BOOK REVIEWS

Edited by

Hilary Charlesworth and Judith Gardam

Cooperating for Peace: The Global Agenda for the 1990s and Beyond

By Gareth Evans
(Allen and Unwin, Sydney, 1993, xviii and 224 pp)

This is a practitioner's handbook for conflict management and world peace through the United Nations, compiled as a teamwork of Australian scholars and diplomats headed by foreign minister, Gareth Evans. Its conceptual starting-point is the axiom that the end of the Cold War has brought about greatly improved possibilities for the UN to realise finally what Evans calls "cooperative security": the integration of military and non-military aspects of security into a flexible, multi-choice bureaucratic program for international institutions, especially the UN, in conflict-prevention and settlement. The book does not aim to throw doubt or nuance on its constitutive axioms. It aims at action with a somewhat Indiana-Jones-like single-mindedness about seizing the momentum: just do it!

The book's enormous self-confidence is reflected in its rigid schematic structure. After a definition of the "issues" (a survey of some of the more spectacular recent international problems and responses by international institutions) it sets out a program for building (Chapter II), maintaining (Chapter III), restoring (Chapter IV) and enforcing (Chapter V) world peace. A final chapter contains a proposal for reforming the managerial structure of the United Nations so as to streamline it for these tasks.

From a UN diplomat's perspective, the book provides much up-to-date information about recent crises in a very condensed form. The thirty-page section on peace keeping, for instance, is a professionally compiled overview of recent developments in this field and a good summary of present problems, as seen from the UN's perspective. In accordance with its thoroughly functionalist, action-oriented approach, however, it sometimes simplifies available information to an extreme extent. Nine UN operations from Cyprus (1964) to Somalia (1992) are squeezed into one-page or two-page "case study boxes", summarising the events and the actions taken by the UN. Every historical moment, every institution, every political struggle is processed into a "problem" or a "response" or a "concept" which is then fitted into the book's tightly woven conceptual schemes. The result is a work that is comprehensive rather than

scholarly; descriptive rather than analytical. As a handbook for busy delegates it is valuable—but less so if one's aim reaches beyond practical coordination.

The initial chapter maps out a series of security problems and suggests a number of "strategies" to deal with them. It contains a rapid, dictionary-like overview of the most important "actors" in the global diplomatic process, and especially of the main UN bodies and their tasks. The results of such mapping-out operations—while useful as an introduction to UN vocabulary—do not bring out much that is new, much less revolutionary.

For example, one of the latest UN enthusiasms—"peace building"—a term included in the UN Secretary-General's famous *An Agenda for Peace*[1] is defined almost out of existence as "strategies which aim to ensure that disputes, armed conflicts and other major crises do not arise in the first place" (p 9). It is then divided into the establishment of international regimes and in-country peace building. Comprehensive—yes—but hardly innovative. The discussion of international regimes opens with the correct point that more attention needs to be given to meeting the basic economic, social and humanitarian needs that underlie conflict. But no such analysis is carried out. To the contrary, the existing network of treaties and other international norms is characterised as "a substantial body of law meeting modern needs" (p 41). The fact that the UN Decade of International Law—an object of one of the routine annual resolutions by the UN General Assembly—is even quoted as a "clear recognition of this reality" receives thus an ironical twist! The rest of the treatment of international regimes follows as a nine page description of existing judicial dispute-settlement institutions, humanitarian law and arms control regimes. The discussion of in-country peace building is similarly disappointing. Justice and economic well-being are (somewhat truistically) recognised as preconditions for internal peace. But the six pages devoted to the topic, however, no more than suggest increased international supervision in domestic problems—avoiding a discussion of the diplomatic and economic difficulties in any attempt to increase such "interference".

Two popular topics in recent UN debate—preventive diplomacy and preventive deployment of peace keeping forces (of which the only example remains Macedonia)—are discussed under "peace maintenance". Prevention undoubtedly is better than cure. But the previous and present Secretaries-General have not been able to increase dramatically the organisation's preventive capabilities, despite the establishment of a new information collection and research unit within the Secretariat. Perhaps prevention is more than a question of a larger and a better informed staff. Effective prevention would need to take place at early stages of conflict when the matter is still under national discussion: international involvement would then raise similar problems as involvement in general, namely the objection of encroaching upon sovereign privilege. To by-pass such an objection would require a much more internationally conversant political culture than most countries now have: the creation of such culture cannot, of course, be attained overnight.

1 UN Doc S/2 4111 (17 July 1992).

The discussion of economic sanctions and "peace enforcement" shows clearly the dramatic change in the organisation's phenomenology in the past three-four years. While before 1990, the UN had been involved in only two sanctions episodes, at the beginning of 1994 nine countries or geographical regions were the object of UN embargoes. The only "peace enforcement" actions had been taken in Korea (1950) and the Congo (1960)—while between 1990 and 1993 "peace enforcement" had been attempted against Iraq and in Somalia and the territory of former Yugoslavia. Again, Evans has a number of suggestions that seem intuitively plausible on how to improve the effectiveness of UN sanctions and how to minimise the problems inherent in the use of armed force legitimised by the UN. Some problems are not mentioned: for instance the lack of uniformity and openness in the administration of UN sanctions by the (now nine) sanctions committees, and the absence of economic analyses on the (actual or foreseeable) effects of sanctions receives no mention. Some of the suggestions merely list problems, not solutions. It is true that peace enforcement should be so conducted that force is used only minimally, that the Geneva Conventions are respected and that UN troops are not regarded as parties to the conflict. How or whether this can at all be attained is another question. Fundamentally the problem lies in the UN's attempt to pursue approaches that are incompatible—though no less necessary because of that reason. The call for consistency and following the rules are not misplaced, but much decision-making in sanctions episodes and peace enforcement will have to remain *ad hoc*: thus also reflecting the exceptional character of such activities. The attempt to lay down "criteria" for humanitarian intervention by the UN, for instance (pp 156–57) seems doomed to failure, partly because of the idiosyncratic character of large-scale international humanitarian crises, partly because whatever feelings we might have about such dramatic action in some situations is bound to exceed in importance and intensity any respect of abstract "criteria" that we might have agreed to in the past. Calls of conscience cannot—for better or for worse—be reduced into application of criteria.

Throughout the book, old concepts are defined and rearranged into new intellectual boxes so as to make them seem more functionally rational, more bureaucratically effective. The result is a slight disappointment, however. Why is it that if the world has really changed so much, we still are stuck with the old problems of the ineffectiveness of inter-State diplomacy through multilaterialism, of the eternal issues of the bureaucratic nature of international secretariats, of substantive problems being transformed into issues of competence, sovereignty and funding?

And this is the book's problem: it fails to arouse the kind of revolutionary zeal that it calls for. This is no real surprise. For who can really believe that today's political challenges can be met by a reorganisation of UN routines? Who can build up new enthusiasm for enhanced UN peace keeping from suggestions such as developing "clear and achievable goals", providing "adequate resources" and attaining "close coordination of peace keeping with peace making activity?" With all the enormous and much publicised problems UN peace keeping has encountered—is it possible to believe that they can be

dealt with by a little administrative streamlining? Or if there really is no other way—which is perfectly possible—why should it be justifiable to dress that kind of technical adjustment and reorganisation in grandiose themes such as "cooperating for peace", "creating a new world order" or outlining a "global agenda for the 1990s and beyond?" Nobody has probably studied the effect of over-enthusiastic internationalism on multilateral cooperation. My guess is that dealing with normal administrative techniques as if they were instrumental to redeeming mankind glorifies routine in a way that makes us unable to develop, perhaps even to recognise and certainly to realise, truly transformative vocation.

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Homosexuality: A European Community Issue

Edited by Kees Waaldijk and Andrew Clapham
Essays on Lesbian and Gay Rights in European Law and Policy
(Martinus Nijhoff, Dordrecht, 1993, xvi and 426 pp)

This book provides a wealth of information about the way in which the European Community has (or has not) dealt with gay and lesbian issues. As is perhaps to be expected in a collection of essays, the quality and usefulness of the sixteen chapters varies considerably. The preface announces that the book is a "report" which is the "result of many years of work by the International Lesbian and Gay Association (ILGA) towards the recognition of discrimination against homosexuals as a concern of the European Community" (p xv). ILGA was founded in England in 1978. It has grown into an "umbrella" organisation with 410 members (gay and lesbian groups) in 60 countries. In 1993 (amidst controversy), ILGA was granted NGO Consultative Status to the United Nations Economic and Social Council after a decade of lobbying. This book results from a project funded by the European Human Rights Foundation and the 15 contributors are academic writers working in Belgium, England, Holland and Italy.

The first chapter is an introduction by Peter Ashman, which sets the tone for many of the other essays in the book. That tone is one of classic liberal jurisprudence, a plea to the European "legal order" which is "based on respect for the human rights of individuals and the rule of law" (p 3). Ashman argues for a strategy based on "rights" and a "persistent appeal to reason and to justice" (p 4). For this reader, Ashman and many of the other authors show too much faith in the ability of present legal structures to adequately deal with the institutional subordination of lesbians and gay men. Many of the contributors seem impervious to, indeed unaware of, the many critiques which have been made of a rights-based strategy. There is little examination of the role which legal institutions play in *normalising* heterosex and *demonising* homosex. Liberal jurisprudence does not possess the language to describe the way in which legal institutions, and the law itself, exercise power over human sexuality.

I thus found the book frustrating: it provides much information but little analysis. Another general criticism of the book is that there is little sense of a gay and/or lesbian "presence" in the work. To my mind, this is because the essays place "the law" at the centre of the analysis, rather than centring the experiences of gay men and lesbians on how community law and policy has a direct impact on their lives. This is a particular problem in the way the book itself treats lesbianism: the position of lesbians is analogised to that of gay men and is dealt with merely by adding the two extra words ("and lesbians") whenever the words "gay men" appear.

The second chapter by Andrew Clapham and Joseph Weiler is the only essay in the book that appears to be aware of its own narrative. It does not adopt a position of distance and objectivity. Instead, it shows some concern for critiques of a "rights" approach and also a concern with the complicity of legal institutions in preserving the *status quo*. Despite these insights, however, Clapham and Weiler boldly assert "[a]t the present stage of lesbian and gay legal protection in Europe, classical rights discourse and mobilisation seem to us the most promising" (p 13). They then proceed to "map" or provide an overview of the "legal landscape", setting out the basic provisions of community law and policy which might be utilised by gay men and lesbians to argue for "rights". This includes an assessment of the rights that may be used against the European Community itself as well as rights enforceable against member States. As the authors note, such argumentation is made more difficult because of the paucity of European legal or policy documents that specifically mention sexual orientation. They conclude by calling "for a campaign both to include sexual orientation in existing equal treatment provisions on a par with anti-gender discrimination and to include sexual orientation in any new initiative [sic]" (p 61). On the whole, I found this essay to be the most useful in the book, because it provides a general overview concerning gay men and lesbians in community law.

The next three chapters, by Kees Waaldijk, Evert van der Veen and Adrianne Dercksen, and Russell Child respectively, are very general and descriptive and represent an odd division into artificial categories. They are entitled, "The Legal Situation in the Member States", "The Social Situation in the Member States" and "The Economic Situation in the Member States". These chapters are also frustrating because each relies for its facts, figures and anecdotes on the "Iceberg project", an unpublished project "documenting examples of legal and social discrimination...in the whole of Europe" (p 77, at n 7). The methodology (and other details) of this project are not explained. Each of these chapters follows a similar plan, examining the way homosexuality is treated in the areas of domestic relationships, parenthood, employment, provision of goods and services, freedom of association and hate crimes (among others). Each chapter ends with a series of "recommendations", which do not outline proposals for change but which call for comparative research into each of the "areas" (legal, social, economic) with which the chapters deal. These chapters are interesting for their factual content, especially the survey of legal

regulation contained in the "Legal Situation" chapter. However, their generality, and the number of questions they leave unanswered is, once again, frustrating.

