. In this sense, democracy has no meaning and defeats the senator's intent in using it.

In Senate Joint Resolution 177, of July 17, 1985, the senator proposed that the President endorse the concept that 1992 be declared an International Space Year. The year 1992 was chosen because it is the 500th anniversary of the discovery of the Americas by Columbus and the 35th anniversary of the International Geophysical Year, which began the space age. It is also the anniversary of the first launching of an artificial satellite and the 75th anniversary of the Russian Revolution. This proposal moved quickly through Congress, on to NASA for study and then to President Reagan for his approval. The United States then submitted the idea to the international Committee on Space Research (COSPAR) where it received a positive response. It is the intent of the United States that it will eventually go to the United Nations to be officially declared an international year.

Matsunaga has offered us a vision that can carry the United States into the next century. He recognizes that the historical openness and ingenuity of the American system and the American people can encourage the design of an era of international cooperation in outer space. The challenge of this new frontier requires such openness and cooperation. The alternative is the extension of the arms race into outer space.

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This work, sponsored by the International Ocean Institute of Malta, is the fifth in a series of volumes of collected essays and documents concerning ocean development and affairs. The present volume covers nine general subjects: the 1982 UN Convention on the Law of the Sea and its Preparatory Commission, living resources, nonliving resources, transportation and communication, marine science and technology, the environment, coastal management, military activities and regional developments.

In the section on the 1982 Convention on the Law of the Sea, Elisabeth Mann Borgese provides an overview of the first two sessions of the Preparatory Commission for the International Sea-Bed Authority in Notes on the Work of the Preparatory Commission. This piece is followed by S. P. Jagota's short description of the history and contents of the 1982 Convention in The United Nations Convention on the Law of the Sea, 1982. It would have been preferable if the sequence of these two pieces had been reversed.

Under "Living Resources," John E. Bardach and Penelope J. Ridings have written an excellent primer on tuna, the industry and its management, in Pacific Tuna: Biology, Economics and Politics. Maxwell Bruce, in the section
on “Non-Living Resources,” surveys a variety of current, experimental and potential ocean-derived energy recovery systems such as ocean thermal energy conversion (OTEC), winds and hydrocarbons, in *Ocean Energy: Some Perspectives on Economic Viability*.

The fourth section, “Transportation and Communication,” contains essays by Yehuda Heyuth on *Seaports: The Challenge of Technological and Functional Changes* and Thomas S. R. Topping on *International Action Against Maritime Fraud*. Professor Heyuth’s essay stresses the increasing intermodal nature of international transport involving inland regions, ports and carriers. The latter essay briefly recounts actions on this problem taken within international bodies such as UNCTAD, the IMO and the International Chamber of Commerce.

The next section, “Marine Science and Technology,” sets forth three aspects of international cooperation in this field. In *On the Nature of a Model Global Maritime Research Organization*, Norton Ginsburg proposes the establishment of a global marine science organization that would comprehensively deal with research, monitoring, data storage, evaluation and training after first identifying the problems of using existing international bodies for this purpose. Velimir Pravdic, in *International Cooperation in Marine Sciences: The Non-governmental Framework and the Individual Scientist*, describes the role that independent scientists may play in protecting the marine environment such as through the Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) and in the environmental impact assessment process. Finally, Roger Revelle, in *The Need for International Cooperation in Marine Science and Technology*, stresses the need for international cooperation in addressing problems caused by human use of the oceans; he deals with such matters as fisheries, offshore oil and gas, coastal zone protection and development, and ocean recreation and tourism.

Under the sixth heading, “Environment,” Edward P. Goldberg discusses the increasing role of the ocean as a waste reservoir and the attendant problems such as with cadmium, in *The Oceans as Waste Space*. The other article in this section, *A Regional Approach to Marine Environmental Problems in East Africa and the Indian Ocean* by Meera Pathmarajah and Nikki Meith, provides a good description of the physical features of these areas, their resources and actions taken under the UNEP Regional Seas programs for the East African region and the South Asia seas. Maps would have made the article much easier to follow.

The East African region is further considered under the next section on “Coastal Management,” in *Catchment Land Use and its Implications for Coastal Resource Conservation in East Africa and the Indian Ocean* by Random Dubois. It focuses on Kenya’s Athi River Basin and provides a graphic description of the coastal environmental impacts resulting from human activities, including land use and industry, in the basin area or catchment.

Section 8, “Military Activities,” contains pieces by C. F. Barnaby on *Superpower Military Activities in the World’s Oceans* and by B. M. Jasani, *A Note on Ocean Surveillance from Space*. The former gives a detailed accounting of the nature and extent of U.S. and Soviet naval capabilities, nuclear and non-
nuclear, surface and submarine. The latter describes the satellite ocean surveillance capabilities of the United States and the USSR and discusses the role of nuclear-powered satellites.

The final section, “Regional Developments,” is devoted to a more political discussion. Daniel T. Dzurek, in *Boundary and Resource Disputes in the South China Sea*, provides a concise and informative examination of the complicated sovereignty and maritime boundary disputes in that region. M. C. W. Pinto, in *Preface to a Proposed Indian Ocean Scientific Conference*, outlines the role that he believes international cooperation in marine scientific research may play in promoting the Indian Ocean zone of peace.

The rest of the volume is composed of appendixes, including reports from governmental and nongovernmental organizations concerned with ocean affairs such as the World Meteorological Organization and the Law of the Sea Institute, and a selection of documents, including portions of the 1982 Convention on the Law of the Sea. It is noteworthy that the appendixes fail to include reports or documents from the IMO or UNEP, two of the most active international bodies in marine affairs. Finally, the book contains a number of tables, including statistics on world fish catch, offshore oil production and world shipping tonnage.

Overall, *Ocean Yearbook 5* is an interesting and varied collection of contributions by academics and international and national civil servants on technical aspects of ocean affairs and development. For the most part, the contributors are not legal specialists. In this regard, the *Yearbook* is not for readers looking for a work strictly on oceans law.

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Scholarly interest in the drawing of boundaries, which dates mainly from the period between the world wars, aims partly at avoiding wars and other conflicts over boundaries. However, confrontations along boundaries continue to develop because of ineptness of allocation (a general statement of the area to be taken by each party and the approximate location of the boundary), delimitation (the exact statement of the location of the boundary by means of a map, with explicit references to the relevant natural and cultural features), demarcation (the actual identification of geographic features along the line of delimitation) and changes in conditions along particular boundaries, either during their evolution or since their demarcation.

Disputes frequently occur, therefore, where shared boundaries are inaccurately or ineffectively determined. Faulty determinations by earlier efforts often remain dormant until the accurate delimitation of a given bound-
ary becomes unavoidably necessary. Even the mere whisper, for example, of the presence of petroleum resources, or pending drilling and exploration plans, reveals the slightest flaw in an existing or partially delimited boundary. The realities of randomly concentrated and limited resources, complicated by political considerations, make the issue of marine boundary delimitation increasingly difficult to settle on an amicable basis. Even so, the past and recent resolution of many maritime boundaries provides excellent exercises in reasonable and intelligent delimitation.

Perhaps the most critical recent study of international boundaries and the principles of intelligent boundary drawing emanates from the pen of a political geographer, J. R. V. Prescott, Reader in Geography at the University of Melbourne, Australia. Prescott's recent treatise on marine boundaries, The Maritime Political Boundaries of the World, culminates a professional odyssey in boundary expertise, evidenced by such previous works as The Geography of Frontiers and Boundaries (1965) and Maritime Jurisdictions in Southeast Asia: A Commentary and Map (1981).

Prescott effectively demonstrates the complex intertwining of questions of international law with problems of political geography and coastal geomorphology at each stage of the boundary determination process, i.e., allocation, delimitation and demarcation. This appreciation for the geographical setting is, unfortunately, lacking in the understanding of many lawyers and legal scholars who focus too narrowly on the technical issues of treaties, state practices and national legislation. In the first part of the book (chs. 2–5), Prescott addresses the physical nature of coasts and their influences on national maritime claims, methods for drawing baselines from which those claims are measured, the circumstances complicating the delimitation of marine boundaries and the special problems of international maritime zones such as the high seas and deep seabed. Amply illustrated and well referenced, this section presents a comprehensive overview of the relevant marine resources law, which will interest lawyers and geographers alike.

The second part of Prescott's book (chs. 6–14) focuses on specific maritime regions, e.g., the south Pacific Ocean, the Baltic, the North and Irish Seas, and the Caribbean Sea and Gulf of Mexico. In this excellent study in coastal-political geography and legal geomorphology, the author first presents the geographic setting, then reviews existing marine boundaries and concludes with pending maritime boundary problems and disputes for each region. As a political geographer, well versed in international law, Prescott presents an always beneficial, and sometimes rather unique, interdisciplinary vantage point from which to view many of the world's problems regarding marine boundaries and the resources they inherently allocate.

Prescott's treatise on maritime boundaries enjoys the further recommendation of being both authoritative and readable. As both a political geographer and an international lawyer who has personally been directly involved in a number of marine boundary determinations, this reviewer attests to the definitive nature, literary quality and high reference value of The Maritime Political Boundaries of the World.
Complementing Prescott's excellent treatise on the coastal-political geography of marine boundaries, *Maritime Boundary*, by S. P. Jagota, provides a thorough historical review of the legal aspects of marine boundary determinations between 1945 and 1983. Unlike Prescott, Jagota confines his study to those boundary matters that have been concluded. An outgrowth of lectures presented by the author at the Hague Academy of International Law in 1981, the book offers a rather comprehensive exposition of boundary agreements, arbitrations and judicial decisions. The first section gives an overview of the developing law of outer maritime zones and delimitations between states, from the ruminations of the International Law Commission (1949–1956), through the 1958 UN Conference on the Law of the Sea, to the Third UN Conference on the Law of the Sea (1973–1982). Some attention is also given to such technical and cartographic aspects of delimitation as map scale, type of map projection and geodetic datum. However, it is the historical development of the law itself that provides the greatest benefit to the reader.

The second section of the book concerns specific treaties and agreements. While somewhat organized by geographical regions, the discussion mainly involves documents and determinations contributing to the development of marine boundary law and policy. A review of judicial and arbitral decisions quite logically follows this discussion of treaties and conventions. The reader naturally anticipates the author's treatment of the *North Sea Continental Shelf Cases* (1969) and the recent *Case Concerning the Continental Shelf* between Tunisia and the Libyan Arab Jamahiriya (1982). This topical sequence of legal histories concludes by detailing the deliberations of the Third UN Conference on the Law of the Sea.

The author frequently quotes the pertinent legal documents, e.g., convention articles, thereby affording the reader direct access to primary source material. Indeed, rather extensive appendixes reproduce much of the text of many referenced treaties, agreements and related legal documents. *Maritime Boundary* is adequately illustrated and benefits from a comprehensive compilation of references. These qualities lend it usefulness as a reference work on marine boundaries.

In conclusion, the reviewed works by the political geographer, Prescott, and the international lawyer, Jagota, together provide a thorough review of past and existing marine boundary determinations, which should prove exceedingly useful to anyone interested in marine resources law and maritime policy. If this reviewer may be permitted to end on a personal note, my only complaint stems from the fact that these books were not available a few, short years ago when I taught coastal-political geography, i.e., the geographical aspects of the law of the sea. As prospective textbooks, they combine to outline an interesting course of study. Indeed, after reading these excellent volumes, I am almost persuaded to return to academia!

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Time and again, scientists and economists have noted that there is no reason to expect mining activities of any important scope in Antarctica in the foreseeable future. No hard minerals in economically exploitable quantities have yet been discovered in the Antarctic land areas. Only large high-grade deposits of high-value minerals could cover the tremendous costs of their exploration, exploitation and transportation. The probability of discovering such deposits, however, remains very low. Therefore, the hopes and expectations concerning the nonliving resources of this continent focus on the possibility that the Antarctic continental shelf may contain oil or natural gas in economically worthwhile quantities. These hopes were stirred by a few traces of methane, which were discovered more than a decade ago, whereas the expectations are mainly based on analogies drawn from the geological and geomorphological structure of continental shelf areas in other parts of the world. In addition to that, the exploration for and exploitation of hydrocarbons on the Antarctic continental shelf would have to face extremely difficult technical problems unknown even to the offshore activities in Arctic waters. Moreover, only a very considerable increase in the price of oil could make offshore exploration and exploitation in Antarctica economically attractive.

