BOOK REVIEWS

EDITED BY

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THE HUMAN RIGHTS COMMITTEE: Its Role in the Development of the International Covenant on Civil and Political Rights

By Dominic McGoldrick, (Oxford, Clarendon Press, 1991, xlv & 576 pp)

The Human Rights Committee, established under the International Covenant on Civil and Political Rights (ICCPR), is a venerable player in the United Nations human rights system. It has the role of monitoring the implementation of the ICCPR, through examining the periodic reports that all States Parties are required to submit and through receiving and considering communications alleging a State's non-compliance with its obligations under the ICCPR made either by other States Parties (Article 41)[1] or by individuals within a State Party's jurisdiction (First Optional Protocol). Australia's accession to the First Optional Protocol in 1991 will mean that the work of the Human Rights Committee will be of increased concern to Australian lawyers and human rights activists. The recent election of an Australian, Justice Elizabeth Evatt AO, to the Human Rights Committee will also make its work of particular local interest.

Dominic McGoldrick's weighty tome (the revised product of a doctoral thesis) is the first book length examination of the work of the Human Rights Committee written in English.[2] For this reason alone, the publication of *The Human Rights Committee* is to be welcomed. The book contains a wealth of impressively footnoted information. Its first chapter on the background to and significance of the ICCPR is a good summary of the development of this branch of international law which would be a useful introduction to those unfamiliar with it. The book goes on to describe the structure and procedure of the Human Rights Committee (Chapter 2),

1 Australia has not made a declaration of acceptance of Article 41. In any event, no State has yet made a communication under Article 41.

2 Manfred Nowak's impressive commentary on the Civil and Political Covenant, which deals extensively with the work of the Committee, *CCPR-Kommentar* (1989), is about to be released in an English translation.

the system of periodic reporting under the ICCPR (Chapter 3), and the background to and procedure under the First Optional Protocol (Chapter 4). The rest of the book, apart from a brief conclusion, examines the jurisprudence of the Human Rights Committee relating to eight different articles of the ICCPR (Articles 1 (self-determination), 2 (general obligation to implement the ICCPR), 4 (derogation provision), 6 (right to life), 7 (freedom from torture), 14 (right to a fair trial), 19 (freedom of opinion and expression), and 20 (prohibition on war propaganda and advocacy of racial and religious hatred)) developed both through the reporting process and under the First Optional Protocol.

For this reader, while admiring McGoldrick's meticulous documentation (Chapter 4 alone boasts 815 endnotes!), the major problem of *The Human Rights Committee* is its overwhelmingly descriptive approach to its subject. The book does not offer a critical, linking thesis and, at the end, one aches for the author to build on his great store of information to make a trenchant analysis of the work of the Committee and its role in the international protection of human rights. McGoldrick's general assessment simply is that the Committee's contribution to human rights has been "substantial, positive, and constructive" (p 504). The final chapter "Appraisal and Prospectus" offers one tantalizing, but unexplored, comment: "It is very difficult to provide positive evidence that the existence of the Covenant and the work of the HRC is having any concrete and positive effect on the human rights position in the States parties." (p 504) Why is this so? What is the significance of this observation for the many international human rights instruments which establish specialized monitoring committees? McGoldrick does not offer any clues. His recommendations for the future work of the Committee are so cautious and uncontroversial that they might have been drafted by a United Nations bureaucrat rather than an academic observer. They include the need for further ratifications or accessions to the ICCPR and the First Optional Protocol and better publicity about the work of the Committee by States Parties and non-government organizations.

The detached, descriptive approach is also employed by McGoldrick in the account of the Committee's jurisprudence under the particular articles examined. At the end of each such chapter there is a short section titled "Appraisal", and here the reader may find some interesting, but all too brief, observations: for example, McGoldrick finds the Committee's practice on the right to self-determination "somewhat disappointing" (p 256). Integration of the critical comment with the reporting of the Committee's practice may have produced a more dynamic and challenging narrative. Also, it would have been useful if McGoldrick had considered not just existing Committee practice, but how the Committee might respond to problems which may be raised in the future.

Another problem with *The Human Rights Committee* is its focus on a limited number of articles of the ICCPR. The criteria for inclusion are

not entirely clear: McGoldrick simply notes that those chosen are "self evidently important" (p 1). It is difficult to think of an ICCPR provision that is *not* self evidently important. Had Nicholas Toonen, the author of the first Australian communication under the First Optional Protocol[3] which argues that the Tasmanian criminalization of male homosexual acts violates both the right to privacy (Article 17) and the norm of non-discrimination (Article 26), consulted McGoldrick's book, he would have been given almost no guidance on how the Committee had interpreted these provisions. While I can understand the practical need to focus on particular substantive articles of the ICCPR, the omission of provisions such as Article 26 is surprising in light of the existing interesting, and often controversial,[4] views of the Human Rights Committee and its potential for development.

