BOOK REVIEWS

EDITED BY

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CONSULAR LAW AND PRACTICE

By Luke T. Lee, (Second Edition. Oxford, Clarendon Press, 1991, xxxiv + 739 p.)

This is much more than a second edition of *Consular Law and Practice* (1961). Dr Lee has given us a composite work up-dating not only his first edition, but his *Vienna Convention on Consular Relations* (1966) and *The Vienna Conventions on Diplomatic and Consular Relations* (1969) as well. Thirty years of State practice have been carefully noted, ordered and written up to form what is now, without any doubt, the primary reference book on consular law.

As dense and interesting as it may be in anecdotal material, however, and as comprehensive as it may have sought to be, the reader looking for guidance on what international law might be on a particular point can easily come away dissatisfied. And consular officers, to whom the book is prudently dedicated, are just the sort of readers who will turn to his book for such guidance, if they cannot find guidance in their own national consular instructions, as most often they will be able to, given the nature of consular functions. One of the most delicate and difficult issues the consular officer and those instructing him or her from a capital have to grapple with, for example, is: what are the permissible limits of consular protection? When does protecting the interests of the sending state and its nationals become interference in the internal affairs of the receiving state? Dr Lee gives three standards for consular protection: the minimum international standard, the national treatment standard, and what he describes as a newly emerged human rights standard. He suggests that "the standard of treatment to be enforced by means of consular protective functions" is to be found in the various human rights instruments[1]. This is a novel suggestion, but one that is not supported by any examples from State practice. It is not the approach taken by Australia, for example, which follows the national treatment standard[2]. The reader

1 P 131.

2 See written answer by Senator Gareth Evans, Minister for Foreign Affairs and Trade, in *Senate Debates*, 4 April

would be left in less doubt if it were clearer that suggestions such as these were based on a comprehensive survey of State practice. Unfortunately this is not the case.

The practice on which the book is based – and in consular law the practice of States is the pre-eminent source of the law – is predominantly that of the United States. This practice is indeed extensive, perhaps more extensive than any other country's,as a result of the size of the consular corps and the difficulties the United States Government has encountered. The United States Government has thus has to articulate policies on many issues no other government has had to address. In other cases he draws on examples from British and Canadian practice, and to a much lesser extent from French, Dutch, Swedish, Finnish, and Portuguese practice. Brazil and the Dominican Republic receive glancing references, and Cuba once, but in a footnote, where the relevant practice is not referred to in any case. There is no mention of the consular practices of African countries, or of Asia or the Middle East. There are numerous references to bilateral consular treaties in the text, but these are more catalogued than synthesised. Much of the historical material of the first edition has been retained, but could well have been dropped in favour of a wider survey of post-Vienna Convention practice. And sometimes where there are gaps, it is diplomatic practice Dr Lee refers to, and not consular practice. It is a pity that the opportunity for a thorough and systematic study in the second edition has been forgone.

In a book finished in May 1990, there are some scandalously out-of-date references. Syria is referred to as "now United Arab Republic"[3] (it ceased to be seven months after the first edition of Dr Lee's book was published in 1961); the unification of Germany is said to be "not yet in sight"[4] (it happened on 3 October 1990); and the many references to "Communist countries" now jar, and could easily have been replaced by "East European countries". From an Australian point of view, it is disappointing that the notorious shooting from the Yugoslav Consulate-General in Sydney on 27 November 1988 and its subsequent closure were not mentioned as a poignant illustration of the sudden elevation from limited immunity (or non-existent immunity) to absolute immunity as the culprit was declared persona non grata and escorted freely out of the country. It is difficult to believe Dr Lee's attention had not been drawn to this incident, which attracted international press coverage, including in the United States[5] not least because the Foreign Minister invoked him as an authority in explaining to the Australian Parliament the Government's response to the incident[6]. This omission mars

1989, pp 914–6, in *Australian Practice in International Law 1988–1989, below.*

3 P 96, n 3.

4 P 79.

5 *The New York Times*, 2 December 1988, I, p 5:1; 4 December 1988, I, p 33:1; *The Washington Post*, 5 December 1988, A, p 17e.

6 *Senate Debates*, 5 December 1988, p 3433, in *Australian Practice in*

an otherwise good analysis of consular immunity.

Dr Lee's book is, nevertheless, the best compendium of consular practice there is. There are, finally, two errors an Australian reviewer who has visited the United States as a foreign government representative is bound to correct, be they the errors of the American author or his British printer: the type of United States visa that is granted to a foreign government official who is not a diplomatic or consular officer is an A2 and not an A1 visa[7], and Leo Gross referred to Bulgaria's invocation of the Connally Amendment in 1962 as having a "boomerang effect", and not a "bommerang effect"[8].

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RECOGNITION AND THE UNITED NATIONS

By John Dugard, (Cambridge, Grotius Publications Ltd, 1987, vii and 192 pp.)

This is a worthy contribution to the Hersch Lauterpacht Memorial Lectures, not least because it takes as its starting point Lauterpacht's magisterial *Recognition in International Law*, published forty years earlier.

Dugard's work concentrates upon recognition and non-recognition in the UN context as they apply to States and territorial changes. For the most part he does not become embroiled in issues about the recognition of governments, although he does not always avoid the confusion between the recognition of States and governments. For example, simply because certain States do not recognise the government of a new State does not mean that they "refuse to give it" – that State – "diplomatic or 'political' recognition" (p 75).

Dugard also "studiously avoided" *de facto* and *de jure* recognition "as they belong primarily to the recognition of governments. In any event, these confusing concepts have outlived whatever usefulness they may once have served" (p 6). His principal authority for this pronouncement is Brownlie's solecism that "standard works, in giving prominence to the *'de jure/de facto'* usage are not only committing atrocities of analysis, but over three decades out of date as a matter of the ordinary description of State practice".[1] In the context of territorial changes, the Australian government still employs recognition of the *de facto* or *de jure* incorporation of territory (during the 1970s both forms were used in relation to the Soviet Union vis-a-vis the Baltic States and Indonesia vis-a-vis East Timor and the terminology is still used with regard to both situations). Moreover,

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International Law 1988–1989, below.

7 P 209.

8 P 630, n 3.

1 "Recognition in Theory and Practice" (1982) 53 BYIL 197 at 208.

in so far as the new recognition policies of the United Kingdom and Australia might lead the courts in the two countries to equate contacts with a new revolutionary regime as signifying implied recognition, there is no guarantee that the courts might not employ the *de facto/de jure* dichotomy where there are competing authorities with which the British or Australian government has maintained or established contacts of varying intensity.