In his doctoral dissertation, written at the law department of the University of Saarbrücken, Dr. Nussbaum describes this factual situation in a brief first chapter (pp. 8-28). This provides readers who are not experts in Antarctic affairs with a useful survey of certain information concerning the geography, geomorphology, climate, flora and fauna of Antarctica, as well as the economic aspects of any mineral exploitation there. In the latter context, the author explains the presence of, and expectations with regard to, mineral deposits in Antarctica, and the economic constraints on their exploitation. Nussbaum concludes, from the present state of knowledge, that mineral exploration and exploitation would probably start on the Antarctic continental shelf (p. 27), an estimation that is widely shared by scientists and mining experts. Thus, the facts show that the legal questions involved in the exploration and exploitation of Antarctic mineral resources are still hypothetical.

In spite of this altogether bleak outlook for any mineral exploration and exploitation in Antarctica, the Consultative Parties to the Antarctic Treaty of 1959 began consultations on this subject at their Seventh Consultative Meeting in London in 1972. And they have intensified their endeavors to conclude an international agreement on Antarctic mineral resources ever since the “Question of Antarctica” became a topic on the agenda of the General Assembly of the United Nations in 1983. Despite vigorous opposition, especially from certain Consultative Parties with territorial claims in that continent, the majority of the General Assembly demanded in several
resolutions that the natural resources of Antarctica serve the benefit and interests of mankind as a whole.

Taking account of this political situation in a brief introduction (pp. 1–7), Nussbaum concentrates in his legal chapters on whether or not the Consultative Parties to the Antarctic Treaty could effectively claim under international law a regulatory power, on the basis of which they could adopt rules concerning the Antarctic mineral resources that would legally bind third states. Their claim to a regulatory power *erga omnes*, as Nussbaum calls it (p. 5), was apparently never expressly stated by the Consultative Parties. They have, however, repeatedly referred to the “special responsibilities of Consultative Parties” as, for example, in the Preamble to their Resolution IX(1) (p. 205). But the opposition to placing the “Antarctic Question” on the agenda of the UN General Assembly relied mainly on the territorial claims of certain Consultative Parties and not on any common power. Nevertheless, their claim to a regulatory power *erga omnes* is a subject of some scholarly discussion, which is principally interested in the question whether a power of this kind could even exist in international law.

In accordance with his theoretical subject, the author chooses an academic approach: in the second chapter (pp. 29–103) he examines four possible reasons for a regulatory power *erga omnes* of the Consultative Parties, which are mentioned but not fully explored in the legal literature. According to the first conception, the essential parts of the Antarctic Treaty form customary rules of international law, and the parties to that Treaty are considered to have exclusive jurisdiction in the area south of 60° south latitude that is to be respected by third states (p. 30). Nussbaum regards the present number of parties to the Antarctic Treaty as not sufficient to meet the requirement of a very widespread and representative participation to create a rule of general customary law (p. 34), and he rightly points out that such a customary rule would be against the interests of the claimant states because it would prejudice their territorial claims for the future (p. 36).

According to the second conception, third states are bound by way of acquiescence because they have silently accepted the claim of the Consultative Parties to regulate Antarctic matters *erga omnes*. Nussbaum is inclined to accept this thesis with respect to living resources (p. 48)—a questionable opinion, because the majority of states that have no fishing fleet able to fish in Antarctic waters could hardly be required to object to the Convention on the Conservation of Antarctic Marine Living Resources of 1982. Moreover, there are in fact fishing vessels in Antarctica flying the flag of the Republic of China (Taiwan), to which the latter Convention does not apply. But with respect to the nonliving resources, he rightly points out that third states could not be bound at all by acquiescence before the Consultative Parties have concluded an agreement on Antarctic mineral resources because the Antarctic Treaty of 1959 does not deal with this matter (p. 49). In addition, the deliberations of the UN General Assembly on the “Antarctic Question” prove, on the contrary, that there is no silent acceptance of the Consultative Parties’ regulatory power *erga omnes*. 
As a third conception, Nussbaum discusses the possibility of making the territorial claims of the seven claimant states, Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom, the basis of a regulatory power erga omnes. Apart from the fact that this would not include the unclaimed sector of Antarctica, the author aptly shows that a condominium of the Consultative Parties would require an amendment of Article IV of the Antarctic Treaty (p. 65). One also can agree with him that, unlike the deep seabed and outer space, Antarctica is not open to an application of the common heritage principle because it is subject to occupation and appropriation, and there already exist, in fact, inchoate titles of the claimant states (p. 73 ff.). In this context, Nussbaum also rejects the possibility of a functionally limited condominium (p. 78 ff.), and he shows that a coimperium would by no means be a sufficient basis for a regulatory power erga omnes (p. 79 ff.).

Fourth, the author turns to the concept of the trust, showing that the Consultative Parties do not represent trustees for mankind as a whole (p. 89). Concluding his comprehensive and thoughtful analysis, Nussbaum nevertheless regards the application of the international trusteeship system of the United Nations (chapters XII and XIII of the UN Charter) as a theoretical possibility for the future, adding, however, that this would be contrary to the interests of the Consultative Parties (p. 98).

Nussbaum’s own attempt to find a more convincing legal reason for the Consultative Parties’ regulatory power erga omnes with respect to Antarctic mineral resources is developed in the third chapter (pp. 104–78). His reasoning consists of two consecutive steps: the recognition of the Antarctic Treaty as a “status treaty” or “objective regime,” and the requirement of third states to respect such a treaty. The crucial issue of this line of thought is whether the Antarctic Treaty is to be considered a status treaty, and what that would mean. Nussbaum adopts the concept of a status treaty as it is laid down in E. Klein’s book on Statusverträge im Völkerrecht (1980). The basic idea behind this concept is that the accumulation of “territorial competence” (territoriale Zuständigkeit) and a “claim to serve the common interest” (Gemeinwohlbehauptung) amount to a legal requirement (“Obliegenheit” or obligatio in rem suam) of third states to respond to the claim, or otherwise to lose their right to participate in the definition of the common interest (p. 107).

Nussbaum applies the different elements of the concept of a status treaty to the Antarctic Treaty, showing that the latter is a “territorial treaty” as it refers to a certain territory (p. 109), that it serves the common interest (p. 117), and that the Consultative Parties intended to establish an objective regime in Antarctica (p. 125). However, the last essential element of the status treaty, and its most crucial one, is that of the “territorial competence” of the Consultative Parties with respect to Antarctica (p. 127 ff.). One has to agree with Nussbaum as well as with Professor Klein that there exists no competence of this kind with respect to an area that is res nullius, as, e.g., the deep seabed (p. 128). But I disagree with their opinion that there is such competence of the Consultative Parties with respect to Antarctica, which
represents a terra nullius area, because the very basis of “territorial competence”—if this is to have any legal effect erga omnes—is a valid title to territory. Thus, “territorial competence” as an essential element of the status treaty is only another term for territorial jurisdiction over the respective area, as we have it in the well-known examples of these treaties such as the Spitzbergen/Svalbard Treaty of 1925. Of course, each claimant state can hold its territorial claim in Antarctica against any third state that would become active within the claimed territory because Article IV of the Antarctic Treaty, which “shelves” the territorial claims, is only applicable between the states parties. But as these territorial claims are not recognized, they amount at most to inchoate titles. As an inchoate title is not exclusive, it can compete with another inchoate title, as, for example, the British does with the Argentine and Chilean ones. In addition, it can also compete with the titles of third states with respect to mineral resources on the continental shelf, which are based on discovery and effective appropriation of the resources. Moreover, as “territorial competence” could not entitle a state to more than the present inchoate titles do, nonclaimant states lack any territorial competence with respect to Antarctica, and there is no common territorial competence of the Consultative Parties. Unlike Nussbaum (p. 131), I am of the opinion that Article IV of the Antarctic Treaty has some relevance in this context, because the provision that “[n]o new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force” applies also to a claim directed exclusively against third states, as the author himself concedes (p. 129 n.87). And finally, it is difficult to see how the effective political measures of the Consultative Parties to keep other states or international organizations out of Antarctic matters until 1983 could give rise to a “territorial competence” of the Consultative Parties (p. 132). It seems to me that the principle of effectiveness can only enforce an existing territorial claim, but it cannot create it.

The second step in Nussbaum’s line of reasoning is the requirement that third states have explicitly or silently to accept the Consultative Parties’ claims to a regulatory power erga omnes in Antarctica if these claims become effective (p. 139 ff.). The author regards the 20 years of silence of general state practice in this context, unlike the situation of acquiescence, as tacit acceptance (p. 140). But he concedes that any new claim to regulate the mineral resources erga omnes would require an additional acceptance by third states because such acceptances would form not only an explication of the object and purpose of the Antarctic Treaty, but a substantial amendment of the existing Antarctic Treaty System involving different interests (p. 157).

By pointing specially to the acceptance of the Consultative Parties’ claim to a regulatory power erga omnes, Nussbaum has certainly met the essential point of the whole matter. One could perhaps have followed other strands of argumentation into the dark areas of this issue, adding certain other aspects such as the fact that the Antarctic Treaty System in its essential features furthers the purposes and principles of the UN Charter. But beyond
doubt, his profound discussion of the question of acceptance has helped to clarify central aspects of the issues involved, thus contributing considerably to the ongoing scholarly discussion.

In a short fourth chapter on the legal status of the Antarctic continental shelf (pp. 179–99) the author shows that the continental shelf concept applies in Antarctica too. Nussbaum concludes his fine, scholarly work with a brief prospective view (pp. 200–02). It ends with the slightly optimistic estimation that the future regime for Antarctic mineral resources is also likely to gain general acceptance (p. 203). Included are three documentary annexes and a map of Antarctica, as well as a comprehensive list of the relevant literature and an index. The book lacks an English summary, however, and one hopes that Nussbaum will publish the essential results of his research and his thoughts in a separate article in English.

Rainer Lagoni
University of Hamburg


In this study on the nationality of companies under private international law and public international law, Professor António Marques dos Santos, of the faculty of law of Lisbon, tries to summarize the various theories regarding this very complex problem. As he points out, this problem involves not only many branches of law but also political and economic considerations. The decision of the International Court of Justice in the Barcelona Traction case is quoted throughout the book, in most cases to back up the author’s position.

In the first part of the book the question of nationality is studied from a private international law focus and the first issue raised is whether nationality can be attributed to companies. The opinions of Niboyet, Laurent and others who deny such a possibility are mentioned. The majority of authors, however, agree that companies possess a nationality and the cases support this view. The decision in Barcelona Traction is categorical. But agreement ends here, since doctrine and state practice adopt more than one criterion on this matter. The five principal theories are mentioned; the author believes that the incorporation theory carried the most weight in the Barcelona Traction Judgment.

In part 2, Marques dos Santos examines the question of diplomatic protection of companies and their shareholders. Regarding the efforts of various authors aimed at recognizing a right of diplomatic protection for shareholders of foreign corporations under general international law, he sees the 1970 decision of the International Court of Justice as reducing these efforts to regional applicability (p. 197). In other words, this decision spells out a tendency of the international community to transform international law into a veritable universal law, taking into account the various legal systems of the world besides those of Western Europe and the United States. However, it
should be pointed out that despite the expressed preference of some of the judges for the development of a rule permitting diplomatic protection of shareholders, they felt compelled to agree that Belgium lacked *jus standi* to afford such protection to those of its nationals who held shares in the Canadian company.

In the final part of the book, the author examines some exceptional economic measures that may be taken by states in case of war such as those against the property of enemy nationals and those aimed at the protection of the national economy during a war. The book also contains summaries in English, French and German, which give an idea of its contents.

In his conclusions, Marques dos Santos stresses that whatever the evolution of international law in this field, the nationality of companies will continue to be of paramount importance from a practical point of view. In the opinion of the reviewer, the author should have voiced his opinions more independently, developing them without so many quotations. We can only deplore that many specialists will not be able to surmount the language barrier, since this book is worth reading.