Issues that Australians may wish McGoldrick had given more attention to include the problems faced by federations in implementing their obligations under the ICCPR (how can a federation respond to a "rogue" federal unit?), the practice of States in objecting to the admissibility of communications under the First Optional Protocol (how often do States object? what likelihood of success on the merits is there if a State does not make procedural objections?), how the adoption of constitutional guarantees of rights affects the rate of individual communications to the Committee (what effect has the 1982 Canadian Charter of Rights and Freedoms had on potential Canadian authors?), and how indigenous peoples could gain access to the Human Rights Committee through invoking the First Optional Protocol, particularly Article 27.

A more minor criticism of *The Human Rights Committee* is its system of citation to views of the Committee adopted under the First Optional Protocol. McGoldrick cites to the United Nations document number of the relevant Annual Report of the Committee and does not include, where applicable, a reference to the two published volumes, *Selected Decisions under the Optional Protocol*, which are much more accessible.

The strength of McGoldrick's book lies in its detailed research: it relies on States Parties' periodic reports, summary records of debates and a great range of scholarly literature. As an introduction to the work of the Human Rights Committee, it has as yet no rival. At least in the substantive areas covered by McGoldrick, the book offers a very useful compendium of the (if this term is meaningful in the context of international human rights law) "black letter" law.

3 Communication No 488/1992.

4 See eg Bayefsky, "The Principle of Equality or Non-Discrimination in International Law", (1990) 11 Hum Rts LJ 1 at 15.

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PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT DEVELOPMENT

By Lauri Hannikainen (Finnish Lawyers' Publishing Company, Helsinki, 1988, xxxii and 781 pp)

Article 53 of the Vienna Convention on the Law of Treaties 1969[1] defines peremptory norms as those rules "accepted and recognized by the international community of States ... from which no derogation is permitted". These are the supernorms or foundation principles of international law. Their unique normative character is derived, procedurally, from their universal acceptance by states and, substantively, from the fact that they are a series of principles which are thought to distil the values of the international legal system. Thus, for example, treaties which require the use of force contrary to Article 2(4) of the United Nations Charter or envisage reciprocal slave-trading or piracy are subject to termination.

The existence of the *jus cogens* doctrine strikes at the heart of consensualism in international law. The idea that states can be bound by norms to which they do not consent appalls positivists[2] who make the further claim that the doctrine weakens the force of international law in other areas by producing, in Prosper Weil's phrase, "normative blurring".[3]

These objections have not proved fatal to the continuing development of the principle of *jus cogens*. It has been referred to by the International Court of Justice in the *North Sea Continental Shelf* cases[4] and is supported by a number of influential jurists.[5] It is clear that many international lawyers are attracted by the notion that there are certain rules of customary law that possess an inalienable, supervening quality. Peremptory norms, therefore, appeal to a tradition in international legal theory that seeks to offer a concrete alternative to the aridity of positivism. Positivists remain disdainful of this aspect of the search describing the creation of specific norms of *jus cogens* as "mystical".[6] It is against the background of this doctrinal conflict that we must view Lauri Hannikainen's beautifully presented[7] and lengthy study.

First, to the internal logic of the book itself. Dr Hannikainen's self-proclaimed intention is to "...clarify the criteria of peremptory norms and

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1 (1969) 8 ILM 679.

2 See eg Weil, "Towards Relative Normativity in International Law", (1983) AJIL 413; Watson J, "Remarks" on the panel 'New Trends in the Jurisprudence of International Law', Proceedings of the Amer Soc of Int'l Law, April, 1992.

3 Weil, ibid, at 415.

4 ICJ Rep 1969, p 3. *Jus cogens* has also been used in argument in both the Case Concerning Phosphate Deposits (*Nauru v Australia*) and the Case Concerning Certain Activities in the Timor Gap (*Portugal v Australia*).

5 See eg Lauterpacht, (1950) 27 BYIL at 397-398; Brownlie I, *Principles of Public International Law* 4th ed, (1991), pp 512-513.

6 Watson, note 2 above.

7 Marit Hannikainen has designed a fake-marble cover that departs confidently from the computer graphics so typical of international law texts.

to apply these criteria with rigour so as to determine which norms of international law can be held to be peremptory".[8] To accomplish this, he divides the subject into three parts. The first is devoted to an historical study of peremptory norms in the period from the inception of international law at the Treaty of Westphalia to state practice following the adoption of the Vienna Convention on the Law of Treaties in 1969. The conclusions drawn from this section form the basis for his discussion, in the second part, of the preconditions for the existence of peremptory norms in contemporary international law. The bulk of the book consists of a third part in which Hannikainen considers principles that have a claim to the status of *jus cogens*. This conventional treatment is not only conceptually satisfying but also permits reference to discrete areas of study, eg the laws of armed conflict are analysed in a separate chapter covering no less than 100 pages.