These three general overview chapters are followed by more specific examinations of various areas of community law and policy (Chapters 6–15). Chapters 6 and 7 deal with the European Convention on Human Rights and Equality and Non-discrimination. After generally describing the Convention, Pieter van Dijk focuses on the rights to privacy and family life, the prohibition of discrimination and the prohibition of inhuman or degrading treatment or punishment. He gives a good summary of the European Court of Human Rights' jurisprudence on the relevant Convention articles, and calls for more test cases to be brought. Similarly, Angela Byre sets out relevant Community Directives as well as "non-legislative" provisions dealing with equality and non-discrimination. She notes that none of the "hard law" specifically covers gay men and lesbians. She advocates a strategy utilising Community gender equality legislation to achieve protection for gay men and lesbians. Although this option may be immediately attractive as a strategy, I would have liked to see a more detailed analysis of its pros and cons. Many other commentators argue that discrimination on the basis of sexual orientation must be recognised in its own context, and cannot be analogised with gender discrimination.

The next three chapters seem oddly placed in the volume, dealing as they do with the principle of subsidiarity (a general principle relevant to all the substantive areas the book covers) and the Community as employer (more specific than most other topics). Francis Snyder (in collaboration with others) deals with subsidiarity in one chapter, employment in the next, and then attempts to link them in a third chapter of "conclusions" from his earlier two. After describing "subsidiarity" as a developing and essential part of the EC constitutional order, Snyder describes how the principle may leave member States more freedom to regulate gay men and lesbians without Community intervention. He concludes that some regulation of discrimination may be necessary at the EC level, to eliminate obstacles affecting the internal market. However, an EC level program of "social integration" of lesbian and gay men may well be complicated by the principle of subsidiarity. Snyder also gives a comprehensive review of EC Staff Regulations and concludes that the equal opportunity measures in place "do not usually seem to apply easily to lesbians or gay men" (p 265). He suggests it may be easier to improve protection by informal procedures and administrative rules, rather than seeking specific coverage under Staff Regulations.

Chapters 11–15 return to a more general treatment of various substantive areas of Community law and policy. Chapters 11–13 cover citizenship, freedom of movement of persons, and freedom of movement of goods and services. Citizenship is dealt with by Antonio Tanca, in terms of the rights that attach to that concept under the Maastricht treaty. These include electoral rights, right of petition and rights to assistance by consulates and embassies. Tanca concludes that "[t]he complex of acquired rights for lesbians and gay men with reference to European citizenship...does not amount to very much" (p 288). Hans-Ulrich Jessurun D'Oliveira describes the principle of the free movement of persons as

one of the fundamental Community freedoms. He then goes on to describe how this freedom is seriously curtailed by Community law which allows member States to regulate movement on "public policy" grounds. This, combined with the general non-recognition of gay and lesbian relationships within Community law and the law of member States means that lesbians and gay men do not enjoy this freedom. Bruno De Witte then examines the "freedoms" that protect inter-State economic activities from restriction by public authorities. He describes how gay and/or lesbian *expression* (such as books, magazines, films, performances) are often restricted by national or local authorities and how such restrictions may be attacked as in violation of free market policies. Once again, "public morality" exceptions are obstacles here. De Witte notes that the extent of these exceptions have not been properly tested in the relevant EC institutions (like the ECJ), and he advocates test cases to establish their boundaries.

The final two substantive chapters, by Lammy Betten and Frank Emmert respectively, deal with rights in the workplace and family policy. In what is now a familiar pattern for the reader, both chapters describe the silence of Community law and policy in these areas, as they relate to gay and lesbian issues. Betten notes that Community action with respect to the workplace has mainly concerned gender discrimination. He provides arguments, based upon fundamental Community principles like free movement and non-discrimination, as to why the Community should also deal with workplace discrimination against gay men and lesbians. He concludes by noting that Community action with respect to gender discrimination has had little success and that the "battle will be even harder when it comes to changing prejudices about lesbians and gay men" (p 358). Emmert notes that the Community does not have a single defined "family policy" and that it generally accepts the competence of member States to define the members of a family unit. Once again, this means that gay and lesbian relationships are generally excluded from the advantages (and disadvantages) which flow from being categorised under the appellation "family".

The final brief chapter, again by Clapham and Weiler, is a call for a nine-point Commission-led Community Action Plan to combat discrimination against lesbians and gay men. This plan includes making the human rights of lesbians and gay men an official part of the portfolio of a Commission Member and setting up an *ad hoc* Task Force to prepare a plan and monitor its implementation. The Action Plan then sets out areas which the Task Force may consider as short term and longer term areas for action. The final chapter is followed by three annexes and a reasonably comprehensive subject index. The first annex is an interesting (although somewhat narrow and legalistic) bibliography. Annexes 2 and 3 are useful indexes of Community law provisions and Community institution decisions which relate to gay and lesbian issues.

Despite the criticisms made above, this book is a very useful research tool. It provides much information which could be used as the basis for an analysis of the role played by the EC in the lives of gay men and lesbians in modern Europe.

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Reconceiving Reality: Women and International Law

Edited by Dorinda G Dallmeyer
(American Society of International Law, Washington, 1993, xiv and 283 pp)

I had only been in my position as lecturer in international law a matter of days when I received my first complaint from a malcontent student. The inclusion of a seminar on feminist analysis of international law and its application to the traditional practice of female circumcision was not, I was told, what students expected of a course dedicated to the theory and practice of international law. Indeed the student standing before me had specifically chosen international law in order to avoid "that sort of stuff".

My student's view that gender is irrelevant to international law is by no means atypical. Nor is it one confined to the student body. In marked contrast to the plethora of writings in its domestic counterpart, international law has only very recently attracted the scholarly attentions of feminist writers. The publication of a seminal article on "Feminist Approaches to International Law" by Charlesworth, Chinkin and Wright in 1990[1] has gone some way to filling the theoretical gap. Yet from a feminist perspective, international law remains a singularly impoverished discipline.

This collection arose out of a meeting of the Women in International Law Interest Group at the 87th meeting of the American Society of International Law in April 1993. The book is organised thematically into three sections. Each comprises four papers. The first three provide a variety of theoretical perspectives on the appointed theme; the fourth usefully reviews and critiques what has preceded. For the pedagogically minded, there is also a helpful Foreword on "Teaching Women's International Human Rights Law" by Ann Tierney Goldstein.

The first part of the book is entitled "The Current State of Feminist Analysis of International Law". In the opening chapter, Hilary Charlesworth responds to the question "what is a 'feminist' analysis of international law?" and provides an excellent overview of some of the existing literature and the various strands of feminist thinking. At its broadest, feminist analysis of international law builds

1 Charlesworth, Chinkin and Wright, "Feminist Approaches to International Law" (1990) 85 *American Journal of International Law* 613. For a response to this article see Tesón, "Feminism and International Law: A Reply" (1993) 33 *Virginia Journal of International Law* 647.

on the so-called "new stream" of international legal scholarship challenging the liberal foundations of international law and its central institutions, the State and State sovereignty. From a feminist perspective, liberalism is unsatisfactory because by claiming to be "neutral with respect to competing visions of 'the Good'" it "masks the political nature of international law" (p 6). While the new stream of international legal scholars has usefully exposed the inherent contradictions of international law, it has not been concerned with the "fundamentally male cast of the international legal order" (p 6).

For Charlesworth, a basic task for international law feminists is to expose the failure of the international legal order to address the concerns of women (p 7). To date, the response of the international community has been to create specialised agencies and instruments such as the Commission on the Status of Women, and the Convention on the Elimination of All Forms of Discrimination Against Women. While acknowledging the importance of such institutions in promoting women's concerns internationally, Charlesworth rightly points out that their existence has also contributed to the marginalisation of women by the mainstream human rights bodies.[2] This is reinforced at a structural level by the provision of weaker enforcement measures in the international instruments and institutions that deal with women (p 6).

Yet the view that mainstream international law marginalises women and that this is bad for women is by no means universally held. In "Feminist Theory as the Embodiment of Marginalisation", Moira McConnell cautiously embraces the margin as a place of safety for women. In "The 'Other' Half of the International Bill of Rights as a Postmodern Feminist Text", Barbara Stark puts a feminist case for the United States ratification of the International Covenant on Economic Social and Cultural Rights (ICESCR). By recognising nurturing rights, she argues, the ICESCR "inverts" traditional hierarchies privileging men over women (pp 26–27). Thus while accepting the marginalised status of the ICESCR *vis-a-vis* its civil and political counterpart, Stark denies that its provisions disadvantage or marginalise women.

While neither of these essays is for the jurisprudentially uninitiated, Stark's analysis is particularly confusing. In effect, she "inverts" standard international feminist criticism of the ICECSR which holds *inter alia* that by failing to recognise the value of women's work, and by prioritising the protection of the family, the ICESCR "leaves patriarchal norms intact" (p 25). Curiously, however, she does so not on the grounds that this critique is in any way invalid, but rather because the ICESCR has "different implications" for American women than for women globally. Thus we learn, to our surprise, that the United States is no longer bound by patriarchal notions of the family (p 25). Similarly, while acknowledging that the failure of the ICESCR to establish binding norms might present problems for women globally, Stark goes on to celebrate these

2 It should, however, be noted that in March 1994 the (mainstream) United Nations Commission on Human Rights appointed a special rapporteur on gendered violence, Radhika Coomaraswamy. See resolution 1994/45 on, *The Question of Integrating the Rights of Women into the Human Rights Mechanisms of the United Nations and the Elimination of Violence Against Women.*

same weak enforcement measures as a "postmodern proliferation of contextualised options" within the domestic American context (p 20).

Part Two of the Book is entitled "The Public/Private Distinction and Its Impact on Women". Its inclusion is unsurprising. Much of the pioneering work on feminist analysis of international law has been in the field of human rights and has sought to expose the way in which the public/private dichotomy operates to marginalise women. Hilary Charlesworth, in her opening chapter, introduces the critique arguing that the distinction between the public and private spheres—central to the liberal State—has had a "defining influence" on international law and international legal doctrine (p 10). The United Nations Charter thus distinguishes between the public domain of international law and the private sphere of domestic jurisdiction. Similarly, international human rights law, while greatly restricting what can properly considered to be domestic, nonetheless replicates the public/private divide by targeting State-sanctioned or public actions. From a feminist perspective this is problematic because "the most pervasive harms against women" (such as domestic violence) typically occur within the private sphere—beyond the scope of international legal regulation (p 10).

However, in "After the Collapse of the Public/Private Distinction: Strategizing Women's Rights", Karen Engle cautions feminists about over-reliance on the public/private distinction. The critique, she points out, has usually taken one of two forms. Either it is argued that international law is exclusive of women because it applies only to the public sphere. A reconceptualisation of international law is therefore required if women—who typically live out their lives in the private sphere—are to be included. An alternative approach holds that international law is not exclusive of the private *per se* but rather uses the public/private divide as a "convenient screen" to avoid including women.

An example of this "collapsing" of the public/private distinction is Rebecca Cook's excellent paper on State accountability. Recognising that the "denials of rights that States permit women to suffer in their private relationships are an important part of the total subjugation of women" (p 94), Cook examines the circumstances in which a State can be held accountable for violations of women's rights carried out by private or non-State actors. She argues (uncontroversially) that international law imposes a duty on States not only to refrain from but to protect against human rights abuse. States are therefore under an affirmative duty to take appropriate legislative or enforcement measures, in order to protect against violations of rights by private individuals. Accordingly, a State can be held responsible, not for the conduct of the private individual *per se*, but rather for its failure to take the necessary preventative or remedial action. Where responsibility cannot be established (for example, if the human right violated by the non-State actor is enshrined in a treaty that the State in question has not ratified) Cook argues that a State may nonetheless be held accountable on an international level (p 108). Clearly then under Cook's analysis current international legal doctrine does extend to the private realm.