G. E. DO NASCIMENTO E SILVA
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_Frustration of Contract und clausula rebus sic stantibus._ By Stefan Schmiedlin.

Almost 30 years ago, I argued that application of well-settled rules of interpretation and supplementation of contracts required, in proper cases, not termination, but continuation in modified form, of a frustrated contract.\(^1\) The argument was based on two simple propositions: first, that contractual terms should not be construed to cover situations that were not taken into account by the parties at the time of contracting;\(^2\) and second, that appropriate terms should be supplied on the basis of good faith to regulate a situation that the parties did not intend to be covered by the agreed-upon terms of the contract.\(^3\) My analysis drew extensively upon solutions evolved in cases of frustrated contracts by courts in Western Europe. German and


\(^2\) Since words are merely symbols to reflect intentions, they should not be interpreted to cover the unintended. The doctrine of frustration is often said to be applicable when circumstances that were unforeseen at the time of contracting render performance unduly burdensome or expensive. However, since parties may take into account even circumstances they do not foresee, the proper criterion is whether the possibility of occurrence of even unforeseen circumstances was taken into account. *Id.* at 314.

\(^3\) Courts have consistently supplied terms to fill gaps left by the parties by creating "implied" conditions. See E. A. FARNSWORTH, _Contracts_ §9.6, at 677 (1982). It is rather astounding that they have been so reluctant to do so in frustration cases. The misconception that they would modify terms agreed upon by the parties is no doubt responsible. Smit, note 1 *supra*, at 288. See also text at note 16 *infra*. 
Swiss courts especially have found no difficulties in supplying new terms for, rather than terminating, frustrated contracts. Since I first advanced my analysis, conditions in international commerce, in which frustration claims are perhaps made most frequently, have changed drastically. Foreign exchange rates have varied wildly, and so have prices of many basic commodities. It was therefore reasonable to expect increased reliance on excuses for nonperformance of the original contract terms such as frustration, unconscionability, mistake and creative construction of contract terms. Nevertheless, reported cases of successful reliance on such doctrines remain relatively rare. One of the reasons for this phenomenon may be that disputes of this nature arising in international commerce are increasingly resolved by arbitration and that arbitral awards are usually not reported.

Although there appear to be no fully reported American or English cases in which a frustrated contract has been kept in effect under newly implied terms, scholarly attempts to justify this continue to be made. It may fairly be said that those that rely on the premise that, in a frustration case, the court may change the terms of the contract have been unable to find an acceptable legal basis for the exercise and that none of the others have found a more acceptable basis than the universally accepted ground rule of contract law that contracts must be performed in good faith.

In particular, currently fashionable analyses on the basis of an acceptable distribution of economic risks have contributed little to insightful analysis. The situations in which reliance may properly be based on the doctrine of frustration vary so widely that no generalizations appear possible as to those in which the economic risk can better be imposed on one party than on the other. In the final analysis, it is not the party that can best bear the economic

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1. Smit, note 1 supra, at 296, 298–99. The new terms need not necessarily favor the party that would suffer a loss in case of performance of the original terms. A party may also invoke frustration in order to obtain a reasonable part of the anticipated advantage that performance of the original terms would bestow upon the other party. See cases cited at 296 n.66, 298–99 nn.89–90.
2. For example, the U.S. dollar recently gained and lost more than 30% of its value within the space of 1 year.
3. The world market prices of oil, coal and uranium have both risen and fallen dramatically in recent years.
5. Sometimes the newspapers or trade journals afford a glimpse of what is happening in the real world. See, e.g., N.Y. Times, Jan. 8, 1985, §D, at 2.
7. See Smit, note 1 supra, at 288.
8. Whether one party rather than the other is best situated to spread the economic burdens of the risk among the part of the public benefiting from its activities is a question to which the answer may vary from case to case. And if both parties serve a large constituency, both parties might be saddled with the risk.
risk, but the party that can fairly be saddled with the risk, on whom the law imposes its burden.

An effort could be made to distinguish between types of risks in applying the doctrine of frustration. It might be argued that the consequences of risks that affect a contract party personally and particularly should fall to the account of that party rather than to that of his contract partner. A typical example would be the burning down of the plant of a manufacturer who purchased raw materials for processing in that plant. In the other category would be unanticipated circumstances that represent market risks affecting all parties equally such as a generally unforeseen rise or fall in the market price of the product. Only the occurrence of such an event, it might be argued, would, in proper circumstances, justify equitable distribution of its consequences under the frustration doctrine.

Categorization of the risk along this line may be argued to serve a useful purpose because it may be helpful in determining whether it is reasonable to saddle a particular party with the consequences of the risk. However, in most cases of long-term sales contracts, the issue is likely to be devoid of practical significance because the purchaser will generally be able to sell the product on the market without suffering disastrous losses and will therefore not be in a position to rely on frustration in any event. But when this is not the case, there appears no good reason for saddling the party individually affected a priori with the risk. For when the unanticipated event was not taken into account by both parties, there appears no reason for imposing the consequences of its occurrence without further analysis upon the party individually affected. For example, if a purchaser of a raw material cannot use it because his plant has been demolished in a fire, it may be reasonable not to hold him to a purchase price that is significantly above the market price if the seller would make a reasonable profit even if the price were set at a lower figure.

All in all, it may fairly be said that the theoretical premises upon which frustrated contracts are to be terminated or continued with new terms are satisfactorily established, but that the reported American and English cases have somewhat lagged behind in formulating an adequate basis for their decisions.

Dr. Schmiedlin’s thesis therefore comes at an appropriate time. By providing detailed treatments of Swiss and English case law and doctrine, it furnishes most useful support for the view that common law courts should follow the example of their Swiss counterparts and, in appropriate cases, supply new terms for, rather than terminate, a frustrated contract. However,

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15 It may be argued that the burning down of the plant is within the sphere of risks reasonably to be borne by the buyer. However, if the seller would continue to make a reasonable profit even if the contract were terminated or a lower purchase price were imposed, a good case can be made for saddling the seller with at least part of the consequences of the unanticipated occurrence.

14 Because it may generally fairly be assumed that the parties, had they taken the unanticipated event into account, would have left the risk of relatively minor fluctuations with the purchaser. See Sm Bt, note 1 supra, at 307, 314.

15 See note 13 supra.
while Schmiedlin's thesis fairly restates the various theories advanced (pp. 27–36, 89–104, 121–49) and makes most useful classifications of cases in which frustration has been invoked (pp. 36–63), it neither endorses any of these theories nor develops its own analysis. For example, while noting that the English courts have thus far only terminated frustrated contracts and not provided new terms, it fails to argue that the theory of the implied term embraced by the English courts can provide a satisfactory basis for providing new terms as well as justify termination (pp. 65, 179–80, 182–83). The omission is the more remarkable since the Swiss courts, essentially proceeding on the same conceptual basis, have, in appropriate cases, provided new terms. Furthermore, the author continues to fall into the error of assuming that, in frustration cases, courts, when supplying new terms, modify the terms of the conduct agreed upon by the parties (pp. 182–83). This is regrettable, because the failure of common law courts to supply new terms in frustration cases is attributable in large part to their failure to discern that provision of new terms does not involve modifying the original terms of the contract.\(^6\)

Notwithstanding the author's perhaps understandable reluctance at this early stage of his career to criticize leading writers and courts, this book is a most valuable addition to the literature and may provide further impetus to a comparatively inspired breakthrough in the common law doctrine of frustration.

_HANS SMIT_
_Columbia University_


In the words of the editors of this useful volume, the United Nations Commission on International Trade Law (UNCITRAL) "has succeeded in giving new life to an old hope: world wide unification of the law of trade." This book is a significant addition to an outpouring of international literature centering on the United Nations Convention on Contracts for the International Sale of Goods, which, following a decade of preparatory work by UNCITRAL, was approved in 1980 without dissent by a diplomatic conference of 62 states.

The Convention is now being implemented by states in each of the regions of the world. In 1981, following recommendations by the American Bar Association and other leading organizations concerned with law and international trade, the President transmitted the Convention to the Senate with

\(^6\) A most interesting question, not addressed in the literature, is whether the provision of new terms would be the function of the judge or that of the jury. While it might be argued that the determination of what is fair and reasonable in the circumstances should be left to the jury, which, as in determining whether someone was negligent, would impose community standards, the better view would be to leave to the judge the provision of appropriate terms required by law.
the request for prompt consent to ratification.\(^1\) On October 9, 1986, the Senate gave this consent by a vote of 98-0, and on December 11, 1986, the United States, Italy and China simultaneously deposited with the United Nations their instruments of ratification, bringing the number of formal approvals to 11. Approval (by ratification or accession) by 10 states is required to bring the Convention into force; following a 1-year period for education and other preparatory measures, the Convention will enter into force on January 1, 1988.\(^2\) Constitutional measures for formal approval are at an advanced stage in several other states; this process will be accelerated by the Convention's entry into force.

The book under review is based on lectures delivered at a course on the International Sale of Goods that was held in 1985 at the Inter-University Center of Post-Graduate Studies at Dubrovnik, Yugoslavia. Ten lectures are devoted to the 1980 Convention on International Sales; four are concerned with related topics. The book provides an inviting tapestry that reflects the diverse interests of scholars from nine countries.

The opening chapter by Professor Sono (Hokkaido; Secretary of UNCITRAL, 1980-1985) recalls the foundations that leading continental scholars laid in the 1930s for the 1964 Hague Conventions on international sales; these Conventions entered into force among a small group of states primarily of Western Europe and will be superseded by the 1980 Convention. Sono also summarizes UNCITRAL's work in developing uniform rules for other aspects of international trade such as periods of limitation, arbitration and carriage of goods by sea.\(^3\)

Dr. Volken (University of Fribourg) discusses the Sales Convention's scope of application and examines problems of uniformity of interpretation that can arise as the Convention is applied by domestic courts with diverse legal traditions.\(^4\)

Professor Goldštain (Zagreb) contributes a valuable exposition of the case for "autonomous" law for international trade—a concept with inviting vistas.

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\(^1\) S. Treaty Doc. 9, 98th Cong., 1st Sess. (1983). The President's message attached a 3-page summary of the Convention by the Secretary of State and an 18-page legal analysis comparing the uniform sales law of the Convention with the sales article of the Uniform Commercial Code.

\(^2\) As of December 12, 1986, instruments of acceptance—of ratification (R) by initial signatory states and of accession (A) by other states—had been deposited with the United Nations by the following 11 states: Argentina (A), China (R), Egypt (A), France (R), Hungary (R), Italy (R), Lesotho (R), the Syrian Arab Republic (A), the United States of America (R), Yugoslavia (R) and Zambia (A).


\(^4\) The 12th International Congress of Comparative Law, held in Australia in August 1986, examined ways to promote uniformity in applying this and other Conventions, on the basis of 15 national reports and a general report prepared by this reviewer.
but ambiguous contours. Goldštajn also incisively examines the Convention's important provision (Article 9) that gives legal effect to usages, observed in international trade, that the parties have "expressly" or "impliedly made applicable to their contract"; these usages, like express contract terms (Article 6), take precedence over inconsistent provisions of the Convention and thus help the Convention to adapt to diverse and changing conditions. In the development of the Convention, states that are generally suspicious of usage as a source of public international law were able, albeit after extended discussion, to conclude that trade usage in the field of international commercial transactions could be given important legal effect without threatening their sovereignty.

Sono, in a second contribution, discusses the Convention's handling of problems that arise in the formation of contracts such as the revocation of offers and exchanges of communications that purport to close a contract when an offer and an "acceptance" do not perfectly match.

Professor Enderlein (Potsdam) contributes a thorough and valuable analysis of the obligations of the seller. Especially interesting are his comparisons of the Convention with rules of law under various legal and regulatory systems of the German Democratic Republic (GDR), including the General Conditions for Delivery for transactions between the socialist countries that are members of the Council for Mutual Economic Assistance (CMEA), and the GDR's 1976 Code on International Commercial Contracts (GIW) applicable to trade between the GDR and market areas. These comparisons reveal surprising similarity of result despite the differences between market and planned economies. Certain points of divergence are also interesting, such as the emphasis in planned economies on remedies to compel the delivery of substitute goods or the repair of defective goods.