As an introduction to his discussion of the role of the United Nations, Dugard deduced from the practice of the League of Nations "the emergence of a new law of collective recognition of statehood, the fulfilment of which was obstructed by the failure of the League to achieve universality of membership" (p 23). However, the creation of States at the time still did involve some assessment based upon an accumulation of acts of recognition. As Dugard explained the situation (pp 17–18):

> "Inevitably the prior recognition of applicant States played a major role in the admission process before the First Assembly of the League and no State without extensive evidence of recognition by the Great Powers was admitted.
> ....
> At the Second Assembly there was a definite movement away from the notion that recognition by States was a condition precedent for admission to the League. .... Thereafter, it was generally accepted that antecedent recognition was not a pre-condition for admission to the League, although a substantially unrecognised State was never admitted to the League."

The role of the United Nations is similarly ambiguous as the variety of views as to its significance (referred to especially at pp 44–45) demonstrates. Dugard prefers to base his justification for collective recognition on Article 3 as well as Article 4. In order to do so, of course, he has to explain the position of Byelorussia and the Ukraine as anomalous (p 54). With regard to Article 4, the requirement of (existing) statehood was acknowledged by the International Court in the *Admissions* case.[2] In the "case of decolonisation" (to use Dugard's heading, p 63), the admissions process provided a ready means of recognising statehood. In Dugard's view (p 78):

> "Existing member States have frequently acknowledged the statehood of a new member by their vote in the General Assembly or Security Council and not by formal notification of recognition.
> ....
> It is hard to distinguish this process of institutional admission and diplomacy from collective recognition, particularly when statehood constitutes a requirement for admission in terms of Article 4 of the Charter and the political organs of the United Nations consider statehood in admitting a new entity to membership."

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2 ICJ Rep 1948, p 56.

However, it is clear that the act of admission is only part of the story for, as Dugard earlier stated (pp 66–67):

> "In most instances the colonial power's certification of statehood, demonstrated by the ceremonial act of independence, and the Special Committee on Decolonization's aggressive assertion of independence, have provided sufficient 'evidence' of statehood for the purposes of admission to the United Nations. The automatic nature of admission to the United Nations is clearly illustrated by the short space in time between formal independence and admission to the United Nations in the case of most decolonised States, which stands in contrast to the delays in admission experienced by applicant States in the pre–1960 period. The major powers, which in the early years of the United Nations had competed vigorously with each other to keep out new members, now vie with each other to recognise and sponsor new members. In the age of decolonisation neither the United States nor the Soviet Union wished to appear to be hostile to this cause or to risk the disapprobation of the Third World bloc by questioning the statehood of the new nations."

The second thesis advanced by Dugard commences with an examination of UN practice in relation to non–recognition. There can be no doubt that, as a consequence, Rhodesia was never a State under international law (p 94). However, the crucial issue was not so much the linkage between the fact of non–recognition of Rhodesia and the issue of self–determination for its people as a whole, but the significance to be attached to the latter (p 97). To the "Oxford" School, there is no doubt that the cases of Rhodesia, the South African homelands and the Turkish Republic of Northern Cyprus support the inclusion in the criteria for statehood of a requirement related to self–determination.[3]

Dugard does not agree with either writer, although he regards the Crawford version of a new rule "prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self–determination".[4] as "an improvement" (p 129). In Dugard's opinion (p 130):

> "State practice on this subject is largely confined to the political organs of the United Nations and from resolutions adopted by these bodies it appears that entities such as Rhodesia, the homeland–States and the Turkish Republic of Northern Cyprus have not been faulted for mere failure to comply with the requirements of statehood but denounced for violation of certain peremptory norms of international law which result in their 'illegality', 'invalidity' and 'nullity'. Resolutions of the General Assembly and the

3 See pp 97–98, citing *inter alios* Fawcett JES, *The Law of Nations* (1968), pp 38–39; Crawford J, *The Creation of States in International Law* (1979), pp 105–106.

4 See Crawford note 3 above, pp 105–106.

> Security Council are not renowned for their usage of precise legal terminology, and it may be suggested that too much emphasis should not be placed on terms employed by these bodies. However, where they clearly and repeatedly use the language of 'illegality', 'invalidity' and 'nullity' in respect of these entities, it is difficult to ascribe to them an intention to withhold recognition on the ground that the entities in question have failed to meet all the requirements of statehood."

It follows from this, in Dugard's opinion, that it is the *jus cogens* to which one must look for an explanation of the non-recognition of these various claimants to statehood (p 132):

> "The notion that there are certain peremptory norms of international law with which States are obliged to conform in their conduct has made a major impact on the law of treaties and now features prominently in the reformulation of the law of State responsibility. But it is by no means limited to these areas, and has implications for a whole range of subjects - including the law of recognition. Developments in this field provide a more satisfactory explanation for the phenomenon of the non-recognised State that fulfils the traditional requirements of statehood than does the construction of a new criterion of statehood. *Jus cogens* blends easily with the traditional notion of non-recognition and gives it a new doctrinal coherence. Furthermore, the practice of the United Nations on the subject of non-recognition seems to be premised on the violation of peremptory norms rather than on the failure to meet the conditions of statehood."

The path then followed by Dugard is hardly surprising, though it suffers from a similar artificiality as Crawford's own thesis. According to Dugard (p 135):

> "An act in violation of a norm having the character of *jus cogens* is illegal and is therefore null and void. This applies to the creation of States, the acquisition of territory and other situations, such as the case of Namibia. States are under a duty not to recognise such acts. Resolutions of the Security Council and the General Assembly are, from a jurisprudential perspective, declaratory in the sense that they confirm an already existing duty on States not to recognise such situations. In practical terms such resolutions are essential as they provide certainty by substituting for the decision of an individual State a collective determination of illegality and nullity. Furthermore, they may (as in the cases of Rhodesia and Namibia) add the backing of the Charter's obligatory provisions to the duty of non-recognition."

Dugard's approach and that of Crawford are not so far apart, the former relying to some extent upon the latter who had accepted "that the principle of *jus cogens* extends beyond the validity of treaties, and that an act in violation of a norm

having the character of *jus cogens* should not be recognised."[5]

However, the artificiality of the theories propounded by both writers is to be found in relation to a matter on which, apparently, there would seem to be a significant difference between them. In order to prove to his own satisfaction the proposition that statehood exists by virtue of certain fixed criteria, Crawford was obliged to explain certain political realities in factual terms[6], and to downplay the significance of recognition of States, "The relation between recognition and statehood has been seen to be close but not inseparable".[7]

On the other hand, one would have expected Dugard to have adopted a very different conclusion. After all, his starting point was the new collective face of recognition and its quasi-constitutive character. However, this premise seems to be incompatible with his ultimate hypothesis that the creation of States or changes to the status of territory are affected by the automatic application of the *jus cogens* of which the resolutions of UN bodies are simply declaratory. The obligation of non-recognition upon States arises independently of any decision to that effect by the Security Council.