This constant airing of the public/private critique by feminist writers, argues Engle, is problematic. In particular, she warns against the dangers of reifying the public/private spheres and of fostering the assumption that what is private is "necessarily bad for women" (p 148). Thus, for example, in contrast to more radical feminists such as Catherine MacKinnon,[3] Engle sees the right of privacy as potentially liberating for women (pp 148–49).

Most interesting, however, is Engle's argument that perpetuating the public/private divide in the literature prevents serious consideration of women's claims to cultural difference. Engle is critical of women's rights advocates for treating arguments based on culture "as though they are yet another manifestation of the mainstream's legal regimes exclusion of the private or women or both..." (p 149). The result, she says, is that women who defend cultural practices which other women may find abhorrent are "either ignored or assumed to be replete with false consciousness" (p 149).

What Engle is raising here—albeit almost in passing—is the not insignificant question of the relationship between feminism and cultural relativism. In her opening chapter, Hilary Charlesworth questions whether a truly international feminist analysis of international law is possible given the criticisms of Western-styled feminism from women in the developing world (p 4). However, while warning against attempting to present "one true story" (p 4) and emphasising the need for diversity, Charlesworth nonetheless concludes that by focusing on common (and one presumes cross-cultural) experience (such as violence) women can speak "'as women' in the international context" (p 5).

Given then the potential for a "diversity of feminisms" in the multicultural international law context, it is surprising (and somewhat regrettable) that more attention is not paid to the task of identifying global feminist concerns. More surprising still is the failure of any of the writers (other than Engle) to tackle head-on the problem of reconciling women's support for cultural practices that *prima facie* violate women's rights with the search for an international feminist agenda.

A second task identified by Charlesworth is for feminists "to proceed to explore the unspoken commitments of apparently neutral principles of international law and the ways that male perspectives are institutionalised in it" (p 7). In Part Three of the book (entitled "Feminist Approaches to War and Peace") the authors consider *inter alia* the unequal treatment afforded men and women under international humanitarian law.

Unsurprisingly, given events in the former Yugoslavia, a recurring theme is the failure of international humanitarian law to provide adequate protection against rape. Both Judith Gardam[4] and Christine Chinkin[5] note that although it has long been established that rape is an integral part of warfare, rape is not

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3 MacKinnon C, *Towards a Feminist Theory of the State* (1989).

4 Gardam, "The Law of Armed Conflict: A Gendered Regime?" in Dallmeyer D (ed), *Reconceiving Reality: Women and International Law* (1993), p 171.

5 Chinkin, "Peace and Force in International Law" in Dallmeyer, n 3 above, p 203.

expressly outlawed by many of the relevant provisions of the laws of war. For example, rape is not specifically listed in common article 3 of the 1949 Geneva Conventions nor is it expressly included as one of the grave breaches of the Geneva Conventions (Chinkin, p 216).

While the systematic rape of Moslem women in Bosnia–Hercegovina has placed rape and other sexual abuse of women and children high on the international agenda, the authors nonetheless remain sceptical. Chinkin, for example, cautions that the high profile media coverage carries the risk that "the rape and violence will be seen as something exceptional, an isolated occurrence peculiar to this particular conflict" (p 205).[6] Similarly in an earlier chapter, ("Comment: 'Theory is Not a Luxury'") Catherine MacKinnon emphasises the link between rape in "the ethnic war of aggression" and rape in "the gendered war of aggression of everyday life".

> For most women this war is to everyday rape what the Holocaust was to everyday anti-Semitism. Without the everyday you could not have the conflagration, but do not mistake the one for the other (p 87).

However, in contrast to Chinkin, MacKinnon warns against the rapes of Moslem and Croatian women being over-generalised. There is a danger, she argues, of characterising rape simply as an inevitable part of life for women in situations of armed conflict. This "just life" doctrine obscures "who is doing what to whom" and leads to the moral and institutional paralysis (p 87–88).

For Gardam, the inadequate provisions regarding rape are symptomatic of a greater malaise: the underlying assumption that despite lofty proclamations to the contrary, protection of the (male) combatant is of greater importance than protection of the (typically female) civilian population. As positive proof, Gardam cites the actions of the Coalition forces in the Gulf War:

> The choice of a campaign of massive aerial bombardment instead of a ground assault rests on assumptions that combatant lives are of more significance. Just contrast the combatant casualties of the Coalition and the Iraqi civilian casualties (p 182).

This analysis is not altogether convincing. As Gardam herself points out, the majority of the Iraqi civilian casualties occurred, not as a direct result of the bombing, but because of the damage inflicted on the Iraqi infrastructure (p 172). Accordingly, many of the deaths occurred after the cessation of hostilities when the civilian population was considerably less "gendered".[7] Moreover, Gardam's reliance on statistics is somewhat selective. A comparison of Iraqi combatant casualties figures with Coalition casualty figures suggests a different—albeit

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6 A notable recent example of this is the United Nations Commission on Human Rights Resolution 1994/45 above which states *inter alia* in its preamble:

> *Alarmed* by the *marked increase in acts of sexual violence* directed notably against women and children as expressed in the Final Declaration of the International Conference for. the Protection of War Victims (Geneva 30 August–1 September 1993)...

7 See in general, *Report to the Secretary-General on Humanitarian Needs in Iraq*, UN Doc S/22366 (20 March 1991).

equally unpalatable—conclusion. That the lives of the Coalition combatants are to be favoured over Iraqi lives—be they civilian or combatant.

A final question posed by Charlesworth is whether feminist analysis of international law need necessarily alienate the mainstream international legal establishment. There are many, no doubt, who view the introduction of the "woman question" as an unnecessary addition to an already overloaded subject area. They will assume of course that gender has not previously been an issue in their discipline. Yet as Charlesworth points out:

> Their conferences, their books, their campaigns are clearly designated as feminist while the masculinity of the mainstream goes unnamed (p 14).

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Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study

Edited by Stefan A Riesenfeld and Frederick M Abbott
(Martinus Nijhoff, Dordrecht, 1994, xvi and 608 pp)

Australians have long been aware of the potential impact that international treaty-making can have on domestic policies and practices. High Court cases such as *Koowarta* in the field of racial discrimination,[1] and the *Tasmanian Dam*,[2] *Tasmanian Forests*[3] and the *Daintree Rainforest*[4] cases in the environmental field served during the 1980s to illustrate the potentially major ramifications which can flow from a decision by the Australian Government to become a party to a particular treaty.[5] Despite the very considerable attention given to this issue during the 1980s as a result of these cases, 1994 has seen the process by which Australia accepts and implements such obligations assume greater prominence on the political agenda than ever before. Former Prime Minister Malcolm Fraser well-captured the spirit of some of the more extremist rhetoric in an article entitled "UN Poses Biggest Threat to Our Sovereignty".[6]

Such controversy is a result of a variety of factors including the continuing debate over the nature of constitutional reforms to be sought in the lead up to celebrations of the 100th anniversary of the Australian Constitution of 1901; a

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1 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
2 *Commonwealth v Tasmania* (1983) 158 CLR 1.
3 *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261.
4 *Queensland v Commonwealth* (1988) 77 ALR 291.
5 See generally Behrens, "The Implementation of the World Heritage Convention in Australia: Problems and Prospects" in Behrens J and Tsamenyi M (eds), *Environmental Law and Policy: Our Common Future* (1991), p 103.
6 "UN poses biggest threat to our sovereignty", *The Australian* (17 August 1994), p 13.

growing awareness of the far-reaching and seemingly inevitable consequences of the process of Australia's relentless integration into the global economy; and various features of the evolving political landscape (including the changing political affiliations of key State governments, and a quest by the conservative political parties for an effective populist cause). In addition, three specific issues have had a major catalytic effect. The first is the entry into force of a new Industrial Relations Act 1988 (Cth), significant elements of which are based on Commonwealth powers deriving from the ratification in 1993 of several International Labour Organization (ILO) conventions. The second is the decision by the United Nations Human Rights Committee in the *Toonen* case[7] (in which Tasmanian anti-sodomy legislation was considered to be incompatible with various provisions of the International Covenant on Civil and Political Rights). The third is the increasing concern on the part of industry, business and rural groups over the ramifications of key environmental treaties such as the Basel (Hazardous Wastes),[8] Biodiversity[9] and Climate Change[10] Conventions to which Australia is now a party and the Desertification Convention adopted in June 1994.[11] In addition, the Government's announcement of its intention to ratify the 1982 Law of the Sea Convention later in 1994 in time to become a party when the treaty enters into force has served to focus the attention of a variety of groups on the consequences of this wide-ranging treaty regime.

While the role of the UN Human Rights Committee and the subsequent decision by the Federal Government to override the offending Tasmanian legislation has done the most to attract public attention to the issue, it is the emerging international environmental regime that has provoked the most sustained campaign by lobbying groups to reform the existing Australian approach to treaties. Environmental treaties appear to have had this effect for several reasons. First of all, it has become apparent that some of the obligations assumed thereunder are capable of having a direct effect on large segments of the Australian community. Business, industry, environment groups and others are all much more aware of, and anxious to make a direct input into, treaty-making than was the case only a few years ago. Such inputs have not been easy to make, however, given the time taken by many negotiations, the highly technical nature of much of the subject-matter, the inaccessibility of the documentation, and the actual cost of monitoring, let alone participating in, the work of Australian delegations at the international level.

Second, the finalisation of a treaty is now often only the beginning of a process of further negotiation with a view to the adoption of supplementary agreements, in the form of protocols or other legal instruments. The need for

7 *Toonen v Australia*, Communication No 488/1992, Views of the Human Rights Committee contained in UN Doc CCPR/C/50/D/488/1992 (4 April 1994).

8 Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989) 28 ILM 657.

9 Convention on Biological Diversity (1992) 31 ILM 822.

10 United Nations Framework Convention on Climate Change (1992) 31 ILM 851.

11 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, UN Doc A/AC.241/15/Rev.7 (30 June 1994).

consultation and participation is thus on-going. Third, the follow-up arrangements established by many of the treaties generate a number of demands upon Australia to submit detailed reports and to justify particular policies and practices. These arrangements also raise the issue of consultation with community groups, with parliament and with State governments.

Under Australian law, as Stephen J noted in the *Koowarta* case, "the federal executive...possesses exclusive and unfettered treaty-making power".[12] The Commonwealth Government is thus not formally obligated to consult the States or to engage in consultations with any other interested parties before entering into an international treaty. Nor does the Federal Parliament have any formal constitutional role in the process except where the direct expenditure of funds is involved or legislation is required to give effect to the relevant treaty provisions. Finally, the Commonwealth Government is not constitutionally obliged to follow any particular procedures in relation to the implementation of obligations undertaken by Australia.

In practice, however, the Commonwealth Government has made a significant effort to consult interested parties at various stages, procedures for "consultation" of the State governments have been developed, albeit on a fairly *ad hoc* basis, and follow-up procedures in relation to implementation have been explored. But the latter still vary significantly from one context to another and are, in general, not guided by a consistent set of principles.

The present situation has given rise to a number of concerns that have not yet been systematically explored but have been the subject of considerable critical comment by various groups. The most focused criticism has recently come from a consortium of umbrella groups including the National Farmers' Federation, Australian Mining Industry Council, Council for International Business Affairs, Metal Trades Industry Association, Australian Chamber of Commerce and Industry, Business Council of Australia, Environment Management Industry Association, National Association of Forest Industries and Law Council of Australia.[13]

Among the proposals made by that consortium are requirements that:

(1) Cabinet state its reasons for taking part in specific treaty talks;

(2) detailed briefings be given to Parliament and industry on treaty negotiations as soon as it is decided to participate;

(3) treaty texts be tabled in Parliament before they are signed and be accompanied by a statement assessing the economic, regulatory, social and environmental impact of becoming a treaty party;

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12 *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 215.