Dr. Sevón (Ministry of Justice, Helsinki) contributes a careful study of the obligations of the buyer. Especially helpful is his examination of the Convention's remedies for breach, coupled with suggestions for contract provisions for problems that are too delicate to be left to general rules of law.

Professor Vilus (Novi Sad/Belgrade) reviews several important remedial provisions of the Convention—one party's privilege to suspend performance based on danger of failure of counterperformance, and impediments that prevent performance (force majeure).

Professor von Hoffmann (Trier) contributes an intensive and valuable study of the Convention's rules on when risk of loss shifts from the seller to the buyer, especially when goods are lost or damaged in transit. The analysis is illumined by examples from domestic legal systems, international trade

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5 Czechoslovakia has a similar code, dating from 1963, which is designed for international transactions with parties in market economy areas. Of less relevance were comparisons between the international rules of the 1980 Sales Convention and the GDR Contract Act, governing relations between GDR socialist enterprises, and the GDR Civil Code, which primarily governs consumer sales.
usages, commercial practices and modern developments in international transportation. Especially interesting and challenging are points where von Hoffmann's conclusions differ sharply from those of the present reviewer.6

Professor Drobnig (Hamburg) draws on his background in comparative legal systems to address General Principles of European Contract Law, with special reference to the validity of contract provisions. This chapter demonstrates the need for uniformity in this field—and also the sharp diversity of approaches that makes unification difficult. The study wisely suggests that, in view of these difficulties, it will be necessary to examine and compare solutions for concrete problems rather than legal theories.

Professor Hellner (Stockholm) brings his widely recognized scholarship to bear on the relationship between the Sales Convention and various Standard Form Contracts—especially the ICC's Incoterms (1980) and the (ECE) General Conditions for the Supply of Plant and Machinery for Export (ECE 188). Particularly significant is Hellner's conclusion that the ECE General Conditions unduly restrict the buyer's right to avoid the contract for serious breach, and therefore need to be supplemented by the provisions of the Convention.7

The book closes with four papers that are not so closely related to the 1980 Sales Convention. Professor van Houtte (Louvain) analyzes the international sales price as a basis for customs valuations; Professor Conetti (Trieste) discusses conflicts rules applicable to international sales; Professor Hoyer (Vienna) examines problems related to security interests; and Professor Šarčević (Rijeka/Lausanne) gives detailed attention to the UNIDROIT Geneva Convention on Agency in the International Sale of Goods (Geneva, 1983).

This reviewer found much of value in this book and can recommend it for those who specialize in commercial, private-law problems of international trade. Finally, this review provides an occasion to note that, with the approaching entry into force of the 1980 Convention, the general commercial lawyer needs to have ready access to this uniform law for international sales. This calls for reexamination of 1950 legislation that excluded treaty law from the Statutes at Large and the United States Code. Informal, ad hoc arrangements have been made for the inclusion of the 1980 Sales Convention in the United States Code Annotated and similar unofficial publications, but there is urgent need for a system to assure that treaty law of general significance will be available in the average private-law library. But that, as Kipling would say, is another story.

JOHN O. HONNOLD
University of Pennsylvania Law School, Emeritus


7 Points where Hellner differs with this reviewer's analysis of the Convention include notes 12 (c.i.f. terms and Incoterms) and 14 (delivery procedures provided by Article 31(b) when the contract relates to goods at a specific location).

A new edition of the impressive handbook on the law of international commerce by Professor Tudor Popescu has recently been published. Popescu’s long academic career and his many works, published in Romania and elsewhere, as well as his personal participation in the elaboration of new rules of international law, guarantee the high quality of this manual. In the foreword he explains the necessity for a new edition (the first appeared in 1976) “with a more accentuated practical character.” That practical character should be emphasized. It is based on the vast literature in this field (particularly on that of France). It analyzes all of the problems belonging to the law of international commerce.

The manual is divided into four parts; these are followed by summaries in French and Russian, an index and an appendix providing a tabulation of arbitral practice.

The first part is entitled “Sources, Acts of Commerce, Participants in International Commerce.” Here the author shows us that the subject matter of the law of international commerce has dual characteristics, being both commercial and international. The foreign element leads to the consequence that the legal relations involved are governed by private international law, although that does not always mean that the sale is itself international. We must emphasize that there are cases in which even the presence of a foreign element does not transform the relationship from one of internal law to one of private international law. The author criticizes the term “commercial international law,” in spite of the existence of a United Nations Commission for International Trade Law.

The sources of international commercial law are shown to be both internal and international. In the former category are such special laws for foreign trade as the Czechoslovakian Law No. 101/1963, the Gesetz über internationale Wirtschaftsverträge of the German Democratic Republic and the Uniform Commercial Code of the United States, as well as general civil laws and practice. In the latter category are international rules such as the conventions concerning the unification of private law and international commercial practice.

Popescu accurately analyzes the various aspects of trade practice. He emphasizes the creative role of practice, the most characteristic being its use in the adaptation of contracts to avoid their nullification, and the role of custom in explaining standardized clauses. In the section devoted to the participants in international commerce, all sorts of commercial companies are fully examined. We have one critical remark to make; the author regards private arbitration as still in force in Romanian law (p. 127). True, it has not been abrogated, but it is no longer used.

The second part of the book deals with contracts of international commerce and the international sale of goods. In relation to choice-of-law clauses (pacta de lege utenda), the author writes:
This possibility given to the contracting parties to choose the applicable law is recognized by all systems of law, even if there are controversies about the limits of its application. Even the law of the United States, which in the first Restatement of the Law of Conflicts of Laws (1931) refused to allow the parties the right to choose the applicable law for the contract, in the Restatement, Second (1971) openly recognized this right for the parties.

In Popescu's opinion, foreign law is to be considered as an element of "law" and not as an element of "fact." We maintain our opinion1 that foreign law is "fact" and not "law," because it must be proved and the rule that jura novit curia does not apply here. Even the author agrees that foreign law must be proved in the courts like any other "fact."

The interpretation of the choice of law made by the parties, the author shows, must be treated in accordance with the rule potius est ut valeat quam ut pereat. He also analyzes Incoterms, leasing contracts, know-how contracts and engineering contracts. In relation to the last, he writes, "the legal concept of engineering is a creation of American practice. . . . Like the Anglo-American concept of agency, the engineering contract contains a series of legal relations, which, in our law, belong to the realm of classical contracts, but which are connected by their unity of aim and object" (p. 282).

The third part of the manual is entitled "Elementary Notions of Banking Law in International Commerce" and the fourth part is dedicated to international commercial arbitration. The problems dealt with include the United Nations Convention on Arbitration, the jurisdiction of arbitrators, including the problem of their authority to judge their own jurisdiction, and the contents of the arbitral award and its execution.

Betinio Diamant
Of the Romanian Bar


By agreeing to the "Generalized System of Preferences" (the GSP), the contracting parties to GATT have authorized preferential tariff treatment for less-developed countries. The decision to allow these preferences derogates from the principle that states are to be treated as economic equals, a principle that follows from GATT's original adoption of most-favored-nation treatment for trade between contracting parties. Although early GATT documents recognized the special needs of less-developed countries, the origin of the GSP concept is often traced to the 1964 report to the United Nations by the Argentine economist, Dr. Raúl Prebisch. Acting on this report, the General Assembly established UNCTAD, which provides less-developed countries a forum to urge concessions, such as tariff preferences,

1 Diamant, Book Review, 70 Revue critique de droit international privé 599, 602 (1981), and 72 id. at 198 (1983).
in order to encourage economic development. The developed countries have not rushed to make general concessions, but they have agreed, albeit grudgingly, to the principle of the GSP and individual countries have adopted specially tailored tariff concessions.

Dr. Natan Elkin, a compatriot of Dr. Prebisch, analyzes the adoption and implementation of the GSP in the book under review. The book's first chapter sketches the historical antecedents of GATT and the GSP, making the necessary point that special trading relations between nations antedate the widespread adoption of most-favored-nation treatment. A short second chapter sets out systematically the basic attributes of the GSP, while a longer third chapter analyzes the system's legal status. The next two chapters examine in substantial detail the implementation of the GSP by the more-developed countries, with special emphasis on the details of European regimes and the role of the GSP in the Realpolitik of international commercial politics. A very short sixth chapter speculates about the nature of the principles underlying the GSP and the system's relation to the concept of a droit du développement. The book's themes are then summarized in a five-page conclusion.

The last 60 pages of the book include a detailed bibliography and an annex that collects official documents. Elkin suggests (p. 16) that the texts reproduced in the first part of this annex—UN General Assembly resolutions, resolutions of UNCTAD conferences, decisions of the UNCTAD Council, a resolution of the UNCTAD Special Committee on Preferences and several decisions and declarations made within the context of GATT—constitute a veritable "code" governing the generalized system of preferences.

Many of the strengths and weaknesses of the book can be traced to its origin as a revision of Elkin's 1983 doctoral dissertation, which he defended before the Faculty of Law of the Catholic University of Louvain. The book's greatest strength is its comprehensive and systematic exposition of the international and national legal texts that make up the written sources of the GSP. Although there is a natural tendency to cite European (especially French-language) texts, Elkin does include some discussion of the U.S. system of preferences and he cites the plentiful Anglo-American literature on GATT and the GSP.1 At the same time, Elkin rarely goes beyond the written primary and secondary sources to report on actual practice or on the economic impact of the GSP. As a result, he probably underestimates de facto advantages enjoyed by less-developed countries, advantages such as the willingness of their more-developed trading partners to overlook their technical violations and their use of traditional GATT exceptions like the balance-of-payment exceptions in Articles XII-XIV.2 For the GATT specialist, in sum, the book is a competent analysis of known material.

1 As Elkin notes (p. 13), the delay between completion of the dissertation and its publication in 1985 means that he does not fully incorporate other important commentaries on the GSP. See especially A. Yusuf, Legal Aspects of Trade Preferences for Developing States (1982).
For the nonspecialist reader, the chapters analyzing the legal status of the GSP will be of most interest. In chapter 3 Elkin distinguishes (p. 64) the légitimité of the GSP from its légalité. By legitimacy he means the acceptance of new values not yet incorporated into the legal system, while by legality he refers to values incorporated into the legal system. After close examination of the texts he collects in the annex, Elkin concludes that, if these acts are looked at as a whole and as part of an evolving process, the GSP has achieved both legitimacy and legality. He comes to this conclusion even though he notes that many of these documents explicitly state that they do not impose an obligation on donor states, and even though he concedes that the legal rights of the less-developed countries are relative because donor countries may now distinguish among them according to their state of development and may withdraw preferences as countries develop. He also acknowledges that the efficacité of the GSP depends upon implementation in national law rather than enforcement as an international legal norm. Nevertheless, Elkin concludes (p. 116) that these rights are legal in the sense that they constitute a droit mouvant or droit souple.

Elkin returns to this analysis in his final chapter (pp. 242–45), where he examines whether the GSP should be classified as part of a distinct branch of law identified by others as the droit du développement. Here he qualifies his earlier conclusion by writing that the GSP appears (semble) to have acquired a certain legitimacy and a certain efficacy that may be the basis in the future of an obligation to grant tariff preferences. At present, however, Elkin reluctantly concludes that there is no right to the GSP.

PETER WINSHIP
Southern Methodist University


British labor relations appear to be in a perpetual state of turmoil as the bitter miners' strike of 1985 showed. The miners' strike ended in fiasco and illustrated the major shortcomings of British labor relations: the Marxist orientation of a segment of the labor movement personified by Arthur Scargill; the inability of the "central" labor organization (the Trade Union Congress [TUC]) to exert its influence and thereby avoid ineffective labor tactics of constituent unions that harm the entire movement; the dichotomy between the union worker's aspirations and the objectives of the union leadership; and the absence of a comprehensive legal regime adequate to channel labor disputes and thereby avert the violence so prevalent in the miners' strike.