This view is not one shared by the Australian government, and it is difficult to accept the reality of the gospel according to John (or James)! The problem lies partly in a familiar commandment on the Law of Treaties, Article 53 of the Vienna Convention:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

It is possible to accept the initial sentence of this provision. As Dugard comments (p 139), "the principle of jus cogens was not seriously disputed in the International Law Commission, the Sixth Committee or the codification conference". The first part of the second sentence is no more than recognition of the legislative authority of the community of States, indicating, in Dugard's words, "that the source of peremptory norms is to be found in custom and treaty, rather than general principles of law" (p 148). The fear amongst Western States stems, of course, from the fact that there is little agreement today upon how customary law is created, especially in relation to the alleged normative activities of the General

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5 See p 147, citing Crawford, note 3 above, pp 82–83, 123.

6 Eg adopting Sureda's thesis as to colonial enclaves being an exception to the application of self-determination as a rule of *jus cogens*, see Sureda A R, *The Evolution of the Right of Self-Determination* (1973), pp 80–82, 174–177, 180, 196–198, 222; Crawford, note 3 above, pp 377–384.

7 Note 3 above, p 143.

Assembly, so that the situation is exacerbated when the "law" in question is of such importance as the *jus cogens*. Dugard adopts a consoling stance (pp 149–150):

> "In most instances peremptory norms will be given full expression in the political organs of the United Nations and be accepted as customary rules by some States and simply as international standards or policy by others, depending upon their attitude towards the formation of customary international law. Herein lies the real dilemma facing the acceptance of norms of *jus cogens*: the modernist, who accepts the accelerated development of customary rules in the political organs of the United Nations, will have little difficulty in finding that many higher norms reflecting international public policy have been translated into customary law through repeated endorsement by the General Assembly and Security Council; while the traditionalist, who insists on strict compliance with the criteria for the formation of customary law, will often conclude that rules of *jus cogens* do not meet the tests of acceptance and recognition contained in Article 53 of the Vienna Convention. This disagreement has led some writers to suggest that an additional source of law, which gives increased weight to resolutions of the General Assembly, should be recognised for the purpose of *jus cogens*. Suggestions of this kind are unfortunate, in that they suggest that *jus cogens* is so unusual a phenomenon that it requires special treatment, and unnecessary in that they ignore the growing acceptance of the political organs of the United Nations as a forum for the creation of customary international law. The debate over the law-making processes of the United Nations is not peculiar to *jus cogens* but pervades a whole range of issues in contemporary international law. The best course is therefore not to seek a special source of law for *jus cogens* but rather to demonstrate that certain peremptory norms do indeed meet the tests enunciated in Article 38 of the Statute of the International Court of Justice."

But should one be so easily cajoled into accepting the consequences of the *jus cogens* as depicted by Dugard and Crawford? If there is danger in accepting the means for the creation of rules of the *jus cogens*, there is even greater peril in the later part of Article 53 where it refers to such a norm as one "from which no derogation is permitted". The automatic application principle is the reason for Crawford's attempts to define the scope of self-determination by reference to purely factual criteria. It is also the reason why Dugard, having established the collective role of the UN in the recognition of States, shied away from accepting the general act of non-recognition as equally significant in the process.

The fundamental weakness with Article 53 of the Vienna Convention is its rejection of the judgmental discretion vested in the international community. It was that judgment

which decided the future of Goa, not the quality of that territory as a colonial enclave. Similarly, it was that judgment which led to the independence of Cyprus, contrary to the wishes of a majority of its inhabitants, who favoured union with Greece, not the fact that Cyprus did not meet the test of being such an enclave. It is also possible for the international community to have second thoughts on the application of rules, even those claimed to constitute *jus cogens*, as well may be happening in the case of East Timor, notwithstanding actions by Indonesia allegedly infringing Article 2.4 of the Charter as well as the right of the East Timorese to self-determination.

In a sense, the employment of *jus cogens* in relation to the invalidity of a treaty is no great disadvantage. The transcription of *jus cogens* into a general norm of behaviour does pose greater problems. States individually do claim a freedom of action even, perhaps especially, in some areas covered by so-called rules of the *jus cogens*, and they, like India or Indonesia, wish to be able to persuade other States that their actions are, in the special circumstances, justifiable. Moreover, for this very reason, States collectively wish to retain a judgmental discretion with regard to such actions which is inconsistent with the notion of no derogation being permitted from a norm of the *jus cogens*.

If this reviewer is not a convert to John's gospel on the *jus cogens*, he is not altogether a believer in the writer's conclusion on collective recognition. The reason is that recognition, in whatever form, is only part of the story, or perhaps one should say of the process whereby the legality or legitimacy of a situation is assessed by the international community. The "recognition" of statehood or territorial change is a composite body of reactions, including in the former case, most importantly admission to the United Nations, but also individual acts of recognition of or acquiescence towards the new situation. The process is constitutive in effect because it is capable of curing defects that might be raised against a claim to statehood or to territorial sovereignty. It is part of the legislative process of the international community. Conversely, of course, the non-recognition of a claim to statehood or sovereignty, if sufficiently widespread and consistent, prevents the change taking place and preserves the rights the policy is designed to protect. It is also an example of the selection and application of the rule which the community regards as appropriate in the circumstances.

It would, however, be unfair to end on a note of disagreement. A short lecture series provides the opportunity for a speaker to formulate a personal view of an aspect of international law and of how that area of law is developing. There is not the space to justify or to defend. John Dugard has been highly successful in stimulating debate and reaction. More particularly he has paid a fitting tribute to the person in whose name the series was established.

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WHOSE NEW WORLD ORDER: WHAT ROLE FOR THE UNITED NATIONS?

Edited by Mara R. Bustelo and Philip Alston (Sydney Federation Press, 1991 xiv and 157 pp.)

The first question in the title of this book suggests that the phrase *New World Order* can be used in a proprietorial way. Although President Bush is certainly not the first person to ever speak of a *New World Order* he is credited with having popularised the use of the phrase following Iraq's invasion of Kuwait. Several commentators have expressed concern that U.S. use of the term has been predicated on a concept of Pax Americana rather than a collective and truly global order. The second question in the title of this book reflects both the convictions of many of the contributors and the content of many of their papers – any so called *New World Order* in the post Cold War era is best determined collectively in the fora of the United Nations Organisation.

This book contains all the papers presented to a major public conference in Canberra on 13 May 1991 (with the addition of a piece by Sir Brian Urquhart from the *New York Times Review of Books*). The 13 contributors cover a broad range of professions and perspectives – apart from Australia's Foreign Minister the authors include lawyers, psychologists, sociologists, political scientists and economists who work as academics, politicians, career diplomats, public servants and private business people. However, despite this diversity all the contributors are Australian (or have been working in Australia for several years) and so the collection of papers represents a uniquely Australian contribution to the discussion on the New World Order. That fact in itself makes the book worthwhile to anyone in this country interested in the topic.