13 "Reforms to Australia's Treaty-Making Process", proposed by Austalian Industry, Report by Industry organisations, their analysis is entitled: "A Proper Role for Parliament, Industry and the Community in Australian Treaty-Making" (13 January 1994).

(4) treaty texts be referred to relevant parliamentary committees for further review and comment from industry and community groups before they are signed; and

(5) a parliamentary vote be held prior to treaty ratification.

The book under review is, in many respects, an invaluable guide to anyone seeking to evaluate these proposals by comparison with the approach adopted by other countries with similar political and legal systems to that of Australia. It contains the papers presented at a seminar held in Geneva in November 1991 and most of the contributors are from Europe or the United States, with the addition of one from each of Argentina and Brazil. The book is extremely well presented and consists of a collection of country case studies, preceded by a general introductory overview by the editors and a historical review of the European origins of legislative participation in treaty-making by Peter Haggenmacher. It also contains a brief comparative outline of the extent to which parliamentary participation in treaty-making occurs in the different countries, a list of the relevant constitutional provisions, and a description of the form of government of each of the countries examined.

Finally, there is a transcript of the two day meeting from which the papers emerged. The latter takes up 175 pages of the book. In general terms a transcript is valuable in situations where no papers have been presented, where those that have been presented are little more than outlines or provocations to discussion, or where there is a significant number of participants who are not papers-givers and who make substantive critiques of the papers. Since none of these justifications applies in this case, it is not surprising that a reading of the transcript yields rather little value-added, beyond that provided by the papers themselves. Thus for example we are treated to Judge Ruda's detailed apology for his inability to present a paper followed by some discursive comments on the approach followed in Argentina (pp 513–19). However, his chapter covers the same ground much more succinctly as well as ranging rather more widely. Moreover, in keeping with an all-too-familiar tradition, the transcript is taken up with regular repetitions of the traditional mantra "I shall try to be brief". At least the transcript serves the point of demonstrating that this particular comment almost invariably foreshadows a very lengthy intervention.

Leaving aside the transcript and the introduction, well over half of the country specific material is devoted to different aspects of the United States approach to treaty-making. While this will make the book particularly attractive to US scholars, it is in some ways the least interesting aspect for international lawyers in general since the United States system is almost *sui generis* given the central role accorded to the US Senate (whose advice and consent on the basis of a two-thirds majority is required before the President can ratify a treaty). Nevertheless, given the new found interest of the United States in adhering to human rights treaties (demonstrated by its ratification of the International Covenant on Civil and Political Rights in 1991 and most recently its ratification of the International Convention on the Elimination of All Forms of Racial Discrimination in mid-1994) the discussion on whether it is within the legitimate

prerogative of the executive to declare such treaties to be non-self executing is particularly informative and timely.

The view that has eloquently been expressed by Professor Louis Henkin is reflected in this volume in the approach advocated by Professor Michael Glennon who argues that the Senate does have the constitutional authority to make such determinations for domestic purposes because of its power to grant or withhold its consent to the ratification of a treaty. Professor Lori Damrosch agrees with Glennon but urges the Senate to refrain from exercising this power because of its undesirable effects on the international human rights regime as well as on the human rights of American citizens. In contrast, the editors argue that the Senate lacks such authority to declare the non-self executing character of a treaty with binding effect on US courts. They suggest that the courts should undertake their own examination of the terms and context of each of the relevant treaty provisions and make their own determination as to the self-executing character of the provision.

The other major issue raised in terms of United States law concerns the basis for interpreting treaties entered into by the United States. Several contributors touch upon the position put forward by the then the Legal Adviser of the Department of State, Abraham Sofaer, in 1987 in relation to interpretation of the ABM treaty. The controversy concerned the weight to be attached by the courts in interpreting the treaty to the undertakings given by the Administration to the Senate, by comparison with the negotiating history of the treaty. Unsurprisingly, none of the contributors is a proponent of the Sofaer doctrine and the editors themselves urge its clear rejection by US courts.

From an Australian perspective the most interesting parts of the volume are the comparative analyses of the approach to parliamentary participation in treaty-making in a range of countries including France, Germany, Italy, the Netherlands, Switzerland, United Kingdom, Argentina and Brazil. Some of the chapters, while being very informative, provide little more than a statement of the legal and constitutional requirements without giving much detail as to the process that is followed in practice. This is true of the study on Brazil and to a lesser extent that on the Netherlands, although the latter does contain a brief reference to debates over the Schengen Accord. By contrast the chapter on Italy focuses heavily on practice as opposed to the formal legal rules. The author notes that calls to "democratize" the Italian treaty-making process have yielded few, if any, results but concludes that this is fortunate in view of the instability of the Italian system of government ("[T]his judgment could radically change if structural reforms of the political system gave to the Italian government the steadiness, the power of leadership and the efficiency that characterize the British cabinet" (p 105)). The chapter on Switzerland contains a number of useful case studies, based primarily on Swiss cases which have gone before the European Court of Human Rights, including in particular the *Belilos* case.[14]

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14 *Belilos v Switzerland*, European Court of Human Rights judgement of 29 April 1988. Series A, No 132.

One of the key questions that emerges from a reading of this book is whether any description of the formal legal processes that are to be followed can give an effective indication of how the various processes actually operate in practice. Thus, for example, the contribution by Lord Templeman in relation to the United Kingdom begins from the assertion that while provisions requiring detailed consultation with the parliament in relation to a treaty are very limited, the failure of a government to take adequate account of strong parliamentary feelings could result in a vote of no confidence leading to the fall of the government. While this may be true in theory, it does not necessarily tell us very much about the extent to which genuine consultation and responsiveness is a part of the Westminster system, in which the government which takes the decision to ratify a treaty will usually have a clear majority in the parliament. Lord Templeman's chapter does however contain a very useful review of the important role played by the House of Lords Select Committee on European legislation. This Committee has been something of a model in terms of its very careful examination of proposed European union legislation, and its reports have been treated as key reference points well beyond the confines of the British debates. This is partly explained, however, by the fact that its focus is not on multilateral treaties in the general sense but on European legislation that will have direct effect within the United Kingdom.

Another question to emerge from the volume is why, despite the fact that so many commentators are convinced that there must be significant limits upon the possibilities for parliamentary participation in the process, other States have succeeded in institutionalising systems which go far towards empowering the parliament to make the key decisions in relation to treaty-making?

Compare, for example, the Dutch approach with the following statement by Lord Templeman in relation to the United Kingdom (which is very close to Australia's position):

> The general principle that negotiation of treaties should be subject to democratic control and influence must be reconciled with the need for speed and efficiency. The executive must by necessity consult and take into account the views of persons likely to be effected by a treaty under negotiation. The finances of parliament available for conducting its own investigation are limited. The difficulties which would arise if the executive were dependent on a doubtful majority in parliament for approval of a treaty in detail, as well as approval in principle, could obstruct the due negotiation of treaties and the reputation of the negotiators in international affairs (p 173).

In rather marked contrast, the approach adopted in the Netherlands clearly provides for full participation of the States-General (Parliament) in the treaty-making process. One begins to wonder whether it is a matter of parliamentary culture rather than of the formal rules that apply.

As noted earlier, one of the suggestions that has been made in relation to reform of Australian treaty-making processes is that a detailed impact statement should be tabled in Parliament by the Government before ratification is considered. It is interesting, however, to compare the experience in Germany in which a comparable "memorandum" is provided to the legislative organs. It

includes parts of the drafting history along with a brief legal analysis of the content. But Frowein and Hahn point out that in many cases the legal analyses contained in the memoranda have not withstood close scrutiny and have proved to be of little assistance to the courts. This experience would give cause to ask whether it is realistic to expect a detailed and accurate impact statement to be drawn up at the time of the proposed ratification.

Although the German experience is also relevant to the Australian debate over federal-state powers, this volume does not reflect the most recent developments that resulted from negotiations within Germany over ratification of the Maastricht Treaty. Indeed that chapter in European legal history could provide some very useful insights into the role played by referenda and by parliamentary debates in the broader political context of international treaty-making.

Overall, this volume is highly instructive and the various contributions have been well-written and carefully edited. The contributors all adopt a reasonably traditional legal approach from which the reader can learn a great deal. That said, however, the principal question that remains unaddressed is why so many international lawyers have chosen to downplay the issues of accountability, legitimacy, and credibility, which go to the heart of the issue. As a result of their virtual exclusion within the strictly legal analytical framework that has been adopted, the book only indirectly yields insights into the fundamental challenge of ensuring that parliamentary participation in the treaty-making process can add transparency and democratic legitimacy while at the same time promoting the goals of efficiency, dependability and effectiveness in international relations.

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International Maritime Boundaries

Edited by JI Charney and LM Alexander
(Martinus Nijhoff, Dordrecht, 1993, two volumes: xlvi and 2138 pp)

In the *Gulf of Maine* case[1] Judge Gros strongly dissented from the delimitation method employed by the Chamber of the International Court and stated:

> anything may henceforth be deemed relevant for the purpose of reaching an equitable result if the States concerned agree to hold it so or the judge is convinced of its relevance. I find this closer to subjectivism than to the application of law to the facts with a view to the delimitation of maritime areas.[2]

Since the judgment of the International Court in the *North Sea Continental Shelf* cases,[3] oceans of printers' ink have been expended in attempts to rationalise, identify or simply make sense of the factors and methods which might be

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1 ICJ Rep 1984, p 246.
2 Ibid, p 377, para 26.
3 *Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands*, ICJ Rep 1969, p 3.

relevant to the delimitation of maritime boundaries between States. These studies have generally focused on judicial decisions and arbitral awards, but with each new case and the emergence of new concepts, principally the Exclusive Economic Zone, analysis has involved engagement with a rapidly moving and transmuting target.

This collection resulted from a project undertaken under the auspices of the American Society of International Law to study State practice in the establishment of maritime boundaries. It includes "all known international boundary agreements reached even if they have not entered into force or have been terminated" (p xxxi),[4] and also summary accounts of relevant judicial or arbitral decisions. In this study 134 boundaries are examined: a few boundaries have been settled since *International Maritime Boundaries* was published[5] and, in particular, Charney notes that the fragmentation of the Soviet Union came too late to be taken into account. Each boundary is examined in detail. A short background note is accompanied with a summary of the factors which were thought to influence the delimitation and illustrated by a clear and simple map. The text of the delimitation agreement is then annexed to the report.

The information drawn from the individual case studies is synthesised on two levels—in ten regional analyses and in nine thematic essays that examine specific issues in an attempt to extrapolate trends in the use of potential delimitation criteria. While not wishing to detract from the high standards of scholarship attained by all the individual authors involved in this project, Barbara Kwiatkowska's "Economic and Environmental Considerations in Maritime Boundary Delimitations" and Keith Highet's "The Use of Geographical Factors in the Delimitation of Maritime Boundaries" must be singled out as models of clarity and analytic depth.

The sheer volume of information contained in *International Maritime Boundaries* is astounding and this is a sufficient justification for its existence. However, assuming that the delimitation methods employed in the adjudication of maritime boundary disputes are indeterminate because of their reliance on equity, this project had a more ambitious aim—to study these agreements to discover what light they might shed on the rules and practices relevant to the resolution of maritime boundary disputes" (p xxx). Three possible conclusions were envisaged: that the study might identify common threads of State practice and thus relatively determinate delimitation rules; that it might indicate that no common patterns essential for the evolution of customary law existed; or that regardless whether State practice provided a basis for custom, information about the ways in which maritime boundary disputes had been settled might contribute to the resolution of the remaining disputes (ibid).

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4 All references in roman numerals are to Charney's introductory essay, Charney, "Introduction and Conclusions" in Charney JI and Alexander LM (eds), *International Maritime Boundaries* (1993), p xxiii and following.