The present docility of British trade unions seems to support the idea

5 Elkin cites in particular the works of Professors Rigaux, Virally and Schachter.
that all is now well and that these problems have been solved. The history of British labor relations, however, dictates a more cautious view.

*Labour Law and Industrial Relations: Building on Kahn-Freund* is a compilation of essays written by the leading experts in British labor law and relations. The great value of this work lies in its critical analysis of the problems inherent in British labor relations.

To state that the labor relations of a country are a product of its history and culture and that these essential national characteristics must be taken into consideration in fashioning its labor law nowadays appears to be a simplistic truism. This truism was ignored by English academic lawyers until the influence of Otto Kahn-Freund began to be felt in the late 1940s. The tremendous influence of Kahn-Freund in bringing about this revolutionary change is not exaggerated by Lord Wedderburn's comment that "to ask whether this revolution would have taken the same course without the presence of Otto Kahn-Freund . . . is rather like asking whether the Russian revolution would have taken the same course without Lenin's arrival at the Finland station" (pp. 31-32).

The importance of Kahn-Freund's contribution to English legal scholarship, with his emphasis on a sociological approach refined by a comparative law perspective, is sufficiently great to justify a book summarizing the great comparativist's efforts. The intention of the editors was to go further and, as the title indicates, "build on Kahn-Freund" by using his methodology to analyze the state of British labor relations and law since his death in 1979.

Thus, the book begins with a translation of Kahn-Freund's preface to the German edition of his *Labour and the Law*, which compares British and West German labor law. This introductory chapter is followed by two chapters outlining the influence of Kahn-Freund on British labor relations, written by Professor Clegg and Lord Wedderburn. These are followed by a chapter analyzing the German writings of Kahn-Freund, which contain his most explicit attempts to develop a sociology of labor law (Clark) and one summarizing his methodology, and, in particular, his use of comparative analysis (Lewis).

German legal scholars such as Eugen Ehrlich transformed the study of law by attacking the positivist idea that law is created solely by the state. Kahn-Freund refined the analyses of the sociological juristic school and most importantly applied its teachings by analyzing in detail the institutions of Weimar Germany's labor law (the arbitration system, judicial decisions, works councils, collective bargaining). From his detailed analysis of the "living law," he was able to provide support for his thesis that state intervention in labor relations had perverted the ideals of the labor movement by making labor law subservient to a dictatorial civil service and a conservative judiciary.

In providing such examples and by recounting the influence that the Weimar experience had on Kahn-Freund's views, these latter two chapters provide insights of great value for a larger audience than specialists in British labor law. A sociological approach, as applied by Kahn-Freund, and a comparative perspective can elucidate problems and prevent the fashioning of inappropriate solutions.
The contributors to *Labour Law and Industrial Relations* do not exempt Kahn-Freund from his own principles; they show how he altered his views in the face of developments in British labor relations in the 1970s. Kahn-Freund's view of British labor relations was, not surprisingly, greatly influenced by his Weimar experiences.\(^1\) He therefore continually paid homage to the "direct democracy" heritage of British labor relations, that is, the important role played by shop stewards and their accountability to the rank and file. He believed that this tradition prevented alienation and served as a bulwark against the growth of fascism in Britain, whereas the centralized prewar German trade union movement furnished little opposition to Hitler.

This contention is questionable. Britain, after all, had a centuries' old tradition of individual political liberty sadly lacking in Germany, and this difference, as well as the geopolitical, economic and social differences between the two countries, more probably explain why they took separate paths in the 1930s. In his later writings, Kahn-Freund's infatuation with "direct democracy" waned as he began to view this political asset as an economic liability that impeded the implementation of structural adjustments essential to the continued vitality of the British economy. In modifying his views, Kahn-Freund demonstrated the need to reexamine one's own premises constantly, and he thus remained true to his own methodology.

The book concludes with a chapter that attempts to apply Kahn-Freund's teachings to recent developments in British labor law. This chapter will certainly be of interest to the specialist. Nevertheless, its detailed analysis of the labor legislation enacted by the Conservatives will perhaps be less accessible to the general reader than the previous chapters.

Labor relations are everywhere in transition. The premises upon which labor relations have been based may no longer be valid. The contributors to *Labour Law and Industrial Relations: Building on Kahn-Freund* provide few precise answers to how labor law can respond to these changes. They do, however, admirably illustrate the need rigorously to apply the sociological and comparative methodologies used by Otto Kahn-Freund in testing possible solutions, and in so doing they provide a work that should be of interest to both labor relations specialists and comparative lawyers.

FRED EINBINDER
American College in Paris


As in prior years, this useful volume contains articles, as well as an account of Dutch state practice, treaties, municipal legislation with international im-

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\(^1\) Kahn-Freund, who served as a judge on the Berlin Labor Tribunal, fled Nazi Germany in 1933.
The eight articles compose a symposium on state responsibility and liability for injurious consequences arising out of acts not prohibited by international law. The authors are M. B. Akehurst of the University of Keele, England; M. C. W. Pinto, Secretary General of the Iran–United States Claims Tribunal; G. Handl, of Wayne State University, Detroit; J. Combacau and D. Alland, of Paris University of Law; Bruno Simma, of Ludwig-Maximilians University, Munich; G. M. White, of the University of Manchester, England; L. F. E. Goldie, of Syracuse University College of Law; and S. P. Jagota, visiting professor at Dalhousie University.

This topic has been under consideration by the International Law Commission, and the texts prepared in connection with the Commission's work are annexed. The consensus seems to be that the term "responsibility" should be used to describe "secondary" remedies for wrongful acts that violate "primary" norms, while "liability" for the consequences of ultrahazardous but lawful acts flows directly from a "primary" norm. Professor Goldie, while distinguishing between "absolute" and "strict" liability, characterizes the injurious effects of risk knowingly undertaken for profit, to the damage of innocent third parties, as unjust enrichment by means of expropriation, imposing liability upon the actor.

Interesting policy statements of the Dutch Government deal with the legality under Dutch law of the deployment of U.S. missiles in the Netherlands (pp. 320–32; over a dozen articles on that subject are listed in the bibliographical section of the volume, pp. 570–71) and the U.S. military action in Grenada (p. 337). The Minister of Foreign Affairs stated in Parliament on April 12, 1984, with reference to the attempt by the United States to forestall the filing of suit by Nicaragua, that "the American step [was] so disappointing" because "we used to regard the United States as one of the strong champions for increasing the jurisdiction and prestige of the International Court of Justice" (p. 396). The Minister of Finance likewise expressed disapproval of the system of "unitary taxation" of multinational or multistate corporate enterprise (p. 420) embodied in legislation such as that of California, which was approved in *Container Corp. v. Franchise Tax Board.* It is noteworthy also that the rule against extraditing Dutch nationals now recognizes an exception if an arrangement is in force permitting any prison sentence imposed to be served in the Netherlands, after trial in the *forum loci delicti* (p. 346).

Under new legislation in 1984 on nationality, marriage has ceased to be a ground for automatic acquisition of Netherlands nationality, but the normal 5-year residence requirement has been eliminated in the case of a spouse if the marriage is of at least 8 years' duration. Likewise, "in line with prevailing ideas on marital bonds in the Netherlands," the residence requirement has been lowered to 3 years for unmarried persons "who have had an extra-marital durable relationship of at least three years with a Netherlands na-

ional” (p. 453). No loss of Netherlands nationality for any reason shall occur if such loss would result in statelessness (p. 454).

A number of interesting cases are found under the rubric of judicial decisions. The Supreme Court (Hooge Raad) rejected the claim of a Belgian Communist “draft-dodger” that his refusal to obey military orders was an unextraditable “political offense” because he intended to harm the Belgian armed forces, to which he objected, as to the Belgian state, because of their “capitalist” nature. The Court held that his individual action did not bring his political goals any nearer to fulfillment and that his action cannot be regarded as a political offense (p. 487). An administrative decision held that discharge of gypsum wastes into the western Scheldt River was not a discharge “at sea” and hence did not violate the Oslo and London Conventions of 1972 against such pollution; and since the discharge was “from ships,” it was not prohibited by the Paris Convention of 1974 for prevention of “marine pollution from land-based sources” (pp. 519–20).

In another case, an industrial tribunal upheld the refusal of a license to export four submarines to Taiwan. Under applicable legislation, export could be prohibited by decree if required in the interest of the national economy, security or “the international legal order.” It was admitted that issuance of the license would be likely to result in a “serious and prolonged disturbance” of relations with Communist China. In the absence of legislative history, and in the presence of conflicting views advanced by academic experts as to the meaning of “the interest of the international legal order,” the tribunal found an analogy in the legislative history of Article 90 of the Dutch Constitution, which provides that “[t]he Government shall promote the development of the international legal order.” The documentation there showed that the drafters of the Constitution held the view that “pursuit of good relations with other states must be regarded as promoting the interest of the international legal order.” The drafters of the Import and Export Act could hardly have entertained a different view; indeed, as Professor Riphagen had observed, in the absence of a central international organization effectively exercising legislative, executive and judicial functions, good international relations constitute the essence of the international legal order. The tribunal also noted that the Government had indicated, when granting a license for the export of two submarines to Taiwan in 1980, that no further such licenses would be granted; that China had then reduced the rank of its envoy to the Netherlands to the lowest possible level, that of chargé d’affaires; that if a license were granted now, China might break off diplomatic relations altogether; that other exporters, including the United States, were reducing arms exports to Taiwan; that as a large and populous power, China was of essential importance to Asian stability; and that in light of all these circumstances the interests of the international legal order outweighed the loss of one or two thousand shipyard jobs. The 1980 decision is not a precedent requiring the grant of a license in 1983 because the factors involved were different (pp. 530–35).

Edward Dumbauld
U.S. Senior District Judge
The law of the sea provides a focus for the 27th volume in the Soviet Year-Book series. Authors show concern for far more than the 1982 Convention. Clearly, the USSR’s status as a great naval and maritime power has influenced thinking, so that the major concern is no longer protection of coasts from invasion. Today, papers discuss the appropriate boundaries of areas of the sea; whether the “common heritage” concept is analogous to the traditional “freedom of the seas”; what general principles should guide draftsmen of agreements on rescue and salvage; whether a code on international inspection of fishing vessels is desirable in order to reduce the friction increasingly evident in practice; whether ecological protection of the sea is compatible with developmental goals; how unhampered access to the sea for research purposes can be provided in law without interfering in the internal affairs of states; and whether navigational rights of research vessels should be classified similarly to those of warships. Although a recurring theme is the long-favored one of protection of sovereignty, a new flexibility is evident.

The volume opens, as has become customary, with a paper by G. I. Tunkin, writing in his 80th year, but still President of the Soviet Association of International Law. His theme is to assess the Nuremberg principles 40 years after, but he goes back to 1917 to repeat his oft-told chronicle of Soviet contributions to the creation of a vastly developed general international law. He rejects Western authors who think that Nuremberg made individuals subjects of international law. He holds to the ever-repeated Soviet position that only states can be subjects. He reasserts his position that contemporary international law can be explained as the concurrence of wills of states rather than as emerging from endless struggle between competing systems. He finds law not only in treaties but in resolutions of the UN General Assembly, and regrets that the Assembly has not spoken out boldly against what he sees as the illegal actions of the “imperialists,” headed by the United States and Israel. He sees these powers pushing international law back into what it was before the socialist camp emerged and negating achievements that have been recorded under the live-and-let-live principles that he and his colleagues have long called the “law of peaceful coexistence.” As always, Professor Tunkin hits hard at what he calls the “nihilists” of the West.

The volume publishes, as usual, the minutes of the 27th (1984) annual meeting of the Soviet Society. It is here, as always, that the outsider finds hints of the dynamics of the formulation of Soviet positions on a variety of topics, for there is considerable divergence of views, especially on the public law panels. Speakers debate the status of a treaty obligation for signatories that do not ratify, and also the binding effect to be accorded custom when a third-party state has not adhered to a multilateral convention. The prevailing view seems to be that the third party is bound only if the principle enshrined in the convention has become *jus cogens*. Newly emerging states are thought by some speakers to be bound by a generally recognized norm, while others would bind the new state only if it had not objected to application.
of the norm. Debate took place between O. V. Bogdanov and I. P. Blishchenko over the sources of disarmament law, whether in treaty or in general international law.