The first section gives a fairly standard account of the development of a European international legal order where, to consider two areas in which peremptory norms are currently thought to arise, colonialism was encouraged and the use of force was simply an extension of foreign policy. Until 1918, according to Hannikainen, there were no norms of universal validity. He does not however discount the possibility that peremptory norms arose in a regional setting. In Europe, at least, there is an argument for stating that certain norms had acquired a degree of peremptoriness. Condemnation of piracy was universal among European states after the destruction of the Barbary princes in the early part of the nineteenth century and the slave *trade* (slavery itself was permitted to continue) was abolished by the Europeans at the end of the nineteenth century. Neither, argues the author, were the laws of war immune from the spread of "supernormativity" during this period. The denunciation of forms of warfare causing superfluous suffering was widespread and the requirement that there be a minimum respect for standards of humanity during war was generally accepted. These are indications of a growing trend towards differentiation and exceptionalism in the development of customary international law but can they be claimed as the first norms of *jus cogens*? Surely, the restrictive operation of these norms, geographically, counts against them being accorded peremptory status or can peremptory norms arise through regional custom? The question is never explicitly addressed.

The chapters covering the period 1919 to 1969 (and immediately following) offer more to both writer and reader. In the first half of the century, we have the League of Nations Covenant Article 20, which seems to express the idea of *jus cogens*, and the 1928 Pact of Paris (the Kellogg–Briand Pact) which purports to outlaw war for the first time. The conclusion of the Second World War brought with it the United Nations Charter and the Nuremburg Trials. Adolf Hitler's inadvertent contribution to the development of *jus cogens* can

8 Hannikainen L, *Peremptory Norms* (1988), p 19.

hardly be overstated. The unprecedented barbarism and aggression that marked the Nazi moment in world history provided the stimulus for the norms prohibiting the aggressive use of force and genocide. These two prohibitions are often advanced as the most likely new norms of *jus cogens*. The author omits nothing in his description of how these norms came to be so regarded but might have dwelt more on the connection between the Nazis and the development of supernorms. Later, in this section, the discussion of the Vienna Convention and the *travaux preparatoires* is comprehensive and raises the interesting point that the provisions relating to *jus cogens* may have been the principal reasons for non-ratification of the treaty.

In Part Two, Hannikainen refines his project further and concludes that there are five major criteria of peremptory norms. (1) They should be norms of general international law (2) accepted by the international community as a whole (3) permitting of no derogation and (4) capable of modification only by a new peremptory norm (these four are drawn from the Vienna Convention); and (5) is a purposive criterion based on the belief that peremptory norms are for the benefit and protection of the international community and are therefore owed to that community by every state.

The first two criteria are problematic. What is meant be "general" here, and does "as a whole" mean universally? We return to the positivist conundrum. If a norm is peremptory, in part by virtue of its universality, is it absurd to speak of imposing such a norm on a reluctant state? The French view is that "there are universal peremptory norms, accepted by all states, but a majority cannot impose a peremptory norm over a dissenting minority".[9] Accordingly, "...a peremptory norm could exist but it would not be universally obligatory".[10] It is Hannikainen's view that the majority can impose its will on the dissenting or objecting minority in the interests of the common good.[11] Coherence is a virtue lacking in the French position and Hannikainen, himself, is guilty of the vice of naturalism. The scoffing of the voluntarists is never far away when the phrase "common good" is invoked.

In Part Three, the author undertakes a survey of possible peremptory norms. Here are considered the use of force, the principle of self-determination, human rights, jurisdiction over sea, air and space and the laws of armed conflict. Briefly, the obligation not to use aggressive force is a peremptory one according to the author. Perhaps, but the inferences drawn from this are more dubious. Are "...titles and regimes deriving from aggressive armed force ...illegal and void"? The possibility of consolidation of unlawfully acquired title is not considered here. We should be grateful that examples of such acquisition are infrequent. Nonetheless, how would the author explain the international community's response to the invasions of Tibet,

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9 Ibid, p 214.

10 Ibid.

11 Ibid.

East Timor, Northern Cyprus and Goa?

The thorny question of self-determination is adroitly handled.[12] There is a peremptory norm in this area but it is not an unconditional right to self-determination. Only the right to independence from colonial empires is regarded as peremptory. Other cases of neo-colonialism or racist oppression do not give rise to peremptory obligations.

The series of rules maintaining international areas free from sovereign control include some important peremptory norms. The norms regulating use of the high seas have a long history and much of the historical material referred to earlier comes into its own in this chapter. While the number of areas in question has expanded because of technological advances the basic rule remains the same. In the author's own words, "...*jus cogens* protects the international status of the high seas, of the air above the high seas, of international sea-bed (sic) and of outer-space by prohibiting their subjection to the sovereignty of individual States".[13] Interestingly, from an Australian perspective, Hannikainen concludes that the Antarctic is not protected by any norm of *jus cogens*.