5 For instance, see Charney, "Progress in International Maritime Boundary Delimitation Law" (1994) 88 *American Journal of International Law* 227, for an account of three more recent cases.

Undoubtedly the third aim has been realised, but a divergence of views arose amongst those examining global trends in State practice. Weil[6] concluded that, from his examination of agreed delimitations, a boundary was agreed because it was appropriate in the circumstances of the case rather than because it was seen as legally obligatory: "In maritime delimitation state practice is practice, no more; in my opinion it is not creative of customary law" (p 123). This view was echoed by Bowett,[7] who noted that the presence of islands, rocks, reefs, and low-tide elevations frequently complicates delimitation, but:

> The situations are so diverse that generalizations are hazardous, and to attempt to postulate "rules" would be to fall into the error which the courts have persistently, and rightly, avoided. The most that can be done is to identify certain tendencies in state practice (p 150).

On the other hand, Highet argues that normative constraints exist for agreed delimitations:

> it is inevitable that states, when entering into delimitation agreements, will have their attention firmly fixed on what the state of the law might be at the time, and therefore also on the significant decisions of the International Court of Justice and arbitral tribunals since 1969 that enunciate the relevant principles and apply them to the specific situation (p 165).

Given this divergence of views, one might well concur in Charney's conclusion that "no normative principle of international law has developed that would mandate the specific location of any maritime boundary line" (p xlii).[8] This leaves open the deeper question—why is it that we have come to such an *impasse*? Why is it that, to use the terminology of article 38.1.d of the Statute of the International Court, "the most highly qualified publicists" in reviewing the fruits of the most extensive study of the question find themselves locked in an interpretative stand-off?

At least three factors offer themselves as possible, and partial, explanations:

- that evidence of an *opinio juris* which governs the delimitation process is absent—as Weil would affirm, State practice is simply State practice,
- that the determination of maritime boundaries has been identified as a form of polycentric dispute which is not amenable either to the application of definite rules or (consequently) adjudicative settlement; and/or
- that the law is in a state of flux.

The difficulty, even impossibility, of gathering evidence of an *opinio juris*, or even the considerations which lie behind an agreed boundary line, is alluded to repeatedly in the thematic essays.[9] The question of whether an *opinio juris* can

6 Weil, "Geographical Considerations in Maritime Delimitation" in Charney and Alexander (eds), n 4 above, p 115.

7 Bowett, "Islands, Rocks, Reefs, and Low-Tide Elevations" in Charney and Alexander (eds), n 4 above, p 131.

8 This point is perhaps more forcefully made in Charney's recent article in Charney, n 5 above, at 1–3.

9 See, for instance, Charney, n 4 above, pp xxxiv, xlii–xliii; Oxman, "Political, Strategic and Historic Considerations" in Charney and Alexander (eds), n 4 above, p 3 at 39; and Weil, n 6 above, pp 121–22.

simply be inferred from practice is, of course, controversial.

The other two factors are more amenable to a brief consideration. A polycentric dispute is one which presents no clear issue to which each party can direct its argument but rather one which contains interacting factors which cannot be isolated and addressed serially.[10] Fuller has expressly identified the problem of "drawing an international boundary across terrain that is complicated in terms of geography, natural resources, and ethnology" as polycentric.[11] In this connection, it is interesting to note that Oxman claims that equidistance is frequently used in delimitation where resources are not a major consideration. Further, he observes that States have not entrusted to tribunals engaged in delimiting maritime boundaries the power to include a living resource management régime as part of its decision.[12]

On the other hand, to identify a given issue as polycentric is a matter of interpretation. It is arguable that this characterisation of maritime boundary delimitation stems principally from the International Court's decision in the *North Sea Continental Shelf* cases. Before this decision, Legault and Hankey claim, there existed "a binding legal presumption in favor of the equidistance method, whether under treaty law or under customary law", and that this method predominated in the extant delimitation agreements.[13] Despite the reference to delimitation by "equitable principles" in the Truman Proclamation,[14] the construction of delimitation as a polycentric issue, as opposed to one presumptively amenable to equidistance, consequently appears to have been the work of the International Court.

A related factor is that the law has developed rapidly since 1969. The emphasis in *North Sea Continental Shelf* on natural prolongation—which Sir Robert Jennings has described as a "pure figment of the Court's imagination"[15]—was effectively discarded in the *Libya/Malta Continental Shelf* case as a relevant delimitation factor,[16] and has received little support in State practice.[17] Delimitation rules are derivative rules: they are logically dependent

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10 This analysis is drawn from the work of Lon L Fuller, and in particular "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353 at 394 and following.

11 See Fuller, "Adjudication and the Rule of Law" (1960) 54 *American Journal of International Law* 1 at 3–4.

12 Oxman, n 9 above, pp 4, 15.

13 Legault and Hankey, "Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation" in Charney and Alexander (eds), n 4 above, p 203 at 205. See also Charney, n 4 above, pp xl–xli.

14 Proclamation by the President with respect to natural resources of the subsoil and seabed of the continental shelf (28 September 1945) (1946) 40 *American Journal of International Law* (Doc Supp) 45.

15 Quoted Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Deliminations" in Charney and Alexander (eds), n 4 above, p 95 at n 75.

16 See ICJ Rep 1985, p 13 at 33 para 34, 36 para 40.

17 See Highet, "The Use of Geophysical Factors in the Delimination of Maritime Boundaries" in Charney and Alexander (eds), n 4 above, pp 185–86, and throughout.

on the legal institution of the zone to be delimited. Given that the Exclusive Economic Zone, trailing in its wake the distance principle of delimitation, has only emerged as a legal institution relatively recently,[18] it should not be surprising that practice is divergent. But this practice has to be interpreted within the normative institutional framework which tempers its performance.

A *leitmotif* of this study is that States negotiate maritime boundaries with an eye on the potential outcome should the dispute proceed to litigation. In other words, States bargain in the shadow of the law.[19] If the view is adopted that State practice has not introduced legal refinements to the equitable principles test, then one might well side with Judge Gros:

> By introducing disorder into the conception of equitable principles, and freedom for the judge to pick and choose relevant circumstances and criteria, the Court, in the Judgment of February 1982 [*Tunisia/Libya Continental Shelf* case, ICJ Rep 1982, p 18] and the States participating in the Third United Nations Conference, by the Convention of December 1982, have given equity in maritime delimitation this doubtful content of indeterminate criteria, methods and corrections which are now wholly result-oriented. A decision not subject to any verification of its soundness on a basis of law may be expedient, but it is never a judicial act. Equity discovered by an exercise of discretion is not a form of application of law.[20]

This would negate the possibility of negotiations influenced by law. Such a nihilistic conclusion does not emerge from this study: although no determinative rule exists that fixes a boundary precisely, analysis of practice indicates that only a narrow range of potential boundaries could be credibly maintained in negotiations.[21]

The paradox is the influence that courts and tribunals have exerted on the formation of credible negotiating positions. The preponderance of State practice lies in agreements, not litigation, which courts have chosen to ignore.[22] If nothing else, this scholarly compendium of practice fulfils the crucial function of explicating to both States and tribunals what State practice actually is, namely, that in 77 per cent of the boundaries examined, the whole or the greater part of the boundary delimitation relied upon equidistance.[23]

International Maritime Boundaries is, quite simply, the most comprehensive source of information on maritime boundaries available, which makes

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18 Although alluded to in the *Gulf of Maine* case (see, for instance, ICJ Rep 1984, p 246 at 294–95, paras 94–96), the sea change came in the *Libya/Malta Continental Shelf* case with the adoption of the 200 mile distance principle as determinative of shelf entitlement—see, in particular, ICJ Rep 1985, p 33 at para 34, 36 at para 40.

19 See, for instance, Oxman, n 9 above, pp 15, 17; Weil, n 6 above, p 120; and Highet, n 17 above, p 165.

20 *Gulf of Maine* case ICJ Rep 1984, p 246; dissenting opinion of Judge Gros, 360 at 382 para 37.

21 See Charney, n 4 above, p xlii; Highet, n 17 above, p 165.

22 See Charney, ibid, p xxiv; Kwiatkowska, n 15 above, p 105.

23 Legault and Hankey, n 13 above, p 214.

comparative UN collections[24] look feeble in comparison. *International Maritime Boundaries* is a fat two-volume work over which international lawyers with any serious interest in the law of the sea should, quite frankly, drool. Food for thought indeed.

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Third Parties in International Law

By Christine Chinkin
(Clarendon Press, Oxford, 1993, xxxvii and 385 pp)

Traditionally international law has been seen as voluntarist in nature; hence "Basically, international legal obligations exist on the level of relations between pairs of individual States" (Simma, quoted on p 1 of the book under review). An obvious example is the treaty; a treaty creates obligations only for the parties: *pacta tertiis nec nocent nec prosunt.* In customary international law there is the concept of opposability; and bilateral defection from rules of customary law is possible, except for rules constituting *jus cogens.*

The traditional analysis of international law necessarily compels consideration of the position of States other than the pair or pairs whose relations are regulated through particular actions. This process of consideration must also necessarily lead, in the light of modern trends towards an international law of cooperation, to a contemplation of the movement in the direction of the "personification of the international community" (Ago, p 5) and thus towards a "community living according to common rules of conduct" (Mosler, p 5).

Professor Chinkin explores the position of third parties, from the traditional perspective and with a critical eye for the future, in three areas of international law in which that position is of special importance: treaties and third parties (Part I), international judicial and arbitral procedure and third parties (Part II), and third parties and international crimes: armed conflict (Part III).

In Part I the author analyses formal prescriptions of States as third parties to treaties against the background of the Vienna Convention on the Law of Treaties 1969, claims by and against third parties, and the position of international organisations and individuals as third parties to treaties. Her treatment is rich in reference to State practice, judicial decisions, and the opinions of writers. She concludes that the effect of treaties on third parties cannot be determined merely by the formal application of treaty rules, especially the *pacta tertiis* rule, but that the factual context, appropriate policies, and other applicable rules have to be taken into account. Moreover, current changes in the prescriptive process of

24 United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Maritime Boundary Agreements 1942–1969* (1991), and United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Maritime Boundary Agreements 1970–1984* (1987).

international law cannot be reconciled with a rigorous application of the *pacta tertiis* rule.

The impact on third parties of the international judicial and arbitral process is considered in Part II. Intervention before the International Court of Justice under articles 62 and 63 of the Statute of the Court is given a separate chapter of its own (updated in the Preface (pp vi–viii) to take account of the judgment of the Chamber of the Court in the *Land, Island and Maritime Frontier Dispute* (1992), which was handed down after the chapter was type-set). Australian readers will be especially interested in the author's analysis of the "essential parties" rule recognised in the *Monetary Gold* case[1] but which the Court has since been reluctant to extend (pp 198–212, 287–88). The *East Timor* case,[2] currently in the Court's list, will require the Court to examine the rule carefully, bearing in mind that the bilateral action instituted by Portugal against Australia impacts directly upon a third state (Indonesia) and a third non-State entity (the people of East Timor). The author concludes on this point that "a rigid adherence to bilateralism will be unlikely to assist in the clarification and meaningful application of norms [ie of self-determination] suggested to be of community interest". More generally she concludes that it is unlikely that the Court will regard intervention to uphold "public rights" as appropriate, still less to endorse the notion of an *actio popularis* in international law.