The papers have been grouped under five sections. The first is entitled "A New World Order in International Peace and Security" and includes five papers which focus on prospects for international peace and security in the aftermath of the Gulf War.

The first paper in this section is by the Minister for Foreign Affairs and Trade, Gareth Evans, who is positive about the future role of the UN in international peace and security matters. Evans believes that after the Gulf war experience any State contemplating a "Saddam-style" aggression must now base a decision to proceed on the possibility of a similar collective response. He does not refer to past illegal invasions by powerful nations of smaller entities but does consider the allied reaction in the Persian Gulf an important precedent for future collective action.

Other papers in the first section of the book include those by Sir Brian Urquhart, Robert Hill, Elaine Darling and Amin Saikal. The papers all speak optimistically of the future prospects for the UN in maintaining international peace and security but stress that individual States, particularly the more powerful ones, must demonstrate the resolve and political will to make the UN the effective Organisation it was

intended, and has now shown it has the potential, to be.

The second section of the book is entitled "A New World Order in Settlement of Disputes" and includes two papers by Connie Peck and John Braithwaite. Both papers are critical of the usual methods for dispute resolution in international affairs.

Connie Peck analyses various approaches to dispute settlement and argues that within the UN system "the predominant method for handling disputes tends to be power-based" rather than interest-based.[1] Power-based approaches to dispute resolution involve the parties positioning themselves for debate and attempting to shore up support for resolutions in their favour in the Security Council and the General Assembly. Peck asserts that while such approaches are useful in containing conflict they rarely resolve the "real issues and grievances which lie behind international disputes". She advocates instead the development of structures and mechanisms for mediation and conciliation and for interest-based approaches to dispute resolution.

John Braithwaite agrees with this analysis and suggestions for change. He is critical of the way the U.S. in the Gulf Crisis was allowed to proceed with "precipitate and irreversible military escalation" despite the calls from the U.S.S.R. and other States for caution and circumspection.[2] Braithwaite argues that while the Gulf War evidenced a collective willingness to resist aggression the international community needs to further develop to the point where individual States cannot use the mantle of UN authorisation to pursue individual goals as he perceived the U.S. to be doing in the Gulf War. He would prefer to see the UN Secretary-General negotiating with a would be aggressor State on the basis that the UN will respond collectively with force if that State follows through with its proposed aggression.

The third section, entitled "A New World Order in International Law", contains papers by Ivan Shearer and Philip Alston. Ivan Shearer's paper meticulously analyses a range of international legal issues arising from the Gulf War. These issues include implications for the rules governing the use of force; the role of the Security Council under Chapter VII of the UN Charter; humanitarian intervention; the status of war; neutrality; and reparations and war crimes. Shearer concludes that in the aftermath of the Gulf War any New World Order will only be credible if it is based not merely on a Pax Americana but on an effectively strengthened UN Organisation.

Philip Alston's paper deals more specifically with human rights issues arising from the Gulf War. Alston perceptively explains that although human rights issues were never "formally at issue in the context of the enforcement measures authorised by the Council" they were on the public agenda in the sense that allied involvement in the war was often "predicated upon the inclusion of human rights objectives as an integral

1 Bustelo and Alston, p 53.

2 Ibid, p 65.

part of the allies' overall aims."[3] Despite this widespread public concern for human rights standards the only issue that was vindicated by substantive action was the right of the Kuwaiti people to self-determination.

Alston concludes that concern to strengthen the international human rights regime was sadly lacking throughout the Gulf Crisis. He argues that despite established practice in the organs of the UN to treat human rights violations as outside the exclusive internal domain of States the Security Council failed to support and strengthen this practice. He is critical of the "backwardness of the Security Council in these matters."[4]

Alan Oxley, Russell Rollason and Ruth Pearce each contributed papers which constitute the fourth section of the book entitled "A New World Order in Economic and Social Issues". Alan Oxley warns that while the end of the Cold War has diffused East/West tensions and has enabled co-operation in the spheres of international peace and security, international economic issues will continue to be dominated by North/South tensions. Any assumption that these tensions will automatically resolve themselves with the termination of the Cold War is fallacious.

Russell Rollason is critical of the inconsistencies between the international community's response to Iraq's invasion of Kuwait and other States' illegal but permitted behaviour. His criticism is based on a possible perception by Third World States of unfair treatment by the rest of the world. Rollason also calls for a New World Order in which the walls between North and South are demolished as thoroughly as those between East and West.

Ruth Pearce discusses the New World Order in international trade negotiations. She focuses extensively on GATT negotiations, explaining that GATT was never as affected by East/West tensions as other organs of the UN. The mandate of the Uruguay Round negotiators includes a commitment to "the renewal and strengthening of a collective, rules-based multilateral system".[5] Pearce acknowledges that all areas of the international community are interdependent. She envisages post Cold War co-operation in security matters contributing to the environment for positive international trade negotiations, and in turn, the results of those negotiations strengthening a positive new world order structure.

The final section in the book is entitled "A New World Order and The United Nations" and contains only one paper by Peter Wilenski, then Australian Ambassador to the UN in New York. Wilenski identifies several areas in which he believes the UN is overdue for reform. He also outlines the major obstacles to reform in a sprawling intergovernmental organisation like the UN. However, he remains positive about the potential for change in spite of the difficulties and enumerates some current proposals for reform including some personal suggestions. He deals

3 Ibid, p 86-87.

4 Ibid, p 98.

5 Ibid, p 115.

with areas such as change to the composition of the Security Council; expansion of the role of peace-keeping and preventive diplomacy; greater long-term planning of the General Assembly's agenda; enhanced effectiveness for the economic and social structures of the Organisation; and the structure of the Secretariat. Wilenski concludes by acknowledging that he has not attempted a list of challenges that the UN must reorganise itself to meet. He argues instead that the institutional reforms are fundamental to facilitate other developments and is convinced that with some basic changes the UN will be well placed to deal with the international challenges that confront the world community.

The book includes three short documentary appendices which provide important evidence of a growing awareness of the unprecedented opportunities for the UN to attain the "promise and vision of its founders". Appendix A and B both contain speeches by the Secretary-General of the UN - the first at the University of Bordeaux and the second before the European Parliament - both in April 1991. Appendix C contains a Declaration by the Group of Seven on "Strengthening the International Order" issued in July 1991.

Overall the book is an excellent source of Australian views on many aspects of the emerging world order and makes a well reasoned contribution to the current literature on the subject. There is just one classic typographical error which must be mentioned. It appears in the Preface on page iv and reads "... in early August 1990, came the invasion of Iraq by Kuwait"!

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CASES AND MATERIALS ON INTERNATIONAL LAW

By Martin Dixon and Robert McCorquodale (London, Blackstone Press, 1991, 553 pp.)