This part concludes with an analysis of international humanitarian law. Depressingly, in the area of weapons of mass destruction, *jus cogens* seems to have undergone something of a regression. Whereas after the Hague Conventions, at the turn of the century, the prohibition on the use of such weapons had acquired peremptory status, the more recent commitment to nuclear deterrence has weakened these rules. Elsewhere in this chapter there is the claim that *jus cogens* norms regulate internal armed conflict as well as international armed conflict. The application of these rules is argued by analogy. Peremptory norms governing the laws of war apply in conditions of warfare. Internal conflicts have the character of warfare therefore these basic norms apply to them. It is difficult to accept this argument if only because states themselves do not often apply the same standards to internal insurgencies and international war.[14]

Finally, in the context of the doctrinal conflict referred to at the beginning of this review, Hannikainen would seem to be a cautious advocate of the naturalist position leavened with a strong dose of functionalism. Perhaps the book's chief failing is its unwillingness to grapple with the major theoretical objections to this approach to *jus cogens*. How would Hannakainan respond, for instance, to the critique of the doctrine made by jurists such as his fellow national, Martii Koskenniemi,[15] and Prosper Weil whose intellectual assaults on the conceptual incoherence and normative

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12 There are, however, some questionable arguments made in relation to the status of East Timor and archipelegic enclaves generally which space does not permit me to consider.

13 Hannikainen, p 595.

14 The author accepts that there is a difference in treatment accorded to POWs. Ibid, p 714.

15 Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* pp 281-283.

blurring produced by the doctrine are powerfully argued?

This reservation aside, what the author does accomplish is a clear and resourceful exposition of the law in this area. He asserts the existence of *jus cogens*, believes in their necessity in maintaining a just world order and calls for an expansion of their domain. Against this, he warns of the dangers of diminishing the legal force of *jus dispositivum* in international law and recognizes the need to define specific norms of *jus cogens* more consistently. Lauri Hannikainen's contribution to this latter task is a considerable one. That is only one of the book's merits. The reader will find many others in this impressive debut.

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SELECTED MULTILATERAL TREATIES IN THE FIELD OF THE ENVIRONMENT

Volume 2

Edited by Iwona Rummel-Bulska and Seth Osafo (Cambridge, Grotius Publications Ltd, 1991, xi and 527 pp)

This monograph is a highly useful publication for specialists wanting to keep abreast of the proliferation of conventions and protocols on environmental protection being adopted at regional and global levels. The drafting of new Conventions on Climate Change and Biological Diversity for the United Nations Conference on Environment and Development are merely the most conspicuous developments in a greatly expanding field of international law which has only recently been recognised as a distinct subject area in its own right. Of course, "environment" is a term of very wide import and it is difficult to formulate a practical working definition which does not exclude relevant factors. This publication considers both the social and biophysical environment, although it is weighted toward the latter.

Since 1977, the United Nations Environment Programme (UNEP) has provided an updated Register of International Treaties and Other Agreements in the Field of Environment. In 1982, UNEP produced a volume of *Selected Multilateral Treaties in the Field of the Environment* which brought together most of the international agreements in this field.

Edited by Seth Osafa and Dr Iwona Rummel-Bulska, this publication is the second volume in UNEP's series. It aims to update the growing number of international agreements concerned with environmental protection that have been enacted during the past decade of tumultuous activity in international environmental law. The volume details 54 legal instruments, covering the period between 1979 and 15 December 1990, as well as a few Conventions adopted before 1979 which were not included in the first volume. The second volume deals with previously peripheral environmental issues such as biological diversity, the movement of hazardous wastes and chemicals, climate change and nuclear accidents. Notable additions include the 1985 Vienna Convention for the Protection of the Ozone Layer and the subsequent

Protocol on Substances that Deplete the Ozone Layer, and the omnibus 1982 United Nations Convention on the Law of the Sea.

The volume also details many interesting regional Conventions that are shaping environmental practices in lower income countries. Examples include the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, and the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (which has only recently come into effect). Several sub-regional instruments are also canvassed, including the 1987 Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System. Bilateral agreements are not included in the book.

Selected Multilateral Treaties is divided into two parts, with the information set out in an orderly and logical manner. The first provides basic data, including a summary of the relevant provisions of each Convention, giving the full title, objectives of the agreement, summary of its provisions, membership, entry into force and details concerning signature and/or ratifications, languages used and the depository. The second part reproduces the texts of the Conventions, together with Protocols, in the same chronological order as their summaries. A chronological index of Treaties from both the first and second volumes, dating back to 1933, provides a complete picture of the evolution of international environmental law. As an aid to the reader, a classification of the Treaties has been added, divided into categories such as atmospheric pollution, biological diversity, marine/coastal environment, energy, cultural heritage, working environment, peace and environment, ozone layer protection and toxic and hazardous substances. A comprehensive subject index adds to the utility of the publication.

A weakness of the volume is the omission of international instruments which are not explicitly "environmental" agreements but which nevertheless contain important clauses concerned with environmental protection. For instance, the recent United Nations Code of Conduct on Transnational Corporations includes several important rules regarding the environmental activities of such corporations. Although it is impossible to include all such instruments, some form of cross-referencing to other relevant international agreements would have been a useful aid.

On the whole, this publication should prove most useful to participants in environmental conferences, scholars and students in University Law faculties and other legal and scientific institutions, as well as government officials.

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WÄHRUNGSRECHT

By Hugo J. Hahn (Munich, C H Beck, 1990, xxxii and 528 pp)

Over the last 150 years Germany has been a kind of laboratory for all

manner of experiments – social, political, economic and cultural.