In Part III the author examines third parties and armed conflict. The traditional legal position of third parties in war or other forms of armed conflict is neutrality. That position has come into question since the advent of the United Nations Charter with its prohibition on the unilateral resort to force, except in self-defence, and the substitution of a system of collective security. Can there be neutrals under such a system, where one side is the aggressor and the other is either acting in self-defence or is taking enforcement action authorised by the United Nations Security Council? It is, however, notorious that, owing to dissension among the five permanent members of the Security Council it has until recently proved impossible to declare an aggressor; thus neutrality as a legal institution, in the author's view, has continued and is "a shadowy third party status, suspended between an ideology which denies it, and a reality which continues to find it useful, and even necessary", as in the case of the Iran-Iraq war (p 311). Exceptionally, the United Nations Security Council declared Iraq to be an aggressor against Kuwait and authorised collective action against it. The author recognises that United Nations member States could not, in such a case, claim neutral status in order to avoid implementing the economic sanctions decided on by the Council, recognise the annexation of Kuwait, nor give assistance to Iraq. Beyond this, however, the author is tantalisingly cryptic; she states merely that:

> A step has been taken away from the traditional third party option of neutrality based upon a State's perception of its self-interest, towards some collective

1 *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States),* Preliminary Question, ICJ Rep 1954, p 19.

2 *Case Concerning East Timor (Portugal v Australia*), Application filed 22 February 1992, ICJ Rep 1991, p 9.

> obligation in the face of a breach of international peace and security based upon the collective view of the Security Council as to the interests of the international community. It is not surprising that the precise parameters of this shift remain uncertain (p 313).

Professor Chinkin's book amply demonstrates the weaknesses and contradictions inherent in the strict bilateralism of traditional approaches to these questions, and points the way to a greater assertion of community interests and to the growth of an international law of interdependence. She exercises an exceptional command of the sources and structures of international law and provides fresh insights and original perspectives. Her researches are widely informed and are not confined to anglophone sources. In all, Professor Chinkin has made an invaluable contribution to an understanding of some fundamental elements of the international legal system. Her book stands as one of those rare works that throws basic principles into sharp relief by pursuing a theme across several discrete areas of substantive law. While it may be the case, as Professor Brownlie suggests in his introduction, that "the conceptual umbrella of 'third parties' may shelter too many items for some tastes", there can be no doubt that Professor Chinkin has succeeded brilliantly in what she set out to do, and that her book will be a standard work of reference for many years to come.

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Non-Combatant Immunity as a Norm of International Humanitarian Law

By Judith Gail Gardam
(Martinus Nijhoff, Dordrecht/Boston/London, 1993, xiii and 199 pp)

The ghosts of the civilian victims of the wars in the former Yugoslavia, the former USSR, Angola, Somalia, and so many other places rise to challenge, and sometimes mock, readers of this book. What could international law and its institutions have done to protect them? Or do these dreadful conflicts fall into some dark crevice, unreached by international law? Is it a dry lawyer's question of classification of the conflict: as international, civil, aggressive, self-defensive, or a war of self-determination? Is it a lack of relevant international conventions, or the failure of the warring parties to subscribe to them? Does customary international law, or—beyond that—elementary principles of humanity, reach out towards the victims and demand that their cause be listened to by the rest of the world?

The author sets out to trace the legal protection of non-combatants in conventional international law and in the practice of States with a view to appraising the status of that protection as a contemporary norm of general international law. The author is especially concerned to assess the impact on the status of non-combatants of the recognition of the right to self-determination, and sees in the inclusion of certain (but not all) self-determination struggles, within the category of international armed conflicts in Protocol I (1977) to the

Geneva Conventions of 1949, a strengthening of the protection of non-combatants in what would otherwise have been purely civil wars. The author sees Protocol II (1977), which applies to non-international armed conflicts, as an inadequate instrument that tends to preserve an undesirable distinction between international and civil wars.

It must be said that this book advances no new theory; nor is it notably adventurous in its arguments. The analysis is conducted within the parameters established by other writers, who are comprehensively reviewed.[1] Nevertheless, the book has value as a careful survey and distillation of issues and views, and as a *vade mecum* in tracing the particularly important issue in the contemporary law of armed conflict of the protection of non-combatants. This reviewer must, however, state a preference for the term "protection" in this context, rather than the author's chosen title "immunity", since the latter implies an unqualified rule not borne out even by the author's arguments.

The book proceeds, after a brief historical review of the place of non-combatants in the law of war up to and including World War II, to consider the "challenges" to the protection of civilians posed by the era of the United Nations. These challenges are represented, first, by the purported abolition of the right to wage war by the provisions of article 2(4) of the Charter of the UN; and secondly, by the emergence of the right of self-determination of peoples, which may be vindicated by force at least in the case of self-defence against the denial of such a right in the contexts of colonialism, foreign domination, and racial discrimination. Both challenges are seen by the author as essentially one: a reversion to theories of "just war", which allow only self-defence as a legitimate justification for resort to armed force. The danger thus posed is that the side "in the right" will not conceive itself to be restrained by any laws of armed conflict, and that an unequal application of those laws will result. The author vigorously refutes this thesis.

Chapters 4, 5, and 6 contain a substantial excursus into the contemporary development of the right of self-determination in international law. The author's justification is that so many armed conflicts today are based on the assertion of such a right; and that—as an echo of just war theories—guerrilla fighters are not inclined to conduct warfare "by the rules". In the end, the author agrees with Heather Wilson[2] that international law, as developed in the UN Declaration on Friendly Relations of 1970, makes legitimate the use of force by groups entitled to self-determination only in self-defence against governments resisting this right, and not the initiation of force in the struggle for self-determination. Even so, the theoretical problem of potential unequal application of the laws of armed conflict remains, although it is hard to find any groups or writers who espouse such a view in terms that international lawyers would recognise as *opinio juris*. It may be that the author has unduly laboured the issue. Indeed, she rightly sees the refutation of the alleged unequal application of the laws of armed conflict in

1 The author's completion date appears to have been mid–1992. She thus did not have access to Green LC, *The Contemporary Law of Armed Conflict* (1993).

2 Wilson H, *International Law and the Use of Force by National Liberation Movements* (1988).

the adoption of Protocol I (1977) to the Geneva Conventions of 1949, in which the *jus ad bellum* is clearly separated from the *jus in bello*; in other words, the Protocol does not pass judgment on the right to wage war, but simply accepts that armed conflicts will occur, re-affirms and develops certain rules to govern such conflicts, and applies those rules equally to States and to non-State entities engaged in certain kinds of struggle for self-determination.

Chapters 7 and 8 examine the position of non-combatants under Protocol I, and—to an extent—the objections that have been raised to some of these provisions, especially by the United States, which has refused to ratify the Protocol. Although this reviewer does not consider that these objections are of sufficient weight to justify the United States approach, he finds that the author has given scant attention to them; moreover, the reservations and declarations of some States on ratification (including Australia), which go a long way to meeting these objections, are not analysed.

Chapter 10 can be regarded as the crucial chapter. It is here that State practice is assessed with a view to showing that certain rules of protection of non-combatants do not depend solely on Protocol I but are part of customary international law. Reliance is properly placed on the decision of the International Court of Justice in the *Nicaragua* case[3] in this connexion, which discounted contrary State practice, unaccompanied by *opinio juris*, in declaring basic principles governing the use of force, and of international humanitarian law, to be part of the corpus of general international law. But what are these principles, if not identical with those contained in Protocol I, that have achieved the status of generally binding norms? The author is no more ready than others to identify them precisely. An appeal to the potency of basic principles of humanity as a source of international law, and references (especially in the context of purely civil conflicts, dealt with in Chapter 11) to international norms of human rights, are only briefly sketched. More could be made of these, building on the writings of such scholars as Fitzmaurice and Meron.

Indeed the reader aches for a book that would go even further. It would not be a just criticism of the author that she has not dared to tread where other lawyers have not. But we are surely better informed nowadays of the psychological, social, and political forces that drive "liberation" and self-determination struggles, especially those that involve such abominations as "ethnic cleansing". The lawyer's contribution towards enforcement of international humanitarian law has been the development of models of international jurisdiction over war crimes and other crimes against humanity. The diplomat's contribution has been the identification of the means at the disposal of the United Nations and its agencies to intervene in various kinds of armed conflict or threats to the peace. What is sorely needed now is a series of studies which would draw on all relevant disciplines with a view to promoting comprehensive and widely informed programs for securing compliance with the norms of protection of non-combatants and other rules of international

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3 *Military and Paramilitary Activities in and against Nicaragua (Merits),* ICJ Rep 1986, p 14.

humanitarian law. The role of the International Committee of the Red Cross (ICRC) in the dissemination of international humanitarian law, and in providing good offices and relief, is indispensable. But the ICRC can do nothing directly in the matter of enforcement, and might compromise its essential neutrality were it to be actively involved in the processes of investigation and prosecution of offenders. In the investigation and documentation of grave violations of the norms of international humanitarian law there is a vital role to be played by the United Nations and by other concerned organisations, and by the international news media.

The book is generally well presented, and contains a useful and comprehensive bibliography. There are a few solecisms, such as "the *ius belli ac pacis*" alleged to mean "the right to wage war" (p 38), and "the German Ottoman Empire" (p 44); and some passages in the argument are not at all clear, for example, the discussion on p 24 of the direct targeting of civilians in air raids during World War II. But overall the author has made a welcome and worthwhile contribution to a debate of the utmost importance.

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Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women

By Lars Adam Rehof
(Martinus Nijhoff, Dordrecht, 1993, xvii and 385 pp)

In compiling this *Guide to the Travaux Préparatoires of the Convention on the Elimination of All Forms of Discrimination Against Women*, Lars Adam Rehof, a professor of law at the University of Copenhagen, has performed a valuable service for international human rights scholars and others who work with the Convention. Although the Convention, adopted in 1979, is the subject of a considerable body of literature,[1] until the appearance of this *Guide* there was not a book-length commentary in English on the Convention.[2] Rehof's work is essentially a description of the drafting history of the Convention, supplemented by some references to the subsequent practice of the Committee on the Elimination of Discrimination Against Women (CEDAW), the monitoring body established by the Convention. The *Guide* fills a significant gap in the existing literature and will be an extremely useful addition to a collection of human

1 See generally Cook, "Women's International Human Rights: A Bibliography" (1992) 24 *New York University Journal of International Law and Politics* 857.

2 See, however, Plata I and Yanusova M, *Los Derechos Humanos y la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer* (1988). A Japanese commentary on the Convention, prepared by the Japanese Association of International Women's Rights, will appear in English translation in 1995. That commentary details the drafting history of the Convention, as well as some of the subsequent practice under it (in particular in relation to Japan).

rights materials.

International lawyers and human rights scholars who have sought to examine the drafting history of individual provisions of the Convention will have experienced the same frustration that Rehof met with in the preparation of this work. There does not appear to be a complete archive of the documentation of the drafting process, either at the United Nations in New York (where the Convention was drafted) nor the United Nations in Vienna (home until mid-1993 to the secretariat responsible for administration of the Convention and servicing CEDAW). Rehof laments this fact, noting (p vii) that he has "spent much time and effort trying to collect relevant documentation from many corners of the world but unfortunately [has] not been able to obtain a complete collection". This situation underlines the importance of the recommendation made a few years ago by the Chairpersons of the United Nations treaty bodies that when future conventions are adopted a compilation of the *travaux préparatoires* should be made immediately after the adoption of the treaty.

Existing guides to the *travaux préparatoires* of other United Nations human rights treaties vary considerably in their approach.[3] Rehof has chosen to structure his commentary article by article, with a chronological discussion within each article and paragraph. This makes the book particularly useful for someone wishing to consult the history of a particular provision, but makes it more difficult to get a sense of the more general issues which may have emerged at different stages of the drafting. The text of each article is reproduced, together with a list of the relevant documentation relating to that article, including references to general recommendations of CEDAW. Rehof also helpfully includes in the appendices the texts of the USSR and Philippines separate and joint drafts on which much of the discussion was based. An introductory chapter describing the background to and development of the Convention in the Commission on the Status of Women, the Working Group of the Third Committee of the General Assembly, the Third Committee itself and the plenary General Assembly precedes the detailed commentary on the individual provisions.