This compendious book of cases and materials has been published in an easy-to-handle volume that runs to 553 pages. The book is highly portable, and one can imagine the international lawyer secreting this work amongst her cabin baggage for ready reference on a long international flight to an overseas conference. However, the book is not intended for the initiated. In their Preface, the authors state that their aim in writing the book was "to include the material generally required by students, both by covering the well-trodden paths and, we hope, by introducing some material relevant to the international law of tomorrow." In achieving this goal, the authors have written the book specifically for a United Kingdom audience. Municipal statutes referred to or extracted are almost wholly those of the United Kingdom, as is the large majority of municipal judicial decisions. This does not rob the work of relevance in an Australian context since most of the materials are, predictably, international in flavour.

However, its use in Australian law schools would necessitate supplementation with local materials.

The book comprises numerous extracts from international conventions, draft conventions, decisions of national and international tribunals, monographs and scholarly articles. The range and diversity of sources is quite impressive. These are supplemented by the authors' notes, which however, are rather sparse and form only a limited commentary on the extracted materials, confined mostly to points of clarification and some additional information. The authors thus leave most of the work to be done by the extracts themselves. In terms of pedagogic technique, there is considerable merit in requiring students to grapple with the text of an extract, rather than have them rely on a pithy summary of its import in an editorial note. Nevertheless, the authors are in a position to indicate to students the rich fabric of international law by providing additional information and references, but their notes do not travel very far down this path.

Although the extracted materials are in slightly smaller print than the authors' notes and annotations, the layout of the chapters is a little difficult to follow. The typeface of major headings within a chapter is the same as that used to identify extracts from international conventions. Similarly the typeface of subheadings within a chapter resembles that used to identify extracts from judicial and arbitral decisions. The consequence is that it is sometimes difficult to locate one's place within the progression of topics covered in a chapter. This might have been remedied by an ample table of contents that indicated the anatomy of each chapter, but the brevity of those entries and the absence there of page references to headings within a chapter gives no succour. In addition to a fuller table of contents, it would have been helpful to include a table of abbreviations. Is a student new to the subject expected to know that "RC" refers to the *Recueil des Cours* of the Hague Academy of International Law, or that "RIAA" refers to the Reports of International Arbitral Tribunals? Fortunately, the authors' bold assumption of the students' bibliographic familiarity has not extended to reducing obscure monographs (such as *Symbolae Verzijl*) to delphic abbreviations (viz S.V.).[1]

On matters of substance, the book has wide coverage. In addition to chapters on such fundamentals as sources of international law, personality, jurisdiction and state responsibility, the book includes significant coverage of the more specialized areas of international human rights law, the law of the sea, and international environmental law. While one cannot hope to consider the full range of topics covered by this book in a standard university course on international law, it is pleasing to have this diversity of choice for a more selective treatment in the classroom. The brief chapter on international environmental law is a useful introduction to an area that increasingly captures the hearts and

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1 See p 17.

minds of the young, and is of rapidly growing global concern.

Another meritorious feature of the book is its currency. There are extracts from numerous cases decided in the last year or two, for example, the decision of the House of Lords in the *Arab Monetary Funds Case*[2] on the recognition of international organizations in domestic courts, and the decision of a Chamber of the International Court of Justice in the Frontier Dispute between El Salvador and Honduras[3] on the intervention of third parties before the International Court. These cases do not appear to have been included for the mere sake of modernity: there remains ample reference to authorities that carry a veneration borne of longevity.

With the rapid pace of change in the international arena, however, readers will not be surprised to find that some of the materials are already outdated. Contemporaneously with the publication of the book in England, the Madrid Protocol to the Antarctic Treaty was signed, proclaiming a moratorium on mining in the Antarctic for at least 50 years.[4] And, to give a further example, the USSR law on the procedure for deciding the Secession of a Union Republic, extracted at page 256, has been rendered redundant by rapid political changes in the former Soviet Union. Despite the tide of events since publication, the book remains a very contemporary account of the law.

A major shortcoming of the book is the brevity of the extracts. On page 8 we are treated to a meagre five lines from Hedley Bull on the nature of international society. A figure who looms so large on the stage of international relations deserves better treatment. On page 57 there is a quotation of four lines from the *Namibia Case* on the status of the Vienna Convention on the Law of Treaties as customary international law. And on page 410 the Permanent Court of International Justice in the *Factory at Chorzow Case* speaks to us in just four lines on the principle that any breach of an international engagement entails an obligation to make reparation. These examples are exceptional, but there appears to be no extract in the book that runs beyond three pages, and very few reach that length. Three evils lurk in such highly condensed extracts. First, it runs counter to the pedagogic value mentioned earlier of requiring students to sort through the rubble of language for themselves in order to find the jewel. Second, the quotations lose their context, and hence in part their meaning and interest. And finally, the reader is deprived of the sheer pleasure of digesting the prose of the International Court of Justice and eminent jurists, be it profound, prosaic or merely prolix. It may have been better to reduce the number of extracts and increase their length, compensating for the loss of some material by the inclusion of more extensive authors' notes.

As was mentioned above, the book covers an admirable range of

2 *Arab Monetary Fund v. Hashim (No.3)* [1991] 1 All ER 871.

3 *Land, Island and Maritime Frontier Dispute Case* 1990 ICJ Rep 92.

4 Protocol on Environmental Protection to the Antarctic Treaty, done in Madrid on 4 October 1991, XI ATSCM/2.

topics in its various chapters. Within each chapter the coverage is also generally good; however, a few notable omissions are blemishes on the fruit of the authors' considerable labours. The Chapter on sources of international law (Chapter 2) contains very little on the concept of opposability of claims. In any dispute between states, the law applicable between the parties will depend not only on any rule of customary international law generally established, but on the modification of such rules through acquiescence, historic title and persistent objection. The problem of the persistent objector is considered in the book in sufficient detail, and there is the briefest mention that a local custom may exist between only two states (page 27), but the treatment on the whole does not capture the complexity of customary law in its operation between states *inter se*.

A further difficulty arises in the chapter on state jurisdiction (Chapter 8). After setting out the traditional distinction between prescriptive jurisdiction and enforcement jurisdiction, the authors claim that because there can be no valid enforcement jurisdiction without prescriptive jurisdiction, the two concepts should be discussed together.[5] But this does not mean, as their subsequent discussion implies, that the two concepts are governed by identical principles. International law recognises a number of bases on which a state may validly assert its authority to prescribe laws, (territoriality, nationality, security and universality), but a state's power validly to enforce those laws is strictly territorial. It is disappointing too to find the discussion of prescriptive jurisdiction confined to criminal cases. The opinions of Dr F.A. Mann[6] and Michael Akehurst[7] on the restrictions placed by international law on the exercise of civil jurisdiction would have been most welcome, especially in the light of the growing importance in Europe of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

A further substantive omission may be found in the chapter on international human rights law (Chapter 6). The focus of the chapter is almost exclusively on "first generation" human rights, namely, civil and political rights such as freedom of expression, the right to a fair trial, freedom from torture and the like. On these topics the authors provide valuable information on the procedural mechanisms for enforcing such rights, both under the European Convention on Human Rights and elsewhere. The Euro-centric focus is understandable in view of the book's target audience, but it is much harder to understand the lack of discussion of the new generation of rights that have now been the focus of the human rights discourse for many years. The

5 P 267.

6 "The Doctrine of Jurisdiction in International Law" (1964-I) 111 *Recueil des Cours* 1; "The Doctrine of International Jurisdiction Revisited After 20 Years" (1984-II) 186 *Recueil des Cours* 9.