This holds true for money: in that time Germany has had no fewer than five currency regimes. Unification in 1871 introduced the Mark in place of a multiplicity of currency systems in the different states; the Mark was destroyed by the hyperinflation of 1924 and replaced, first *de facto* by the Rentenmark, and then *de jure* by the Reichsmark. The Reichsmark suffered the same fate as the Mark after World War II and was replaced by the Deutsche Mark in the West and the "Mark der DDR" in the East. The East German currency disappeared even before the State itself and it is foreseeable that the Deutsche Mark itself will be incorporated in a European currency (although any such currency is likely to be the Deutsche Mark in disguise).

Germany has also been active in monetary and financial matters on the international level. The Treaty of Versailles imposed notorious reparations obligations on the defeated Germany. To deal with the problems they caused, the Dawes Plan of 1924 and the Young Plan of 1930 were implemented. The London Agreement on German External Debts of 1953 paved the way for Germany's re-entry to the international financial world. At the writing of this review, Germany is making its presence felt in that world with domestic interest rate increases that have disrupted foreign exchange markets and threaten a major realignment of currency values.

Money has been at the centre of the turbulence on many occasions. The burden of reparations and the hyperinflation of 1924 are frequently blamed for the rise of Nazism. The refusal of the Soviet Union to participate in the currency reform of 1948 certainly precipitated the post-war division of Germany. And there is no doubt that the enormous imbalance in purchasing power between the currencies of West and East Germany corroded the body politic of the East.

It is interesting to speculate whether the German strength in philosophy and scholarship is a cause or effect of the eventful history of the Germans. In any event, there is no doubting the distinction of their scholarship in monetary law. FA Mann, who became the leading monetary lawyer of the common law world, was of course a refugee from Nazism. His seminal work, *The Legal Aspect of Money*, was in many respects a translation of the German tradition into the common law idiom.

This work on monetary law by Professor Hahn, appropriately dedicated to Mann, is a continuation of that tradition. Hahn brings to it not only a formidable academic background but practical experience at the EC, the OECD and in international arbitrations.

His focus is German domestic law but he places it in both its historical and international contexts. The book's scope is comprehensive: it covers forms and theories of money, nominalism and value clauses, foreign exchange and private international law, European and international law and the constitution and functions of the German Bundesbank.

The author's view that the Bundesbank's independence has no constitutional basis is perhaps

surprising but, like his rejection of a constitutional protection against inflation, encouraging for the fibre of German democracy. There is a detailed discussion of the prohibition on indexation clauses, an inheritance from the post-war occupation and now emblematic of anti-inflation resolution. The contrast with Australia, where such clauses are common in routine transactions, is instructive.

The book was published in 1990 and has therefore been overtaken by events in some key respects, notably reunification and the Maastricht Treaty. There is a brief discussion of the monetary aspects of the Treaty for Monetary, Economic and Social Union between West and East Germany of 18 May 1990, which preceded reunification. A useful appendix contains annotated extracts from the Treaty and a summary of the views of the Federal Constitutional Court on the currency reform of 1948, drawing parallels with the 1990 currency reform in the East.

The Maastricht Treaty has put into concrete form many of the proposals for further monetary convergence in Europe discussed by Hahn. Most significantly it proposes a European central bank system similar in many respects to the German system and with the primary function of ensuring price stability. According to a subsequent announcement, the seat of the European Central Bank will be Bonn.

However quick or slow the progress to full European monetary union, it will be heavily influenced by German monetary experience, practice and law. *Währungsrecht* will be an invaluable aid to those dealing or otherwise interested in these matters.

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INTERNATIONAL DISPUTE SETTLEMENT

By JG Merrills (Second Edition, Cambridge, Grotius Publications Ltd, 1991, xxii and 288 pp).

Standard international law textbooks have a single chapter on the peaceful settlement of disputes which typically contains little more than a discussion of the International Court of Justice. Since only a small number of international disputes are submitted to the Court this emphasis is inappropriate and overstates the place of adjudication as a dispute resolution process in the international arena. It does however reflect the approach of many international law courses which also concentrate upon the decided cases of the Court in preference to other, often less readily accessible, materials. More specialist books focus upon specific methods of dispute resolution,[1] but the first edition of Professor Merrills' book on international dispute settlement was

1 Eg Lachs, "International Mediation and Negotiation" in Lall A, (ed) *Multilateral Negotiation and Mediation* (1985); Bar-Yaacov N, *The Handling of International Disputes by Means of Inquiry* (1974); Cot J, *International Conciliation* (1972); Simpson J and Fox H, *International Arbitration* (1959); Kirgis F, *Prior Consultation in International Law* (1983); and numerous books on the International Court of Justice.

welcomed as one of the comparatively few books to examine the entire spectrum of methods for the peaceful settlement of disputes, as listed in Article 33 of the United Nations Charter,[2] and reiterated in various General Assembly Resolutions.[3]