In the bibliography of works from the People’s Democracies of Eastern Europe, the German Democratic Republic’s authors prove to be the most prolific, but none even comes near to the mass of literature being published in the USSR itself, as evidenced by the 16 pages of items. Tunkin can take credit for stimulating the writing of an ever-increasing number of papers and books, for bringing the Soviet Association into the worldwide International Law Association and for publishing the Year-Book. His 80th birthday is an occasion that commands attention the world around, even among the many with whom he crosses swords.

JOHN N. HAZARD
Board of Editors


Since its assumption of office in 1981, the Reagan administration has followed a policy of constructive engagement with regard to South Africa. Its aim is to maintain cordial relations with the white minority regime in order to generate influence that could be used to persuade it to adopt internal reforms and external policies conducive to peace in the southern part of the African continent. The book under review is an examination of how this approach has been handled in practice and what results it has produced.

The first three chapters deal with the Angola-Namibia complex, Mozambique and Zimbabwe. On the first issue, the United States and South Africa agree that Namibian independence should be linked to the withdrawal of Cuban troops currently stationed in Angola. But, whereas the United States would be content with improving relations with the current Marxist Government of Angola in order to woo it away from Soviet influence, South Africa seeks its downfall and replacement with a more friendly government led by the UNITA rebels. Although it concluded a peace agreement with Angola in February 1984, South Africa has continued to provide assistance to UNITA and periodically to invade the southern provinces of Angola under the pretext of destroying bases of the Namibian guerrillas of SWAPO. As a result, Angola has sought more support from its Soviet and Cuban allies and the size of the Cuban expeditionary force has increased. This evolution has been accentuated by the repeal of the Clark amendment by the U.S. Congress, which forbade military assistance to UNITA. As for Namibia, hopes for an independence settlement in accordance with the rel-

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1 Movement for the Total Independence of Angola, led by Jonas Savimbi.
2 South West Africa People’s Organization, led by Sam Nujoma.
levant UN guidelines\(^5\) have become very dim indeed, although South Africa has been prevented so far from granting the territory "independence" on its own terms.

South Africa also concluded a peace agreement with Mozambique at Nkomati in 1984, while U.S. diplomats were busy improving relations with the Machel Government. However, South Africa has never stopped assisting the RNM\(^4\) rebels and thus contributing to the further deterioration of the internal situation in Mozambique. As for Zimbabwe, the U.S. attitude has wavered between approval of the country's pragmatic policies and upset over its Marxist rhetoric. The latter concern led to a near break in diplomatic relations in July of last year.\(^5\)

The remaining four chapters deal mainly with South Africa itself. The first (ch. 4) describes the genesis and development of the sanctions campaign in the United States and its impact on Congress. It is followed by a description of the attitude of U.S. economic circles toward sanctions and the tendency of U.S. corporations to leave South Africa mainly for reasons of lack of profitability and excessive risk. The next chapter considers events leading to the presidential sanctions decree of September 1985, which was designed to forestall tougher legislation contemplated by Congress. The last chapter describes the evolution of the U.S. attitude toward the ANC,\(^6\) partly under the influence of contacts with that organization initiated by influential South African businessmen. The author's overall verdict is that the constructive engagement approach has been a total failure and that such successes as its proponents claim for it are actually due to pressures in South Africa itself and the impact of the growing sanctions movement in the United States and worldwide.

For anyone who desires an up-to-date presentation of the evolution of U.S. policy in southern Africa, this well-written and objective study is of great usefulness, particularly with regard to economic questions and the attitude of business both in the U.S. itself and South Africa. It shows that within the global East-West perspective favored by the Reagan administration, good relations with the current regimes of Angola and Mozambique, the acceptance of Namibian independence under a SWAPO government and early steps toward ensuring good relations with a postapartheid South Africa are more likely to benefit U.S. and Western interests than stubborn adherence to ineffective constructive engagement policies. Some comparisons are drawn with the situation in the Middle East, and the author finds that in southern Africa the United States has successfully avoided—so far—the

\(^5\) SC Res. 435 (Sept. 29, 1978), which established the UN Transition Assistance Group for Namibia.

\(^4\) Mozambican National Resistance. This movement appears to lack strong central leadership and has no clear policy beyond the overthrow of the current Government.

\(^5\) As a result of the speech made by a cabinet minister at the July 4 reception in the presence of former President Carter, the U.S. ambassador was recalled. See ECONOMIST, July 19–25, 1986, at 35. Economic assistance was later canceled.

\(^6\) The African National Congress, a multiracial movement whose titular leader is the imprisoned Nelson Mandela and whose acting leader is Oliver Tambo.
trap of becoming too closely identified with one side while seeking to play the role of an honest broker.

The book deals with events up to October 1985. Developments since that time appear to confirm most of the author’s findings. The South African Government has continued to disregard outside pressures and has toughened its attitude by imposing a general state of emergency in June 1986 and pursuing military incursions into neighboring countries. These actions have not led to any lessening of pressures from the black majority inside South Africa and have given more fuel to the worldwide sanctions campaign. The South African economy is in deep recession and is preparing for a siege. Its leaders must now pay at least lip service to the Government’s defiant position. It will be interesting to know whether and how they will pursue their contacts with black movements in order to promote a reasonably stable and prosperous postapartheid South Africa.

DIETRICH KAPPELER
University of Nairobi


The still recent Panamanian-American Treaties concerning the Panama Canal have given rise to an interesting bibliography, proof of which is offered by the invaluable monograph published in Switzerland by Dr. Richard Perruchoud. The book that is the subject of this review came out in the same year—1983—as the aforementioned publication. It is the work of the prestigious Panamanian jurist Dr. Julio E. Linares, a former minister and a professor of international law in his native country. He approaches the question from the point of view of the legitimate interests of Panama. As the subtitle of the work so expressively suggests (“From Roosevelt colonialism to senatorial neocolonialism”), Linares’s entire dialectical effort is devoted to demonstrating with sound arguments how the gains achieved by Panama in the new Canal Treaty were tempered in the Treaty concerning the neutrality of the Canal by the amendments, conditions, reservations and understandings or interpretations introduced by the U.S. Senate when it gave its advice and consent to the ratification of the Treaty. The author underlines the fact that this Treaty is to govern in perpetuity not only the present sluice Canal, but also, with regard to the regime of permanent neutrality, any other international waterway constructed either entirely or partially on Panamanian soil and, with regard to the internal security, efficiency and maintenance of the Canal, any other interoceanic route that might be used, totally or partially, within such territory, provided that the United States has participated or is at present participating in its construction or financing.

In successive chapters, the author studies the signing of the Torrijos-Carter Treaties, the doubtful capacity of Torrijos to represent Panama in their signing and ratification, the Panama Canal Treaty and the 1967 projects for the Treaty, the question of permanent neutralization or neutrality, the position relative to this before the 1967 Treaty and the protection and defense of the Canal according to the Treaty. The detailed analysis and critical review of the text of the Treaty are very interesting (with the inclusion of a long historical paragraph with reference to Article VI, covering both the Thompson-Urrutia and the Montería Treaties). There are pertinent observations regarding the absence in the Treaty of a clause stipulating compulsory arbitration or one that recognizes the compulsory jurisdiction of the International Court of Justice, and Linares duly emphasizes the danger this implies for Panamanian interests. In the following chapters, the passage of the Treaties in both countries is described and the aforementioned senatorial amendments, conditions, reservations and interpretations are examined and criticized with great rigor and care. There is also a transcription and discussion of the letter Carter wrote to Torrijos when the Senate gave its advice and consent to the ratification of the Treaty. In this letter Carter guarantees that he will respect the sovereignty and dignity of Panama and reaffirms the principle of nonintervention in its internal affairs. However, the letter is received with skepticism by Linares who doubts whether the statements contained therein will be honored in view of similar promises made at other times to Panama by Presidents Theodore Roosevelt and Taft, which were openly broken later on. At the same time, the Panamanian Instrument of Ratification is examined in detail concerning the Treaty of Neutrality and Panama’s relations with third countries. On this point, Linares is of the opinion that agreement to the Protocol to the latter Treaty does not confer any rights on the states adhering thereto with respect to transit through the Canal; nor does it permit them to take any action whatsoever to maintain the regime of permanent neutrality. The book ends with a chapter devoted to the nullity of the Treaty of Neutrality and to the legal position of Panama as to rescinding it, together with some conclusions. With respect to invoking nullity, the author concludes that the Treaty cannot effectively grant the United States a hypothetical “right” of aggression and that it prevents Panama from freely disposing of its most important natural resource. In the conclusions, the thesis supported throughout the book is briefly reiterated. There is also a useful documentary appendix and a well-chosen bibliography.

In short, this work is to be recommended. It is essential reading for all those who are interested in this subject.

José Pérez Montero

University of Oviedo


Let us imagine we are dreaming... Let us imagine we will wake and all this will belong to the past. I will then call you up and say “I had
For those who have been close to the problem, it is difficult to write about the Malvinas war without reliving the traumatic experience of those dark days of 1982. Yet almost 5 years have now elapsed and it is time to reflect on the event in serenity. In doing so, I wish to put into brackets the merits of the territorial dispute. I would like to focus instead on a far more difficult legal, political and moral puzzle: Why did the war take place? What kind of war was this and what does it teach us? We must not forget that these are not, and should not be, just academic questions; as Michael Walzer has reminded us, war has a moral reality.\(^2\)

By June of 1982, the Argentines had reached a level of political and moral depression rarely paralleled in history. Yet from these ashes the Argentines started to understand the value of human dignity, respect for human rights and the importance of peace. We are familiar with the fortunate outcome: Argentina has now become, after its darkest era, a liberal democracy, once again respected in the family of nations. Nationalistic rhetoric aside, the moral force of those achievements far exceeds any benefit that might have accrued to Argentina from recovering the islands.

There are several conventional explanations of the Malvinas war. The first was put forth by the Argentine Government at the time. The military took the islands by force because the Argentine people were tired of the protracted, useless negotiations with the British and of the insensitivity showed by them toward the legitimate Argentine aspirations.\(^3\) Of course, it does not follow from the undeniable truth that the British never took the negotiations seriously\(^4\) that the Galtieri junta acted wisely or lawfully in undertaking that costly military adventure. In other words, in international law as in common sense, reluctance to negotiate cannot justify violence.

Another possible explanation is that the Malvinas conflict was part of a broader confrontation in the South Atlantic, which would encompass the conflicting claims over Antarctica as well. This view, which is popular in some Argentine circles and is suggested by one of the essays in the book under review,\(^5\) would have it that the Anglo-Argentine confrontation is best

4 A personal experience will suffice to illustrate this. When the present writer was a member of the Argentine delegation that met with the British in Lima, Peru, in February 1978, to discuss the Malvinas controversy, the British delegates first listened politely to our proposals (which included a broad scheme of economic cooperation designed to bribe them into recognizing Argentine sovereignty). As soon as we had finished, they retrieved brochures displaying the most recent models manufactured by their ship industry and started explaining the reasons why the Argentine Government should buy them.
5 See Battaglini at 2, 6–10.
understood from the standpoint of "geopolitics." This explanation is not convincing. There is no such thing as a science of "geopolitics" that would explain conflicts by reference to the "great picture" or the "logic of the situation" or the "true national interests" involved. Wars are unchained by the choices of men and women. Those decisions are influenced by many heterogeneous factors: pure vanity and other psychological obsessions of decision makers, domestic political pressures, perception of a mythical "national interest," ideological considerations, and so on. It is therefore impossible to reduce a phenomenon like the Malvinas war to geopolitical variables, even assuming that such variables would make sense.

The more common explanation, however, was articulated by the press and many observers at the time. The Argentine junta attacked in order to divert attention from domestic political and economic problems. This explanation has considerable merit. Governments, especially tyrannical ones, often turn to foreign policy in the hope that the people will forget about their domestic plight. This was particularly true in Argentina in 1982, where the Government's domestic policies were no longer a viable option for political or economic success. Yet this is only part of the story. Why take that tremendous risk? And, in any event, for how long could a government divert attention from domestic problems?