7 "Jurisdiction in International Law" (1972-73) 46 *BYIL* 145, at 170-177.

right of peoples to self-determination is curiously dealt with elsewhere in the book,[8] but there is a paucity of information on the rights of indigenous peoples, the protection of minority and cultural rights, and on the right to work and development. Space no doubt prohibits a detailed consideration of all these issues, but readers are at least entitled to know the directions in which human rights law has developed over the last decade, and the direction in which it is likely to develop in the future.

The question remains whether this book proves a worthy rival to Harris' excellent book bearing the same name. Dixon and McCorquodale's book is a competent and current collection of cases and materials for the student of international law. In the reviewer's opinion, however, the two books are not in the same league. Perhaps they were not intended to be.

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WAR, AGGRESSION AND SELF DEFENCE

By Yoram Dinstein, (Cambridge, Grotius Publications Ltd, 1988, xxx and 929 pp.)

The outlawing of recourse to war has been a relatively recent phenomenon in the history of the modern State system. In conventional terms its main thrust came from the Pact of Paris 1928 and the Charter of the United Nations. Within this framework, customary international law has hitherto played primarily a supplementary role. The concept of the *jus cogens* as a major normative development is a recognition that the conventional rules in themselves have not provided the international community with the necessary protection from the threat of inter-State violence which might lead to the use of weapons of mass destruction.

It is against this background that Dinstein's work has to be set as a timely and valuable contribution to three aspects of the contemporary debate: what constitutes war, especially given the twilight areas that exist between armed hostilities and so-called peace; how aggression is defined and how it relates to the attempts to establish the criminality of State conduct; and where the future lies in the area of self-defence and collective security.

In the first part of the book, Dinstein propounds what might seem to be a dogmatic view of the situation in the Middle East. Rather than adopting the possibility of "a State of 'intermediacy' between war and peace" (p 18), Dinstein is dismissive: "Legally speaking, there are only two states of affairs in the relations between States - war and peace - with no undistributed middle ground" (ibid). To preserve this position, the writer has to admit that even if there is a formal state of peace between two countries, some of their relations may be governed by rules relating to armed conflict (eg if there are

8 In Chapter 7 on Sovereignty Over Territory, at p 247.

hostilities not amounting to a state of war) (p 19). Similarly, even if there is a major war in progress, adversaries may continue to conduct their relationships in part as if peacetime conditions prevailed (eg the conduct or trading or diplomatic relations) (p 20).

In furtherance of this theory, Dinstein treats an armistice agreement as having some of the consequences of a peace treaty. To have the status and effect of such a treaty, the arrangement "both (i) puts an end to a preexisting state of war, and (ii) initiates or reinstates amicable relations between the parties" (p 37). Thus the Treaty of Peace of 1979 between Israel and Egypt had this effect, notwithstanding the fact that "'normal and friendly' relations are to be introduced after an interim period of three years" (p 38). While it cannot be said that the General Armistice Agreements of 1949 between Israel and Egypt, Lebanon, Jordan and Syria were designed to establish amicable relations between the enemy States, they did have aspects of a "permanent character" (p 45). In Dinstein's view, therefore, the post-Agreement period was one of "peace" so that "should any of the former belligerents plunge again into hostilities, this would be considered the unleashing of a new war and not the resumption of fighting in an on-going armed conflict" (p 47).

It would follow from this distinction that, as Iraq and Israel never signed an Armistice Agreement in 1949 or thereafter, the Israeli attack on the Iraqi nuclear reactor in 1981 could be justified as part of an on-going but intermittent war between them (p 48), rather than as an act of self-defence (p 176). The difficulty with this hypothesis is that it would equally justify whatever action Iraq might take against Israel, including, of course, the launching of Scud missile attacks.

As far as the position of the other Arab States was concerned, the Armistice Agreements left the underlying tensions arising from Israel's existence unresolved. The war of 1967 was brought to an end by cease-fire arrangements and not by armistice. Unlike the latter, which in modern practice does constitute a formal cessation of hostilities, a cease-fire is a mere suspension of hostilities. Legally, a state of war continues and "a cease-fire violation is irrelevant to the determination of armed attack and self-defence" (p 54). Thus, according to Dinstein (p 56):

"the 'Six Days War' between these parties is nowhere near the finishing line, after two decades, in the absence of either a peace treaty or an armistice agreement. A number of rounds of hostilities between Israel and the Arab countries (most conspicuously, the 'Yom Kippur War' of October 1973) are incorrectly adverted to as 'wars'. Far from qualifying as separate wars, these were merely inconsecutive time-frames of combat, punctuated by extended cease-fires, in the course of a single on-going war."

Overall it is difficult to avoid the feeling about this part of the book that it is not just legalistic but also fatalistic. Not only have Israel and Iraq retained the right to attack each other whenever an opportune moment presents itself (despite the fact that the

relevant (apparently) rights and wrongs of 1948 are now lost in the mists of time), but the same is also true of the relations between Israel and Syria and Jordan (the "parties" referred to in the above quotation) once the 1949 Armistice Agreements had broken down with the 1967 War.

This approach is also unrealistic. The international community is as concerned about breaches of the peace or acts of aggression whether they follow an armistice or a cease-fire agreement, more especially if the latter has been of relatively long duration. A condition of "no war" may not constitute peace, but a return to open warfare could well lead to an invocation by the Security Council of Article 2.4 of the Charter. For that reason, hypotheses based upon an intermediate status between peace and war do have greater plausibility than the author seems to suggest (p 18).

The second part of the book commences with an "historical perspective of the legal status of war" from its Roman origins (p 62) to the Covenant of the League of Nations (pp 77–80). The "contemporary prohibition of the use of inter-State force" is a condensed but thought-provoking survey. Nevertheless, the author presents a largely textual view of the Charter. Adherents of "humanitarian intervention misconstrue Article 2.4": "no individual State is authorised to act unilaterally, in the domain of human rights or in any other sphere, as if it were the policeman of the world" (p 89). Similarly, the Indian invasion of Goa in 1961 cannot be justified by reference to any theory of "illegal occupation" because of the "overall prohibition of the use of inter-State force" in Article 2.4 (p 87). As far as the inescapable fact that States do employ force in a manner that seems incompatible with that provision, Dinstein is content to rely upon (p 94) the Court's often quoted passage in the *Nicaragua* case,[1] which concludes with the words:

> "If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

The logic of this approach depends upon whether one accepts Dinstein's proposition that when "resorting to force, States ordinarily invoke the right of self-defence" (p 93). The examples of humanitarian intervention and reintegration of colonised territory do not fall within this classification and therefore cannot be so readily dismissed.