This second edition of *International Dispute Settlement* is considerably expanded as well as updated. The chapters examine each of the processes in turn, commencing with the non-adjudicative (diplomatic) methods of dispute resolution (negotiation, mediation, inquiry and conciliation), moving on to the adjudicative methods (arbitration and adjudication), and then to the political processes which operate through the United Nations and regional organisations. An interesting chapter on the dispute settlement provisions of the United Nations Convention on the Law of the Sea[4] demonstrates the flexibility of the diplomatic and adjudicative processes and shows how the Convention combines them in an innovative way. The objective was to allow disputants maximum freedom of choice of process while strengthening the obligation upon them to have recourse to at least one such method. This approach has been pursued in subsequent treaties, but the failure of the Convention to receive sufficient ratifications to bring it into force means that the effectiveness of its dispute resolution provisions cannot yet be assessed. The final chapter appraises whether the creativeness shown by States and individuals over the last hundred years in devising techniques and institutions for the peaceful settlement of disputes has been successful and makes some suggestions for further development. It addresses ways in which both the legal and political processes might be made more acceptable to sovereign States, and how States might be encouraged to accept authoritative third party decision-making more readily.

The book addresses dispute settlement through process. It examines the trends over the past hundred years which have resulted, on the one hand, in the formulation of diverse methods for the peaceful settlement of disputes but, on the other, in the continuing reluctance of States to accept in advance any compulsory third party process. Merrills emphasises the gap between the growing number of treaties which contain dispute resolution clauses and the infrequency with which they are invoked. Throughout he analyses disputes where there was ad hoc recourse to a certain process, or processes, to determine the factors that influenced parties to proceed as they did. The richness of available mechanisms is therefore contrasted with their limited practical application. In each chapter detailing a particular

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2 Those listed are negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

3 Notably, Declaration on the Principles of Friendly Relations between States, GA Res 2625 (xxv) (1970); Manila Declaration on the Peaceful Settlement of International Disputes, GA Res 37/10 (1982).

4 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, rep (1982) 21 ILM 1261.

process he explains its nature and distinguishing features, indicates its current use, and evaluates critically the factors which make it likely to be effective or otherwise. The descriptive aspects are enhanced throughout by examples drawn from a widely based state practice, from all regions of the world and from the work of regional organisations, as illustrated by the chapter on conciliation. The chapter first outlines the use of conciliation during the inter-war years, its treaty base and the work of a number of conciliation commissions. Merrills then discusses the tasks typically performed by conciliators and compares the investigatory powers often granted to a conciliation commission with the task of attempting to bring the parties together to accept some recommended solution. In this way conciliation, as a process, is contrasted with inquiry, mediation and arbitration, a technique that is used throughout the book to clarify similarities and differences between the various processes. The chapter then discusses the inclusion of conciliation in a number of modern treaties and outlines some treaty articles which provide for recourse to this method. Finally the significance of conciliation is assessed.

Although each chapter deals with a specific process the use of comparisons and illustrations drawn from different aspects of the same dispute means that the real value of the book is gained through reading it as a whole, rather than just as individual chapters. For example, reference is made to efforts to resolve the dispute between the United States and Iran arising out of the capture and detention of the hostages in the context of negotiation, mediation, arbitration (establishment and work of the Iran-United States Claims Tribunal), adjudication and political processes. The examination of the International Court of Justice as a dispute resolution forum in the chapter on adjudication is supplemented by discussions on particular aspects of its work elsewhere in the book. For instance, the chapter on negotiation includes an examination of the relationship between negotiation and adjudication, and that on the United Nations raises the question of whether recourse to the Court is compatible with the simultaneous use of the political organs of the United Nations.

As mentioned, the book has been so expanded since the first edition that it is more accurately viewed as a new book. The additions have provided more information on certain processes (consultation and international commercial arbitration), and more examples of recent state practice through case studies (notably the dispute arising out of the sinking of the *Rainbow Warrior* and the recent decisions of the International Court of Justice) and treaty negotiation rather than theoretical evaluation. The book omits explicit sections on matters that are often included in books on domestic dispute resolution, in particular Alternative Dispute Resolution processes, such as the impact of a significant power imbalance between disputants, the relevance of political and legal factors on the outcome of the process, the causes of international disputes and conflict, the nature of international disputes, or the factors that escalate or

impede the settlement of international disputes. Although some aspects of these difficult topics are integrated throughout the book, its emphasis is on process and the account of the actual use of the processes by States, not on the structural changes required for the removal, or at least minimisation, of international conflict. The particular problems caused when non-State entities are also participants in an international dispute are not considered. As in the majority of international texts no connection is drawn between the obligation upon States to settle disputes peacefully and the existence of a right to peace and the possible content of such a right.

While the book is practical in explaining the purpose of the different processes, and the powers of the selected third parties it is not, and does not purport to be, a skills manual. It does not provide guidance to those acting, or hoping to act, as negotiators, third party mediators, conciliators, arbitrators or experts. The work on techniques of principled or co-operative negotiation is footnoted and not discussed. No criteria are offered for assessing whether a particular outcome of a dispute resolution process is appropriate or likely to be lasting.