The discussion of individual provisions of the Convention is largely descriptive and does not involve critical analysis of the debate or the provisions of the Convention. As a result, the text can be rather dry. Missing from the book (and the literature more generally) is an account of the drafting process that gives a real sense of the political and personal dynamics of the development of the Convention.

In addition to the description of the drafting of the individual provisions of the Convention, the *Guide* contains a collection of useful up-to-date information about developments under the Convention since its entry into force in 1981. The

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3 See Bossuyt M, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987); Burgers J and Danelius H, *The United Nations Convention Against Torture* (1988); Detrick S (ed), *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (1993). See also Lerner N, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 2nd ed (1980).

appendices include the list of States Parties to the Convention as of the end of December 1992, as well as details of the status of submission of reports and their consideration by CEDAW, as well as the rules of procedure of the Committee. Of particular interest in view of the number and coverage of reservations entered by States Parties to the Convention is the text of those reservations and declarations, as are the objections lodged by a number of States Parties in response to some of the more extensive and controversial reservations.

The *Guide* also includes the text of the 20 general recommendations adopted by CEDAW as of the end of 1992.[4] Of these the most important is General recommendation No 19 on Violence Against Women (1992). Towards the beginning of the discussion of each article (under the heading "Comments made by the Com[mittee]") Rehof refers to these general recommendations as appropriate.

The book also provides a list of ILO conventions relevant to issues of women's equality, League of Nations and United Nations treaties on the subject, as well as instruments adopted by the Council of Europe and the European Communities. A list of cases decided by the European Court of Justice and opinions of its Advocates-General relating to sex discrimination is provided (but without any annotation), and relevant provisions of the Vienna Convention on the Law of Treaties are reproduced. Also of particular interest is the report prepared by the Secretariat for the 1992 session of CEDAW, dealing with article 6 of the Convention (trafficking in women and the exploitation of women by prostitution).

While Rehof does refer to a certain amount of secondary literature in footnotes, the book might have benefited from a select bibliography on the Convention, perhaps organised by subject-matter or according to specific articles of the Convention. The index is rather brief: it does not, for example contain an entry for "violence against women" or for each of the general recommendations, so it would be difficult for a reader who wished to find out what has been said on the subject of violence to track this material down through the index.

The *Guide* largely fulfils the aspirations set by its author and is a significant contribution to the literature on the Convention. However, those goals are fairly modest (though clearly achieved only as the result of much painstaking work) and the *Guide* goes only part of the way towards fulfilling a broader need for scholarly examination of and commentary on the Convention. As Rehof himself recognises (p 4), no reference is made to the detailed practice of CEDAW (other than the general recommendations), in particular its examination of States Parties' reports. Nor is there any discussion of the practice of States Parties themselves under the Convention, in particular as revealed in their reports submitted pursuant to article 18 of the Convention.

Thus, while Rehof's book is a significant and welcome contribution that fills a major gap in the literature of the Convention, there is still a pressing need for a

4 At its 1994 session, CEDAW adopted General recommendation No 22 (1994) on Marriage and the Family, focusing on articles 9 and 16 of the Convention.

detailed commentary on the Convention that builds on Rehof's work and that also analyses developments at both national and international levels under the Convention since its adoption. Rehof's work is an important step on the way to that goal and has made the tasks that remain to be done far easier than they would otherwise have been.

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United Nations Covenant on Civil and Political Rights: CCPR Commentary

By Manfred Nowak
(NP Engel, Kehl, 1993, xxviii and 947 pp)

The appearance in 1989 of Manfred Nowak's impressive German commentary on the International Covenant on Civil and Political Rights[1] (ICCPR) was a major event in the development of the literature on international human rights and the Covenant. In its 1993 English edition, a revised and updated version of the earlier work, Nowak's commentary has now become available to a much broader audience and should be welcomed by scholars, human rights activists, lawyers, and government officials (among others).

Students of the ICCPR have been fortunate in the high quality of the commentaries published in English on the Covenant. The collection of essays edited by Louis Henkin,[2] though now more than a decade old, is still an excellent introduction to the Covenant. In more recent years, McGoldrick's book on the Human Rights Committee and its practice is a fine contribution to the literature,[3] covering the matters it does often in greater depth than Nowak, but limiting that coverage to a selection of the Covenant's articles. Nowak's *Commentary* stands apart from other works in its combination of comprehensiveness and detail. It is presently the only work that covers all provisions of the Covenant and its two Optional Protocols, incorporating discussion not only of all the substantive rights guaranteed by the Covenant, but also important procedural questions.

The author, a professor of law at the Federal Academy of Public Administration in Vienna and Director of the Ludwig Boltzmann Institute of Human Rights, has an impressive scholarly record in the area of human rights generally, but is particularly well-known for his work on the ICCPR. Nowak has published regular surveys of the practice of the Human Rights Committee, the body of independent experts established under the Covenant; particularly useful

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1 Nowak M, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll: CCPR Kommentar* (1989).
2 Henkin L (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981).
3 McGoldrick D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991).

have been his resumés of the Committee's decisions under the First Optional Protocol to the Covenant.

This commentary proceeds article by article through the Covenant and the First Optional Protocol, with discussion of the provisions of the Second Optional Protocol concerning abolition of the death penalty being incorporated in the section dealing with the guarantee of the right to life contained in article 6 of the Covenant. Both the English and French texts of the relevant provision are reproduced, followed by a discussion of the drafting history of each provision, with the author highlighting important issues of disagreement and identifying current issues which may not have been addressed (or even thought of) during the drafting of the treaty. Nowak frequently puts forward his own views with, as one reviewer noted in the review of his German edition of the Commentary,[4] a tendency to take a liberal view when interpreting the scope of rights, while adopting a somewhat stricter view when considering questions of jurisdiction and procedure.

The discussion incorporates references to the Committee's case law under the First Optional Protocol, though in many important respects that jurisprudence is sparse and unhelpful when one is attempting to apply provisions of the Covenant in a domestic context. Nowak includes a large number of helpful references to decisions of the regional human rights organs (in particular the European Commission and Court of Human Rights), as well as to a wide range of secondary literature. Unreasonable though it may be in view of the already voluminous nature of the commentary, my only regret is that there is relatively little reference made to national case law applying the provisions of the Covenant. It would be particularly interesting for common lawyers to have access to some of the wealth of experience in those countries (particularly in Europe) in which the ICCPR forms part of national law.[5]

For Australian readers, the work is of particular utility, in view of Australia's accession in 1992 to the First Optional Protocol to the Covenant, which enables persons subject to Australian jurisdiction to take complaints alleging violations of the Covenant by the federal or State governments to the Human Rights Committee once domestic remedies have been exhausted. The detailed discussion of individual rights and the references to the Committee's case law are of particular value for that reason. Of equal importance from the procedural point of view is Nowak's exegesis of the provisions of the First Optional Protocol itself, especially the discussion of admissibility criteria for communications.

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4 Partsch in (1990) 33 *German Yearbook of International Law* 496 at 499.

5 See also the experience of Hong Kong, where the ICCPR now forms part of domestic law. Decisions under the Hong Kong Bill of Rights (and the text of that instrument) appear in Byrnes A, Chan J, Edwards G and Fong W (eds), *Hong Kong Public Law Reports* (1993). For a recent Privy Council decision under article 11(1) the Hong Kong Bill of Rights (identical in terms to article 14(2) of the ICCPR) which has a bearing on similar legislation in Australia, see *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72; [1993] 3 WLR 329.

In addition to the commentary on the articles of the Covenant and the Optional Protocols, Nowak provides a wealth of further reference materials. In the various appendices, which run to 223 pages, he reproduces the text of the Covenant and Protocols, the reservations and declarations made by States Parties, declarations of states of emergency made by States Parties pursuant to article 4(3) of the Covenant, the status of ratifications of the Covenant and the Protocols and acceptance of the article 41 inter-State procedure. Also reproduced are the rules of procedure of the Committee, guidelines on reporting by States Parties, the list of reports submitted by States Parties and details of their consideration by the Committee, a list of those who have served as members of the Committee since its inception, and a list of the documents issued for the purposes of the Committee's work. In short, almost all that one could ever want to know about the Committee is included here. It is particularly useful when trying to track down the details of a particular country's interaction with the Committee.

The appendices also include the text of General comments 1-21 adopted by the Committee, the book having gone to press before the adoption of the Committee's latest general comment, General comment No 22 (48), which deals with article 18 of the Covenant (freedom of thought, conscience and religion)[6] and General comment No 23 (50) which deals with article 27 (rights of minorities)[7] and General comment No 24 (52), which deals with the issue of reservations.[8] Nowak has also compiled a table of communications considered by the Committee, organised numerically according to the Committee's own numbering. Citations are provided for each case, to annual reports of the Committees in which its views are published, and to the two volumes of selected decisions of the Committee's decisions, as well as to the Human Rights Law Journal. For the Anglo-Commonwealth reader a citation to the International Law Reports, where many of the earlier decisions of the Committee are reported, would also have been helpful.[9] The work is rounded off by a select bibliography of works cited in the text, and a useful index.

Manfred Nowak has produced a *tour de force* that reflects an immense amount of scholarly knowledge and endeavour. No serious collection of basic works on international human rights can afford to do without this important work.

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6 For the text, see UN Doc CCPR/C/21/Rev. 1/Add 4.

7 For the text, see UN Doc CCPR/C/21/Rev. 1/Add 5 (1994).

8 For the text, see UN Doc CCPR/C/21/Rev. 1/Add 6 (1994).

9 The new *International Human Rights Rights Reports*, published by the University of Nottingham from 1994, will contain the Human Rights Committee's decisions under the First Optional Protocol as well as its concluding observations on the reports of States Parties under the Covenant.

Regulation of Food Products by the European Community

By Charles Lister
(Butterworth and Co (Publishers) Ltd, 1992, xii and 311 pp
Current EC Legal Development Series)

This book is one of a number of titles in a series dealing with source materials and commentary on European Community law aimed at "lawyer, consultant, researcher" and others. At first sight one doubts the wisdom of publishing, in other than looseleaf form, a text on the regulation of food products. The topic normally involves a complex and constantly changing set of standards. However, this is not a catalogue of standards, rules or directives that might quickly become outdated. Rather, this text is largely about European Community food regulation policy and process. Consequently, the commentary and references can have long-term utility.

The content assumes the reader has some basic understanding of Community regulatory tools, directives, regulations. Although there is a Table of Contents there is no detailed index, which may be a problem for those not thoroughly familiar with the subject matter. An Appendix lists six main Council Directives relating to foodstuffs.

The first chapter contains a brief introduction to food regulation in the European Economic Community and some of the issues canvassed in detail in later chapters. Chapter 2, entitled "The Framework of the Community's Food Regulatory Policies", exposes the reader to the institutional structure of the Community as it affects the food trade, and the important influences upon the formulation of the Community's food regulatory policy. In doing so it discloses some of the tensions that are familiar to any observer of the highly controversial field of food regulation. Among these influences and tensions are, first, the considerable difficulties created by the presence of disparate national laws and the natural reluctance of member States to accept changes to their national regime of food regulation. Charles Lister draws attention to the on-going dominance of the policies of Community member States of Germany, the Netherlands, France and, more recently, Great Britain. The extra-Community influence of the United States Food Drug and Cosmetic Act 1938, the work of the United Nations Codex Alimentarius Commission and its expert committees on Community food law is also noted.

Lister cites the notorious Common Agricultural Policy (CAP) as being another significant influence, and observes that it is responsible for bitter divisions between farmers on the one hand and traders and consumers on the other. Further, the CAP is seen as a source of friction to the member States among whom the costs and benefits of the policy are not evenly distributed. The succinct overview of the main issues is supplemented with further references in the notes. A third major influence derives from the consumer interest in food regulation and policy. Mention is made of the activities of both the European Parliament and the Economic and Social Committee in reinforcing the demand

by consumer groups for food regulatory policy to be sensitive to consumer concerns. Article 100A(3) of the Treaty inserted by the Single European Act 1986 (in force from 1987) represents some Community acknowledgment of the importance of this interest. This reviewer notes too that the Maastricht Treaty (the European Union Treaty, 7 February 1992) inserts new titles dealing with consumer protection (XI) as well as public health (X).