The *jus cogens* is given relatively brief treatment (pp 98–103), perhaps because Dinstein regards as "unassailable" the view that the prohibition on the use of inter-State force constitutes such a peremptory rule (p 99). He gives some illustrations of treaties which would be affected by Article 53 of the Vienna Convention on the Law of Treaties. In particular, he provides a case where the arrangement in question would fall foul of the

1 ICJ Rep 1986, p 3 at 98

reference to a norm "from which no derogation is permitted": two States "cannot enter into a valid agreement in which they absolve each other from the prohibition of the use of inter-State force and decide to settle a dispute by war" (p 101).

Curiously there is no discussion in this context of the status of *jus cogens* outside the field of treaty law. It seems to be assumed that the *jus cogens* is of general application, though there could well be differences in the role it might play. It is one thing to hold that a treaty is automatically invalidated by conduct in breach of the norm. It is quite different to postulate that no derogation is permitted in the wider field of inter-State relations. If force is used at the inter-State level, it is for the Security Council to respond to and to classify the situation (eg under Article 39 of the Charter). The fact that its reaction might vary as a result of political factors suggests that derogation might be permitted or tolerated (India in relation to Goa; Iraq in relation to Iran), denounced (Israel in relation to the occupied territories; Iraq in relation to Kuwait), or there might even be a shift from denunciation to tolerance (Indonesia with regard to East Timor).

Part II of the book is completed by chapters on "the criminality of war of aggression" and "controversial consequences of the change in the legal status of war". It is only in the last section of the latter chapter that Dinstein takes up the contention that "a unilateral State action, no less than a treaty, can have no legal force when it is in contravention of *jus cogens*" (p 160). While commenting that "the notion of nullity of unilateral acts inconsistent with *jus cogens* is problematic" (after all, "even if international law refuses to validate an act conflicting with *jus cogens*, it may be forced to recognise the situation brought about by that (illegal) act") (ibid), Dinstein avoids the issue of the community's power of judgment over whether an act in breach of the *jus cogens* has occurred.

Part III deals with exceptions to the proscription on the use of force, primarily the right of self-defence. True to his circumscribing approach to the use of force by States, Dinstein regards an armed attack as an essential prerequisite to the exercise of the right. He regards the text (as well as a majority of writers) as on his side, alleging that supporters of a broader view of self-defence are forced to criticise the draftsmanship of Article 31 (p 175). This is not altogether fair on the alternative view which can reasonably point to the opening words of Article 51 ("Nothing in the present Charter shall impair" the right of self-defence) as suggesting that, where there is no armed attack, a right of self-defence continues to exist subject to the provisions of the Charter (most notably to the possibility of the United Nations itself taking adequate remedial action).

The need for some form of second tier response is highlighted by the very narrow interpretation of an armed attack by the International Court in the *Nicaragua* case,[2] where it was said that, "in customary law, the prohibition of armed attacks may

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2 ICJ Rep 1986, p 3 at 103

apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces." In the latter situation, a State would be entitled to resort to countermeasures, which would be "less grave" than those available in the case of an armed attack.[3] Even more "baffling", to use Dinstein's description (p 183), is the fact that the Court also held that there is no "right of 'collective' armed response" to acts of lesser magnitude.[4]

In dealing with the role of the Security Council, Dinstein seems to draw on an inadequate distinction between the freedom of a State to continue to exercise a right of self-defence (p 196), and the power of the Security Council to issue a legally binding decision requiring both the victim and the alleged aggressor to cease hostilities (p 197). There appears to be no recognition of the possibility that the victim's right might come to an end if the reasonable objectives of self-defence are achieved. On the other hand, Dinstein correctly points out that a failure to comply with the reporting requirement contained in Article 51 should not be regarded as undermining the legality of the measures taken in self-defence (pp 198–199).

Given the narrower interpretation of Article 51 in relation to armed attack, and as an exception to Article 2.4, it is perhaps surprising that the author is so supportive of what he calls "defensive armed reprisals". It is one thing to argue that a series of minor incursions should be regarded as amounting in total to an armed attack and therefore as justifying a response proportionate to the totality of the incursions. It is quite different to justify reprisals to secure compliance with the law in future (p 208). Such reasoning fits more rationally with a broader approach to the interpretation of Article 51 as a whole.

When it comes to collective self-defence, Dinstein is critical of those who advocate the need for the prior identification of some form of collective before the right can be exercised: "States are entitled to exercise the right of collective self-defence either on the spur of the moment or after thorough preparation" (p 234). In light of the apparent freedom of action thus available to the third State, it is not surprising that the writer is suspicious of the Court's conclusion in the *Nicaragua* case that "the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked."[5]

However, what is surprising is that, notwithstanding his earlier advocacy of a freedom of action on the part of the third party, Dinstein adopts the line of Judge Jennings[6] by emphasising the need for the

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3 ICJ Rep 1986, at 110
4 ICJ Rep 1986, at 110
5 ICJ Rep 1986, at 105
6 ICJ Rep 1986, at 544–545

intervening State to show that its own rights have been infringed in order for it to exercise a right of collective self-defence (pp 248–249).

The final chapter on collective security deals in outline with the powers of the Security Council and the General Assembly. It largely avoids the issue of whether the notion of collective self-defence based upon no more than a request from the victim of an armed attack has the potential for providing a measure of collective security. It would have been interesting therefore, if the book had been written in the aftermath of Iraq's invasion of Kuwait, to have read Dinstein's views on the issue of whether States in general could have answered Kuwait's request for assistance with an action similar to "Desert Storm" in the absence of approval by the Security Council.

The author is to be congratulated for managing to cover so many legal issues in such a relatively short space. The book is an informative introduction to the topic even if one may not always agree with the author's point of view. It is also further evidence of the value of the series of volumes produced by Grotius Publications.

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CHERNOBYL: LAW AND COMMUNICATION

Edited by Philippe Sands (Cambridge, Grotius Publications, 1988, xxxiii + 312 pp.)

Chernobyl: Law and Communication is ostensibly an edited collection of legal materials relevant to the topic of transboundary nuclear air pollution. Closer examination however, reveals the Chernobyl incident being used as a point of departure for a general examination of transboundary environmental harm and the role played by communication technologies in the management and control of international emergencies.