The acceptance by States of processes for the peaceful settlement of their bilateral and multilateral disputes and the enhancement of the peacekeeping functions of international and regional institutions are two sides of the same coin. Both are directed towards the goal of maintaining international peace and security. Both are currently receiving a great deal of practical and academic attention. The International Court of Justice has the most crowded docket in its history. States are negotiating treaties with elaborate provisions for dispute resolution. The Decade of International Law has led to General Assembly initiatives on the Draft Rules on Conciliation of Disputes between States,[5] and the Resolution on Fact-Finding.[6] The Security Council has requested the Secretary-General to provide "analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and peacekeeping".[7] The Secretary-General's response, "An Agenda for Peace" makes far-reaching recommendations for improving the effectiveness of the United Nations' functions of preventive diplomacy, peacemaking, peacekeeping and peacebuilding.[8] The peacekeeping operations of the United Nations have never been more widespread with personnel supervising the transition to elected governance in Cambodia, providing humanitarian relief in Somalia, and overseeing the aftermath

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5 GA Doc A/46/383, 28 August 1991.

6 Declaration on Fact Finding by the United Nations in the Field of the Maintenance of International Peace and Security, GA Res 46/59 (1991).

7 Statement, Summit Meeting of the Security Council, 31 January 1992.

8 "An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping", Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, A/47/277.

of the Gulf War, in addition to tasks they have long been performing in many other parts of the world. They have also never been more costly. The Report therefore appropriately considers the budgetary commitments this increased activity entails.

While these developments have occurred subsequent to the publication of *International Dispute Settlement* their omission does not reduce its usefulness. Rather they reinforce the timeliness of a publication which embraces the whole field of dispute resolution and gives the reader a readily accessible basis upon which to assess these new developments. This writer considers the peaceful settlement of disputes to be an ideal course for teaching undergraduate or postgraduate students about the prescriptive processes of international law, the operation of the international legal system and the many tensions that reduce its effectiveness.[9] This book provides a useful starting point for such a course and is a very welcome and valuable addition to the literature on international dispute resolution.

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TEXTBOOK ON INTERNATIONAL LAW

By Martin Dixon (First edition, Blackstone Press Ltd, London, 1990, v–xxiii and 248 pp)

International Law is a discipline which is more than hospitable to claims of intellectual grandeur. International lawyers are by turns poets, utopian philosophers and self-styled originators of new world orders. Here is a subject requiring academic rigour that also allows us to dream a little.

It is therefore somewhat disarming to be confronted with a text so utterly free of pretension. Dixon's guide to passing exams (this is admitted, shamelessly, in the preface) announces itself boldly and nakedly as a mere *Textbook on International Law*. The cover is unlikely to date if only because its design has never been fashionable and the whole book has the look of one of those "Coles Notes to Hamlet" where the Danish Prince is revealed to have a grudge against his stepfather.

However, appearances count for little and the revelations in Dixon's text are likely to be more meaningful and useful to the average international law student. The usual list of unmistakeable suspects are rounded up from "The Nature of International Law" through "Jurisdiction" to last and, in positive law terms alas, least, "Human Rights". Each of these core topics is dealt with in a comprehensive and up-to-date manner. Indeed, apart from a rather thin table of instruments and a glossary that includes a definition of "United Nations" in its variable two page survey, I found this concise and well-organized text quite commendable.

Unfortunately, in a universe of precarious student budgets and proliferating student texts, harder questions need to be asked and harsher judgements made. *Textbook on International Law* may be

9 See further Chinkin and Sadurska, "Learning about International Law through Dispute Resolution", (1991) 40 ICLQ 529–50.

commendable but is it recommendable or even prescribable? The competition is certainly becoming fierce: a new Harris, a relatively recent Starke, an ageing but short and inexpensive Akehurst, a forthcoming Australian Cases and Materials, a host of American texts and a brand new Cases and Materials from the United Kingdom. The latter is a particular curiosity in the context of this review because one of its authors is Dixon himself (his co-author is former Sydney University graduate Robert McCorquodale). Is *Cases and Materials* meant as a companion piece to *Textbook*? (They share an austerity of presentation.) Should they be recommended together? Will either suffice for a foundational undergraduate course?

First, in respect of Dixon and McCorquodales' *Cases and Materials*, the two books adopt a different order of treatment, for example, Human Rights are elevated to sixth in chapter order and environmental law and acquisition of sovereignty are given separate chapters in *Cases and Materials* but are incorporated as part of chapters on state responsibility and jurisdiction respectively in the text under review. On a personal note, I prefer the approach adopted in the Cases and Materials book and would view it as the superior elementary text if forced to choose. The variety of writings and access to source materials, which, when chosen intelligently, offer the same insights as a standard text, are points in its favour.

Some shortcomings of the Dixon text: the index, in common with many international law books, is the source of much frustration. Self-determination appears only once (under use of force) but is considered in some detail and under its own heading during the discussion of acquisition. *Terra nullius* appears nowhere in the index. Acquisition does not have its own index heading and consequently sovereignty is obliged to accommodate a large number of sub-headings. Avulsion is one of them but conquest and occupation are both missing. And so on.

In the text itself, there is an equivocation on certain issues (self-defence, jurisdiction) that is entirely understandable but eventually fatiguing and sometimes the choice of subject areas under which certain topics are dealt with appears arbitrary – self-determination's appearance under jurisdiction will surprise some readers. Others will merely accuse me of quibbling.