I would like to suggest here another explanation, one which, in conjunction with the last one mentioned, may help clarify why the Argentine dictators did what they did. There is a strong correlation between domestic oppression and foreign aggression. Those rulers who ignore moral and legal constraints in the way they treat their citizens are likely to ignore similar constraints in their dealings with other nations. There are two reasons for this. First, the lack of democratic checks to power eliminates the debate that may give government officials a sense of whether it is right or wise to engage in a foreign conflict. To be sure, democratic debate will not necessarily prevent foreign policy mistakes, as the American Vietnam experience painfully shows. But at least it will enrich the decision makers' perspective and awareness of the dangers involved, and will thus diminish the risk of tragic foreign policy errors. Second, dictators inevitably become persuaded that they can get away with anything. For those who regard themselves as being above the law, international law is no exception. Because they encounter no domestic opposition, their sense of power grows to egomaniacal levels, and soon they start believing that they can bully anyone who happens to be in their way, including foreign governments. The stage is set for the implementation of

6 See the revealing study by Doyle, Kant, Liberal Legacies and Foreign Affairs, 12 Phil. & Public Aff. (pt. I) 205, and (pt. II) 323 (1982), which argues that wars have never taken place among liberal states.

7 Aside from the legal or moral correctness of their action, the prudential miscalculations of the junta's members were truly incredible. Not only did they reject proposals that were much more advantageous to them than anything they could have got by negotiation (see Coll, Lessons for the Future, in The Falklands War 232-38 (A. Coll & A. C. Arend eds. 1985)), but, in their madness, they also believed that (1) the United States would be neutral; (2) the Soviet Union would veto anti-Argentine resolutions in the Security Council; and (3) the British would not react.
the "might makes right" philosophy. This point is illustrated by the junta’s attitude toward the two superpowers. During the late 1970s, the public enemy of the Argentine military was President Jimmy Carter. The dictators reacted angrily toward what they then perceived as the "stupid idealism" reflected in his human rights policy. Notwithstanding their furious anti-Communist creed, they admired instead Soviet "realism," as shown, for example, by the invasion of Afghanistan. They thought that the Soviet Union was an example of a nation that knew what it wanted and took it, and got away with it because, unlike the United States, it was not constrained by moral principles. In short, the Argentine dictators subscribed to the theory of the amorality of international relations. So the issue for them was not whether it was lawful, right or even wise to invade the islands. The only issue was whether they could get away with it. The same Hitlerism they practiced within Argentine borders became their guide in international relations.

The foregoing considerations show why it would be wrong to believe that the Malvinas adventure is independent from human rights concerns. The two issues are linked in two important ways. As indicated above, the tyrant’s domestic immorality carries over to foreign affairs. But equally important, apart from self-defense, wars waged by dictators who force men and women to fight and eventually die are immoral, unjust wars because the dictators do not represent the people. This was true in the South Atlantic even if, as a matter of international law, the islands should belong to Argentina. The junta, a self-appointed group of tyrannical rulers, took all of Argentina into an enterprise that could not be morally justified precisely because of their tyrannical nature. This is so, totally apart from the illegality of the adventure and the high probability that it would result, as it did, in a military disaster.

These moral considerations were not absent from the world's reaction. After a resounding diplomatic defeat in the United Nations, the Argentine junta could get no more than a verbal condemnation of the United Kingdom in the OAS. The perception of the international community was that the junta's action was unlawful and that a fascist government did not deserve support, regardless of the merits of the controversy. Even those governments, like Venezuela and Panama, which expressed solidarity with Argentina, failed to endorse the military invasion. In short, in this human rights era, world opinion is increasingly focusing not just on the reasons for wars, but on the moral legitimacy of those governments that initiate them.

In the volume under review, several scholars, most of them Italian, examine legal aspects of the world’s reaction. The essays focus on two main topics. The first is the legality of the Argentine invasion and the British

8 The post-1982 literature on the Malvinas is voluminous. See the books by R. Perl, supra note 5, and Coll and Arend (eds.), supra note 7; and LA QUESTIONE DELLE FALKLAND-MALVINAS NEL DIRITTO INTERNAZIONALE (N. Ronzitti ed. 1984). There is also a periodical literature that is extensive in this Journal alone. See Acevedo, The U.S. Measures Against Argentina Resulting from the Malvinas Conflict, 78 AJIL 323 (1984); Franck, Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War, 77 id. at 109 (1983); and Moore, The Inter-American System Snarls in Falklands War, 76 id. at 830 (1982). For a serene Argentine account, see R. Vinuesa, EL CONFLICTO POR LAS ISLAS MALVINAS Y EL DERECHO INTERNACIONAL (1982).
response. The second is the reaction of international organizations, in particular the EEC and the OAS. As to the first, the conclusions of the authors differ. Professor Joe Verhoeven, for example, concludes that the action by the United Kingdom cannot be characterized as self-defense because the Argentine attack was not technically aggression. Verhoeven supports this statement by observing that the British title to the islands was precarious, and that therefore the Argentine attack cannot be said to have been against British sovereignty. Thus, under Resolution 3314 (XXIX), the precariousness of the British title is a “pertinent circumstance” excluding aggression. He nevertheless believes that the Argentine invasion was unlawful, a violation of Article 2(4). Since it was not aggression, however, the United Kingdom could not claim to be acting in self-defense, but could invoke instead the justification of armed reprisals, whose legality the distinguished Belgian professor defends (p. 101). This original analysis is particularly topical in view of the recent U.S. raid on Libya (best explained as an armed reprisal, rather than self-defense); and also in the light of the recent ICJ discussion of self-defense and countermeasures in the Nicaragua case. Armed reprisals are punitive in character, however, and the British action was instead aimed at regaining control over the islands.

Professor L. Forlati also takes the view that the British action cannot be characterized as self-defense, but for a different reason: that the UN Charter only authorizes reaction in self-defense against an ongoing armed attack (pp. 137–40). Since the Argentine invasion had already been consummated, the delayed British reaction could not be justified under Article 51 of the Charter. Forlati believes that the British action could be justified instead under customary law principles of self-help (p. 139). She also discusses, and correctly rejects, the claim that the British action could be characterized as having been in defense of human rights (pp. 144–45). While Forlati’s view of the interplay between Articles 2(4) and 51 is too restrictive, her analysis is original and well documented. In a short essay, Professor B. Grandi argues that since Argentina failed to withdraw the troops as provided in Resolution 502, the United Kingdom’s action was a lawful exercise of the right of self-defense. He reserves his opinion, however, about the proportionality and necessity requirements (pp. 44–45).

As to the second theme (the reaction of regional organizations), the analyses are equally divergent. Professor M. Panebianco presents a thorough account of the actions of the EEC and the OAS. He aptly observes that Latin American solidarity did not result in assistance to the Argentine armed aggression, but rather in solidarity with Argentina for the economic damage suffered from the European sanctions (p. 82). However, the question which of these partly contradictory reactions was more consistent with international law, and especially with Resolution 502 of the Security Council, remains unanswered. In a subtle article, Verhoeven concludes that the EEC did not have the express or implied power to adopt punitive measures against third parties for the violation of rights of a member state, as opposed to the violation of the rights belonging to the EEC itself (pp. 101–15). Only the individual states are empowered to do so. A similar view is defended by Professor F. Pocar in his penetrating short piece. He demonstrates that the
sanctions could not possibly have been based on Articles 113 and 224 of the EEC Treaty (pp. 159–62). A different view about the EEC sanctions is defended by Forlati, who argues that while the sanctions were legitimate in regard to the member states and Argentina, they were not so with regard to the dissenting members, Italy and Denmark (pp. 147–56).

Two articles discuss the application of the Rio Treaty. Professor Cançado Trindade offers a fascinating account of the process of adoption of the two resolutions by the 20th Meeting of Consultation of the Rio Treaty (pp. 163–94). After delineating the difference between the moderate first resolution (before the British landing) and the more aggressive second resolution (after the British landing), he observes that even those countries that supported Argentina did so reluctantly (with the possible exception of Venezuela). He concludes that the American nations as a whole refused to adopt the Malvinas cause as an inter-American cause (p. 201). In his final paragraph, Cançado Trindade hints at the possible reasons for the failure of the Rio Treaty: the reluctance of most American nations to express solidarity with a government guilty of gross violations of human rights. In an essay on the same issue, Professor Leita aptly shows that, in the presence of an armed attack in the sense of the Treaty, the member states regarded themselves bound only by the duty of mutual consultation, thus leaving all measures in aid of the Argentine junta to their total discretion (pp. 216–20). In the opening essay, Professor Battaglini offers an interesting historical survey of the dispute, although he exaggerates the importance of the “Antarctic connection” (see pp. 6–10). Particularly illuminating are the discussions of the 17th-century views of Dr. Samuel Johnson (pp. 1–5, 11–12). Finally, Professor Migliazza recalls the applicability of the law governing military occupation, principles that the Argentine army honored (perhaps its sole redeeming feature) even though it regarded the islands as Argentine territory (pp. 27–30).

The volume under review is a high-quality contribution to the already important existing literature about the Malvinas war. It is most valuable for anyone interested in the legal aspects of the conflict. Not the least of its merits is the consistency in the quality of the essays, which shows the increasing influence of Italian writers upon international legal thought.

What matters most today is to assess the political future of the dispute. Democratic Argentina has expressed its intention to settle the conflict peacefully, but understandably has not renounced its intention to recover the islands. The United Kingdom must be sensitive to the importance of the political changes inside Argentina, and make every effort to reach a solution, now more than ever.10 Fresh, meaningful negotiations are therefore indicated. Yet if these fail again, the wisest move would be adjudication by a judicial or arbitral body. Unlike many of my fellow citizens, I happen to believe that Argentina has a very strong legal case and should agree to submit the dispute to an impartial judicial or arbitral body for resolution.

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9 For an American perspective, see Moore, supra note 8; see also Perera, The OAS and the Inter-American System: History, Law, and Diplomacy, in Coll & Arend (eds.), supra note 7, at 132.

10 Unfortunately, the recent British declaration of a 200-mile fishing zone around the islands is most unhelpful in this regard.
Be that as it may, the paradox is that Borges's nightmare of 1982 has generated, for the first time in Argentina, hopes that there will be no more crimes committed by despotic rulers, both within and outside Argentine borders.

FERNANDO R. TESÓN  
Arizona State University


The conflict between Argentina and Great Britain in 1982, known as "the Malvinas War," and its inevitable diplomatic consequences, forces the members of the Organization of American States to analyze and debate the principles and objectives of the system in which they operate. With this aim, the Special Commission for the Study and Restructuring of the Inter-American System was created within the regional organization. This book provides a record of the contributions to the commission by Jorge Guillermo Llosa, as the Peruvian representative, and it includes the text of the lecture he gave when he was named as a member of the Sociedad Bolivariana del Perú.

If the book is analyzed from a purely formal point of view, one must conclude that it is somewhat anarchic and difficult to read. The portion dealing with the commission consists of a partial transcript of the commission's sessions, edited to present, as a soliloquy, Llosa's contributions to what was undoubtedly an interesting discussion. The objective of the book—to make public the position of Peru on the subject debated—could also have been attained by publishing the proposal that was prepared by the Peruvian delegation and submitted to the Special Commission for its consideration. To make such observations, however, is in no way to impugn Llosa's knowledge and authority as a presenter of Peru's position, or to deny the relevance of the points that he raises.

The Peruvian proposals would amend Articles 1, 2, 3, 16, 18, 19, 21, 23, 29, 30, 45 and 46 of the Charter of the OAS, and Articles 2 and 3 of the Inter-American Treaty of Reciprocal Assistance, as well as introduce new principles. These proposals are the result of a serious and valid analysis of inter-American relations and of their normative framework. The Peruvian thesis was based on the premise that the history of the American countries does not justify the supposition of the existence of an "a priori" continental unity, as is maintained in the Preamble and the first two chapters of the Charter of Bogotá. On the contrary, there is a clear distinction between the United States, as a developed nation, with its worldwide interests and responsibilities, and the countries of Latin America, with their need to identify themselves with the community of developing nations.