The book is a joint publication of the Annenburg Washington Programme in Communication Policy Studies and the Research Centre for International Law at Cambridge. The relevance of the former to an international legal study is not readily apparent. However, as Eli Lauterpacht remarks in his introductory note, "... the provision of suitable information lies at the root of acceptable solutions expressed in legal terms." Indeed, this book is the first in what Lauterpacht indicates may be a series of studies into the relationship between communications and International Law. In particular the context of transboundary pollution the connection is both manifest and disturbing. We are reminded in a foreword by Newton Minow (Director of the Annenburg Programme) that "the human race has developed capacity for mass communication and

mass destruction at roughly the same time in history raising the ultimate question of whether we have the wisdom to use one to avoid the other." (p xvii). For Minow, the New Era of Communications (characterised by the imminent demise of government control over transborder information flows) has created "an imperative towards internationalism." However he wisely cautions that communications-based increases in proximity will present an entirely new set of difficulties and that "wisdom ... lies not in expecting communications media to solve all problems but in using the technology to better understand each other." (p xxvii).

The devastating reactor explosion at Chernobyl in 1986 starkly revealed the uncertain and inadequate state of the law as it relates to transboundary nuclear air pollution. In *Chernobyl: Law and Communications* Phillipe Sands presents a carefully selected compendium of those materials he considers necessary "to assess the issues of law arising out of the Chernobyl accident as well as the likely developments" (p xi).

These materials are introduced in a 49-page essay which also serves to provide a comprehensive summary of the difficult legal issues surrounding the extraterritorial consequences of nuclear accidents. According to Sands the relevant issues can be articulated as four questions of International Law: whether states are under an obligation to (1) prevent the release of radioactive material; (2) inform other states should an accident occur; (3) provide assistance to affected third countries; and (4) provide compensation for damage caused. In his introduction, Sands explores each of the questions posed above before concluding that whilst the legal issues are clear enough, their resolution is and will continue to be problematic. This is not surprising. Traditional or classical International Law has not proved particularly amenable to providing even a rudimentary framework for effective protection of persons or property let alone the global environment form *inter alia* transboundary nuclear pollution.

Nowhere is this better illustrated than in the difficult and largely unregulated area of responsibility and liability for transboundary harm. The lack of clearly defined rules or international standards against which behaviour may be measured is a primary obstacle to the development and application of appropriate liability mechanisms. Even if obligations could be positively identified and procedures for their enforcement utilized, other problems remain. What is the applicable standard of care upon which to affix liability? How are the consequences of a nuclear accident to be quantified monetarily? Add to such legal and procedural difficulties, the political unwillingness of states to expose themselves to potential future litigation and it is less surprising to discover that not one compensation claim has yet been successfully filed against the USSR for damage arising out of the Chernobyl accident.

Despite these seemingly intractable problems associated with responsibility and liability and the existence of other fundamental obstacles to effective regulation, Sands is optimistic about the future – in particular he cites the impact that Chernobyl has had on traditional notions of state sovereignty; a growing recognition that certain activities carried on within the nation-state must now, because of global implications, come under international scrutiny and control.

Certainly the record of activity in these four years since 1986 is impressive. Two conventions relating to notification and assistance were quickly drafted and widely adopted just months after the accident. Existing agreements on civil liability of nuclear operators have been coordinated and strengthened. A number of bilateral arrangements are now in place to ensure that the effects of a similar incident will be minimized through early, cooperative action. Even recent moves to improve safety of the 46 orbiting nuclear reactors currently in space may be attributed to a new post-Chernobyl consciousness.

The legal materials which follow Sands introduction span nearly 300 pages and are arranged chronologically, "to indicate the way in which concern with the different issues has developed." (p xi). Each document is prefaced by a brief editorial note and accompanied by a select bibliography. Half of the twenty-four chosen texts are treaties. Included are the two major civil liability conventions, (Paris 1960, Brussels 1963), the 1979 Geneva Convention on Long-range Transboundary Air Pollution (minus Protocols), and the 1986 Notification and Assistance Agreements referred to above.

The remaining texts are an interesting selection consisting primarily of recommendations, restatements, and guide-lines issued by organizations such as the International Atomic Energy Agency (IAEA), the International Law Association and the OECD. The International Law Commission's 1982 Montreal Rules applicable to transboundary pollution are also reproduced.

As testimony to Sands own optimism, international decision-makers continue to act with uncharacteristic rapidity. A number of important developments (essential inclusion in any future edition of *Chernobyl: Law and Communication)* have taken place even since publication in 1988. In September of that year a Protocol designed to strengthen the existing civil liability regime by linking the 1960 Paris and 1963 Geneva Conventions was adopted at a joint OECD – IAEA conference and signed by 19 states.[1] Several bilateral and regional agreements on notification, assistance

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1 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (1988). Text reproduced in 42 Nuclear Law Bulletin (1989).

and information exchange have also been concluded over the past few years.[2] The recent work of intergovernmental organisations in the area of nuclear safety is substantial with a number adopting regulations and guide-line levels for radioactive contamination of food moving in international trade.[3] The 1990 IAEA/OECD-sponsored development of an international severity scale for nuclear accidents and incidents will hopefully standardise communication by ensuring the accuracy of nuclear event reporting.[4]

While the Chernobyl accident may well fade from public memory, Sands' work is unlikely to become marginal or irrelevant. Since 1973, nuclear power has displaced 11.7 billion barrels of oil, over 15 trillion cubic feet of natural gas and over 1.5 billion tonnes of coal.[5] It currently generates 17% of the global electricity supply and comprises 5% of all primary energy.[6] Despite the devastation wreaked at Chernobyl, utilisation of nuclear power is likely to accelerate significantly. Whilst world energy demands (particularly in the less developed countries) are increasing steadily, the environmental appropriateness of conventional sources, is being seriously questioned. As pointed out by the International Panel on Climate Change in its recent report, a reduction or containment of global CO_2 emissions (carbon dioxide being the principle greenhouse gas) will require significant limitations on the burning of fossil fuels.

As a result there is an urgent need for the International community to re-evaluate carefully, in light of recent experience, the role that nuclear power could and should play in an environmentally sound energy strategy. *Chernobyl - Law and Communication* will be an indispensable tool for directing this debate from a legal and policy perspective.

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2 Eg Agreement between Switzerland and France on exchange of information in case of an incident or accident which may have radiological consequences (1989). See 45 Nuclear Law Bulletin.

3 Eg Guide-lines adopted by the Codex Alimentarius Commission of the World Health Organisation, see IAEA Newsbriefs, No 7 (1989) p 3, also regulations adopted by the Commission and Council of the European Communities. Reproduced in 44 Nuclear Law Bulletin (1989) pp 83-88.

4 31 IAEA Bulletin No 4 (1989) p 70, 32 IAEA Bulletin No 1 (1990) p 58.

5 32 IAEA Bulletin No 1 (1990) p 35.

6 Ibid, p 39.

Australian Practice in International Law 1988 and 1989

edited by Jonathan Brown*

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