On a wider comparative level one finds oneself confronting the larger pedagogical questions of international legal education. To paraphrase Orwell, "Why I Teach?" becomes the issue. Choice of text becomes central to the method of inquiry. Most international law teachers seem to prefer the Cases and Materials approach. Harris's increasingly gargantuan collection remains the preferred textbook in this regard. Often students are encouraged to read Akehurst's introductory text during the summer break before returning to embark on the international law adventure with Harris as the primary tool of navigation (a more unwieldy compass one can hardly imagine, not for reason of its authoritativeness alone do students refer to it as "the Bible").

Leaving aside doubts about student assessment of the relative merits of surfing and reading introductory international law texts, I would have little hesitation in recommending Dixon over Akehurst as a vacation taster. To take a more pessimistic view, one might also see it as the perfect night before exam crammer. Either way, this text offers a good survey of the major international legal issues. Students for whom the law remains an enigma or a maze, may regard Martin Dixon's elegant portable study as something of a saviour. Meanwhile, the task of bringing international law to life must be left to other more ambitious books and the skills of the teacher.

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Australian Practice in International Law 1990 and 1991

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I INTERNATIONAL LAW IN GENERAL

Customary international law – sources of international law – whether or not there exists an international legal obligation to seek out and try war criminals from World War II

On 14 August 1991 the High Court of Australia handed down its decision in *Polyukhovich v Commonwealth* (1991) 101 ALR 545 in which it held that the *War Crimes Act 1945* was a valid exercise by the Commonwealth Parliament of its legislative powers. The Court held, in particular, that section 9 of the Act, which provided that a person who, on or after 1 September 1939 and on or before 8 May 1945, committed a war crime was guilty of an indictable offence against the Act, was not invalid in its application to a charge laid against Polyukhovich. In the course of his dissenting judgement, Brennan J made the following observations (at 574–576), with which Toohey J (who was in the majority) agreed (at 648):

> The primary question on this branch of the case is whether the material relied on establishes that in 1989 there was either an obligation under customary international law or a matter of international concern that war criminals from the pre–1945 years be sought out and tried for their offences. As the sources of the postulated obligation and of the postulated concern are the same, there is no difference in content between the obligation and the concern. There are no relevant treaty obligations. The treaty obligations imposed by the Geneva Conventions of 1949 were not retrospective. The legislative obligations accepted by Australia under those Conventions were fulfilled by the Geneva Conventions Act 1957 (Cth) which substantially translated the Convention provisions into Australian municipal law. Although the material demonstrates that there was a widespread aspiration that the war criminals of the Axis powers should be brought to justice after the Second World War and although that aspiration was repeated in a series of resolutions in the UNGA and in the Economic and Social Council, the practice of States in the community of nations does not reveal a widespread exercise of jurisdiction to try alleged war criminals for extraterritorial war crimes. European States have exercised jurisdiction in respect of war crimes committed in their respective territories, but Israel and Canada are the only States which have asserted jurisdiction to try alleged war criminals in respect of extraterritorial war crimes.
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> To determine whether, in these circumstances, there exists a customary law obligation to try alleged war criminals in respect of extraterritorial war crimes, it is necessary to refer to the sources of international law. Article 38(1) of the Statute of the International Court of Justice is generally regarded as a complete statement of the sources of international law: Brownlie, *Principles of Public International Law*, 4th ed (1990), p 3. It provides:
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> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principals of law recognised by civilised nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

In the absence of international conventions, the custom required to evidence "a general practice accepted as law" must be "extensive and virtually uniform" *(North Sea Continental Shelf* cases (1969) ICJR 1 at 43) and "followed on the basis of a claim of right and, in turn, submitted to as a matter of obligation" (MacGibbon, "Customary International Law and Acquiescence", (1957) XXXIII *The British Year Book of International Law* 115 at 117). In *Nicaragua v United States of America* (1986) ICJR 14, the International Court of Justice accepted (at 98) that it is "sufficient that the conduct of States should, in general, be consistent with" a postulated rule of international law, but that was a view expressed in conjunction with an inquiry whether there was an *opinio juris* as to the binding character of the postulated rule (see at 99–101). An *opinio juris* supportive of a postulated rule of customary international law must explain and inform the practice of States in order to show that that practice is "accepted as law". The principle is conveniently stated by Dr Akehurst's summary of his article "Custom as a Source of International Law", (1974–1975) XLVII *The British Year Book of International Law* 1 at 53:

"*Opinio juris* is necessary for the creation of customary rules; State practice, in order to create a customary rule, must be accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law (a claim that conduct is permitted can be inferred from the mere existence of such conduct, but claims that conduct is required or forbidden need to be stated expressly). It is not necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other States."

In the present case, there is no evidence of widespread State practice which suggests that States are under a legal obligation to seek out Axis war criminals and to bring them to trial. There is no *opinio juris* supportive of such a rule.

Note: further aspects of this judgement are considered in Part IV – Jurisdiction – below.