A new inter-American system should take into account these facts. Its objective should be to eliminate U.S. hegemony and establish the formal equality of countries within the OAS. Inter-American relations are defined as a normative system of contractual character, which must assure peaceful coexistence and cooperation for development, retaining the juridical ascendancy of Latin American law. Inter-American solidarity is only possible,
as far as this Peruvian proposal is concerned, if it is assumed as a defined juridical obligation and not in the vague way that it is mentioned in the Preamble and Article 3 of the OAS Charter.

In addition, the current Charter is based upon a general moral concept of solidarity and seeks to outline the requirements for the effective exercise of representative democracy. According to the Peruvian document, the imposition of a specific type of political organization is not conceivable since this would violate the principles of autonomy, equality and nonintervention. The goal of international systems is not merely to maintain a certain order but to assure peace and cooperation. Therefore, Peru proposes the acceptance of the principle of ideological, political, economic and social pluralism as a way of preserving each country's individuality. Such a principle recognizes the obligation of nonintervention and the right to freedom from intervention. It also proposes widening the concept contained in subsection (b) of Article 3 of the Charter to incorporate the principle of peaceful life since peace is considered to be the condition and, at the same time, the expression of international cooperation.

As regards the defensive solidarity mentioned in subsection (f) of Article 3 of the Charter and specified in Articles 2 and 3 of the Rio Treaty, it is understood that such a concept is ruled by the principles of nonintervention and autonomy. For that reason, the proposal suggests defining the concept of aggression more precisely and creating a system of collective economic security.

The Peruvian document also recommends a reaffirmation of the will to keep Latin America free of nuclear weapons, as well as the adoption of the Stockholm Declaration of 1972 on the environment. It asserts the right of those countries that are members of the inter-American system to participate in worldwide economic decisions, the appropriateness of private foreign investment to national plans of development and the necessity of creating a culture that promotes liberation and development. The lecture given by Llosa when he became a member of the Sociedad Bolivariana del Perú, entitled "La Reestructuración del Sistema Interamericano a la luz del pensamiento de Bolívar," closes this book and it is the most interesting part. In it, the author displays the depth and breadth of his knowledge of Latin American history. He examines the problems that afflict the inter-American system and puts forward solutions.

The merit of this work is that apart from letting us know the position of one country with regard to the problem of inter-American relations, it helps us to think the problem over very carefully.

RICARDO GUILLERMO SIGWALD
Of the Buenos Aires Bar


There is a paucity of careful analysis of the basic legal issues in the Arab-Israeli conflict. In this country most of the analysis that has appeared supports
the Zionist position. The Mallisons give greater weight to the Palestinian Arab arguments. Their anti-Zionist conclusions put this book at odds with most of the legal writing on the topic.

Much of the analysis the authors provide has appeared in articles they have published in law reviews and UN documents. The primary value of the book is that it marshals arguments on key issues to call for a particular solution to the conflict. The authors' previous writings have provoked controversy, in particular a caustic attack by Professor Julius Stone in his 1981 book *Israel and Palestine: Assault on the Law of Nations*.

The authors, both distinguished scholars on the Middle East, set for themselves the formidable task of finding through application of international law a solution to the Arab-Israeli conflict. They urge a two-state solution—a Palestinian state in the West Bank and Gaza Strip alongside Israel.

They view this solution as the best remedy for the lack of order in the lives of Palestinians and Israelis:

> [T]he Palestinians who have been the victims of organized Zionist terror since the time of the Balfour Declaration and who have been victimized by the Government of Israel's highly institutionalized state terror since 1948 have not received the benefits of a minimum order system. In the same way, those Israelis who have been the victims of the Palestinian responding violence have not received the benefits of such a system [p. 16].

To achieve a two-state solution, the authors suggest collective pressure on Israel:

> If there is any single point that has been made most clearly in the world community dealings with the State of Israel and Zionist nationalism over a period of more than three decades, it is that there will be no solution of the Palestine problem until effective sanctions are applied to the Government of Israel [p. 420].

Viewing the UN Security Council as unlikely to accomplish this because of U.S. veto power, they urge sanctions organized by the General Assembly.

But recognizing the ineffectiveness of sanctions without U.S. participation, they state:

> [I]t may be hoped that the combination of world community pressure and the increasing economic drain of support for Israel on the United States will bring it back to the principled position taken by President Eisenhower when Israel refused to withdraw from Suez in response to the United Nations demand in 1957 [p. 422].

The authors recognize that a solution effected through collective coercion would be "imposed," and therefore potentially unstable. But they view the status quo as an "imposed settlement by the military power of the Government of Israel" (p. 421). They argue that coercion is appropriate because the "absence of elementary justice in the military settlement now imposed upon Palestine leads to the great and increasing use of coercion" (p. 422). They view Israel's 1982 invasion of Lebanon (to which they devote ch. 7) as "further evidence that the Zionist-Israel aggresssion will continue until international action is taken to stop it" (p. 419).
To show the injustice of the imposition of Zionism on the people of Palestine, the authors argue (ch. 2) that Jews do not constitute a nation in the international law sense. In support, they quote a U.S. State Department statement that it “does not regard the ‘Jewish people’ concept as a concept of international law” (p. 84). They analyze in that context the Zionist fundraising organizations and conclude that their tax-exempt status in U.S. law is inappropriate since they are legally creatures of the Government of Israel and channel funds to it.

To challenge the commonly held notion that the Zionists were “given” a state in Palestine by the League of Nations and United Nations, the authors argue (ch. 1) that the Balfour Declaration (incorporated into Britain’s mandate over Palestine) does not authorize a Jewish state unless due consideration is given to the rights of the (then) majority inhabitants of Palestine. Regarding the UN General Assembly’s 1947 resolution recommending partition of Palestine into Jewish and Arab states (the topic of ch. 3), they find in it no basis for a Jewish state that gives preference to Jews over others. They point out that the resolution contemplated states in which equality of all before the law would prevail. Characterizing Israel as an “exclusivist state” (they cite its Law of Return, which gives preference to Jews in immigration, pp. 164–65), they find that the partition resolution does not constitute a legal basis for it.

On the other side of the equation, the authors find that the Arabs of Palestine enjoy a right as individuals to return to their homeland and a right as a nation to exercise self-determination there (ch. 4). They find authority for establishment of a Gaza-West Bank state in various UN resolutions, including Security Council Resolution 242 of 1967.

On the issue of Jerusalem (the topic of ch. 5), the authors suggest an east-west division that would legitimize Israel’s control of the western side (most states do not recognize Israel’s claim to west Jerusalem) and that would allocate the eastern side to the Palestinian state to be established. On Israel’s control of the Gaza Strip and West Bank, they argue (ch. 6) that Israel violates international law by remaining there and by maintaining civilian settlements there. They find and analyze violations by Israel of humanitarian law in both the West Bank and the Gaza Strip, and in Lebanon.

A number of the issues raised merit further exploration. The authors argue that the Jews do not constitute a nation, yet concede the legitimacy of Israel within the 1949 armistice lines. If the Jews do not constitute a nation, this conclusion as to entitlement requires further explanation. In support of this conclusion, they accord validity to the Balfour Declaration and the partition resolution but do not explain why these two documents serve as an underpinning for a Jewish state (even a hypothetical nonexclusivist one), given the right to self-determination of the Arab population of Palestine. The authors’ reliance on Security Council Resolution 242 as legitimizing Israel within the 1949 armistice lines is not adequately explained in light of the apparent contradiction between that interpretation of the resolution and the right of the Palestinian Arabs to return to Palestine and to exercise self-determination there.
These analytical loose ends notwithstanding, this book represents a major advance in the search for a solution to the Arab-Israeli conflict in that it focuses much-needed attention on the underlying legal issues, and in particular on the competing claims to sovereignty over Palestine.

John Quigley

College of Law, Ohio State University


The editor proposes a formidable goal: to provide a forum for objective legal analysis to identify, explore and develop methods of utilizing law as an instrument of peace in Palestine. This goal is somewhat contradicted by the final paragraph of the introduction, in which the editor disclaims detachment and states that "objectivity does not imply a neutral position between the aggressor and the victim." Despite provocative terms such as "aggressor" (i.e., Israel) and "victim" (i.e., Palestinians), the Yearbook strives for a level of objectivity. The editor's statement that the problem-solving tool of law was never utilized by decision makers as an effective policy alternative to violence is misleading since Israel (and the Arab states, from time to time) has explained, if not planned, foreign policy decisions in terms of international law.

The volume is divided into two sections. The first consists of articles on legal topics. In Legal Systems and Developments in Palestine, Annis F. Kassim surveys the different legal systems in Palestine from Ottoman rule to the present. The article covers too much ground with little depth. Sally V. Mallison and W. Thomas Mallison, Jr.'s article on The Juridical Bases for Palestinian Self-Determination is based upon a biased assumption against Jewish self-determination. Autonomy and the Palestinians: A Survey, by David H. Ott, examines several autonomy and power-sharing proposals (such as an article by Hannum and Lillich and the New Ireland Forum Report) rather than systematically discussing and comparing various theoretical legal categories (i.e., public and private international leases, condominiums, commission-style governments, joint sovereignty regimes, UN trusts, etc.) and their practical outcome. Any discussion of joint rule in Palestine may be moot since a precondition of success is normalized relations between the ruling powers and the determination of all parties to succeed in the endeavor. John Quigley, in United States Complicity in Israel's Violation of Palestinian Rights, analyzes why the United States may be obliged to rectify alleged Israeli violations of international law and to offer Palestinians reparations for said Israeli actions.

The second section consists of juridical decisions and political-legal documents. A source of previously untranslated Hebrew and Arabic documents in English would be welcome. However, there seems to be no theme to the presentation except for presenting Israel in a negative light. Furthermore, many of the court cases, and the Karp report and the UN report on Lebanon, have been widely reported on and reprinted in other journals and the popular press.
Book Reviews and Notes

All of the articles share common problems. Generally, except for UN documents and English sources, the footnotes cite secondary, rather than primary, sources. The historical background of the articles is often either weak or highly selective. For example, the authors ignore the division of Palestine into Transjordan and the territory covered by the partition resolution, the impact of that division and the effect on Palestinian nationalism of Jordanian and Egyptian rule of the West Bank and the Gaza Strip, respectively. While the issues are discussed in a scholarly manner, little or no analysis is made of the underlying assumptions. However, in comparison to other partisan works, the articles are well written, footnoted (although not with the thoroughness of law school journals) and make some attempt at objectivity and presenting Israeli positions. The first volume of what is intended to be an ongoing series shows promise and we look forward to future issues.

Lawrence A. Kletter
Of the Massachusetts Bar


The importance of independent and impartial judges is as great in international adjudication as in national judiciaries. Distrust of the fairness of the International Court of Justice seems to have motivated the U.S. withdrawal from that Court. Two chapters of this book deal specifically with international judges (pp. 447–49, 496–511). Part I of the volume contains 26 country studies by 45 authors, dealing with non-Communist nations from Australia to Uruguay. The U.S. report is by former Dean Robert B. McKay of New York University and James M. Parkinson, New Jersey court administrator. The project originated at the International Bar Association's (IBA) Berlin meeting in 1980. Chief Justice Leonard King of South Australia and Judge David K. Haese of the family court of Australia presided over the sessions. The country studies followed the pattern of a questionnaire prepared by Professor Shimon Shetreet of the Hebrew University of Jerusalem, who then as rapporteur summarized the country studies and prepared a draft of Minimum Standards of Judicial Independence. After discussion and amendment, it was adopted at the New Delhi meeting in 1982 (which Dr. Shetreet did not attend since the Indian Government professed inability to assure the safety of the conference if any Israelis participated). The text of the IBA standards appears at pages 388–92. The standards stress not only the independence of the individual judge but of the judiciary as a whole vis-à-vis other branches of government.

The effect of local diversity is striking when the country reports are compared. As Lord Lane remarks, “Just as the bumble-bee is said to be an aerodynamic impossibility, so the Lord Chancellor is a constitutional impossibility” (p. 526). He is head of the judiciary but also a political figure and participant in the legislative process. Yet nowhere is the independence of judges better assured than in England. In continental countries it is con-