The chapter goes on to show that the persistent difficulties, due to these influences and tensions, contributed to the Community's realisation that the ambitious goal of full harmonisation of food regulation, propounded in the 1960s, was unworkable. There came a growing acceptance of the value of the principle of mutual recognition of regulations as a more appropriate way of dealing with some areas of non-uniformity. Important direction on regulatory policy was provided by the European Court of Justice through a series of rulings concerning article 30 of the Treaty of Rome. In case 8/74 *Procureur du Roi v Dassonville*[1] the Court determined that all national "trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are measures having an effect equivalent to the quantitative restrictions" on imports and thus contravened the Treaty.[2] This reviewer was surprised to see a quote in terms similar to this wrongly attributed to the prominent case 120/78 *Cassis de Dijon*[3] although of course, the judgment of *Cassis de Dijon* is completely compatible with that determination. With progressive rulings, many of which involved the marketing of food products or beverages, it became clear that any national measure having like effect was prohibited. The Court in *Cassis de Dijon* gave relief from that general ruling in *Dassonville* to those national provisions necessary "to satisfy the mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer".[4] (It is of concern to this reviewer that Lister, by asserting unequivocally (p 26) that article 36 provides the "only permissible exceptions", does not alert the reader to the view that the "mandatory requirements", to which *Cassis de Dijon* refers, are distinct from those matters expressed in article 36.[5]

Chapter 3 is devoted to "Labelling, Presentational and Advertising Rules", which will be of particular interest to many international observers of food regulation and policy because it is an area of considerable world-wide activity. The reader will see that as a consequence of the decisions of the Court of Justice, informational labelling has become the preferred measure for protecting the consumer in the Community. It usually is the measure that has the least impact on the free circulation of goods (compared with that of, say, compositional standards) and tends to satisfies the requirement of "reasonable

1 [1974] ECR 837.
2 Ibid, p 852.
3 [1979] ECR 649. See p 26 n 1.
4 [1979] ECR 649, 662.
5 See further Kapteyn PJG and van Themaat V, *Introduction to the Law of the European Communities*, 2nd ed (1989), pp 389, 392.

proportionality". In this chapter, the author outlines the issues raised by Community food labelling measures and provides the reader with a valuable inventory of articles, texts and Community papers. Extra-Community readers familiar with the concept of mutual recognition will be interested in illustrations of how it operates in the Community, including some of the authorised derogations to the principle. For example, sometimes the use of a product name may still be restricted in one member State (for example, "yoghurt" products must contain live bacteria) although in another member State the name may be used for a product that does not comply with such restriction. The restriction must pertain to a characteristic that is recognised in the first member State as "essential" to the integrity of that product (p 56).

Chapter 4 deals with the distinctive categories of food that can be grouped by their mode of processing (for example, frozen, irradiated) or designated use (for example, diabetic use). "The Regulation of Food Additives" in Chapter 5 is accompanied by a balanced commentary on what is a universally recognised "hot" topic. The discussion also contains a useful diversion into the troublesome US Delaney Clause for comparative purposes (p 138 ff). Chapter 6 deals with materials in contact with foodstuffs and Chapter 7 provides illustrations and commentary on the vertical directives which comprise the infamous compositional or recipe standards and their oft-associated with prescribed names.

In Chapter 8, Lister deals with a concern that troubles all federal-style systems when member States are charged with enforcing harmonised rules. The problem is consistency of application. Indeed, he sees that the most pressing need in Community food regulation is for a mechanism for "uniform monitoring and control of food labelling and safety" (p 236). Other topics canvassed in the book include pesticide and other chemical residues (once again with opposing viewpoints fairly presented (p 245 ff)), prepackaging standards, the serious problem of food hygiene, and the general directives on product liability and safety (p 277).

In Chapter 9, Lister tackles some of the shortcomings of the Community food regulation. The reader senses the urgency behind his call for the articulation of clearly defined objectives for Community food policy (p 285). (Australia only recently took steps to remedy the widely proclaimed defect in its food regulatory system with the enactment of the National Food Authority Act 1991 (Cth) which sets out the objectives of food standards.) Law-makers and reformers will recognise the tensions created by the desire to have certainty (the upside of the "rigidity" that Lister criticises, p 286) in the law and yet flexibility so the changing circumstances can be met in a timely way. This reviewer would add that certainty through detailed prescription can, in part, assist in addressing the problem of non-uniform enforcement that Lister raises in the previous chapter. International lawyers would sympathise with his concern about the ambiguity and inconsistencies that the use of directives (to be "applied in spirit") rather than regulations, creates and how this is exacerbated by "repeated translations and multiplied by national transpositions" (p 287). Those interested in process will note with concern the criticism about the lack of transparency in

rulemaking by Commission (p 290) and Council (p 291). Everyone consumes food and its effects are potentially life-threatening. Therefore, when rulemaking involves food it is crucial that the process be open and accessible to all.

In the last chapter, Lister suggests some solutions to relieve the problems raised in the previous chapter. These include the official codification of Community regulations and directives (p 296) (an essential step in the view of this reader), speedy implementation by member States of the 1989 Directive on the inspection and control of foodstuffs (p 300); and serious consideration of the creation of a Community Food Regulatory Agency responsible for the preparation and revision of Community rules and perhaps enforcement. (Lister concedes there is a conflict with principle of subsidiarity). This reader is disappointed that he did not spell out his own views on what the objectives of Community food regulation should be. His obvious breadth of knowledge and thoughtful analysis of many of the difficult issues suggest that he could make a valuable contribution to the debate.

The book is a good resource for any observer of food regulation. It provides a broad overview of food regulation in the European Community for those trying to come to grips with the complexities of the Community market place, be they practitioners or researchers. Those extra-Community food policy-makers and commentators who are pre-occupied with regulation in an international market would find it particularly instructive, especially now that the Uruguay round of the GATT talks have been completed. The descriptions of the various institutions and the mechanisms of food regulation aimed at providing cohesion within the Community, are revealing and helpful. Those who have experienced the complexities of a federal system will recognise and appreciate the great task faced by Community regulators in trying to create a single market for goods.

Generally the notes are a fine source of supplementary information, further reading and comment. Unfortunately, the material on the Court of Justice rulings and significance of article 36 (mentioned earlier) detracts from the merit of the work. Finally, readers should note that there is little reference in the work to the Maastricht Treaty. As public health and consumer protection have particular relevance to the area of food regulation, one suspects the effect of the Maastricht Treaty amendments could be quite significant. This is not a criticism of Lister's work as the book was published during 1992, the same year that the Maastricht Treaty was signed. Undoubtedly, the time-lines associated with publication were working against him.

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Protection or Punishment: The Detention of Asylum Seekers in Australia

Edited by Mary Crock
(Federation Press, Sydney, 1993, xix and 177 pp)

Detention for the purposes of immigration control is not new in Australia. But in recent years there have been a number of government initiatives in relation to detention of potential immigrants that have brought the practice of immigration detention into the spotlight. In particular, the detention of asylum seekers or persons seeking refugee status has provoked much controversy since the passage in 1992 of legislation requiring the mandatory detention of "boat people".[1] Boat people are asylum seekers arriving by boat and claiming refugee status at the "border". No requirement was made under the new legislation for mandatory detention of asylum seekers who had entered lawfully, overstayed their visas and subsequently applied for refugee status.[2] The legislation was railroaded through Parliament two days before the Federal Court was due to hear an application for release of a group of Cambodian asylum seekers who had successfully appealed against the Australian Government's refusal to recognise them as refugees. The Cambodians had already endured detention for over two years. Following a constitutional challenge to the legislation that was unsuccessful in most respects, the Cambodians were subjected to further detention under the new legislation despite the fact that their appeal against the refusal of refugee status had been successful owing to an admission of unspecified mistakes by counsel for the Government.[3]

Protection or Punishment is a valuable collection of papers arising from a series of seminars held during Refugee Week in mid-1992 that comment on the legal, policy and practical issues involved in the detention of asylum seekers in Australia. The book is divided into six parts. The first part focuses on the

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1 The Migration Amendment Act (No 4) 1992 (Cth) provides for mandatory detention of up to 273 days. In calculating this period, the clock stops running in certain circumstances such as when court proceedings are undertaken on behalf of the asylum seekers or when the refugee status determination proceedings are otherwise out of immigration officials' hands.

2 The Migration Reform Act 1992 (Cth) provides for detention of people who have overstayed their visas, but it also provides for bridging visas for release of such persons. Dennis Richardson notes the distinction between authorised and unauthorised arrivals is substantially maintained by the Migration Reform Act 1992 (Cth). The Act entered into force on 1 September 1994. See Richardson, "The Official's View: The Policy Outlived" in Crock M (ed), *Protection or Punishment* (1993), p 15.

3 In *Chu Kheng Lim and Ors v Minister for Immigration, Local Government and Ethnic Affairs and Another*, (1992) 110 ALR 97, the High Court held that Section 54R, inserted by the Migration Amendment Act (No 4) 1992 (Cth), was invalid. Section 54R provided that courts could not order the release of boat people. However, the rest of the legislation was upheld, effectively meaning that, with limited exceptions, boat people would be detained for the duration of Australian refugee status determination procedures.

political motive for detention; the second contains a number of critical analyses of the detention policy; the third examines the position of detainees; the fourth provides a basis for comparison of Australia's policy with the policies of other countries; the fifth contains a number of perspectives on the alternatives to detention; and the sixth is a postscript on developments postdating the seminars on which the book is based, particularly the progress of the various court actions involving asylum seekers, the inquiry into detention by the Joint Standing Committee on Migration and the continuing changes to immigration legislation and regulations. There is also a useful summary of the statistics in relation to persons seeking refugee status at the border.

The papers are all relatively short, perhaps opening the book to criticism for lack of depth of coverage. I would have liked more space devoted to analysis of the international legal standards relevant to asylum seekers and the ambiguities in these standards that are currently being exploited by governments. But any shortfall is offset by the range of contributions, which ensures a multi-faceted debate of the issues. Editor Mary Crock, an experienced practitioner and respected writer in the field of immigration law, contributes with the introduction, Chapter 5 ("A legal perspective on the evolution of mandatory detention") and the postscript which is written jointly with John Griffiths, a legal practitioner who represented some of the Cambodian asylum seekers on a *pro bono* basis. The other contributors to the book include politicians, bureaucrats, journalists, lawyers, human rights activists, social workers, psychiatrists, a representative of the United Nations High Commissioner for Refugees (UNHCR) and representatives of many non-government organisations which work in the refugee field. The contributors write from a personal perspective rather than as official representatives of the many organisations from which they are drawn. For the most part there are no surprises. Most of the perspectives are critical of Australia's detention policy, either in principle or in view of its particularly rigid and harsh implementation considering the size and nature of Australia's immigration control problem as compared with the problems and responses of other countries.

The book provides an informed basis from which to judge the recent report on detention by the Joint Standing Committee on Migration. The Committee has endorsed the Government's policy of detaining asylum seekers, though recommending that "there be a capacity to consider release where the period of detention exceeds six months".[4] Only Senators Barney Cooney and Christabel Chamarette made alternative recommendations. Senator Cooney recommended that courts, which he defined broadly, have the power in appropriate circumstances to order release from the beginning of the period of detention.[5] Senator Chamarette submitted a dissenting report in which she recommended

4 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (1994), p 156 at para 4. 181.

5 Addendum by Senator Barney Cooney, in Joint Standing Committee on Migration, ibid, p 195 at 200.

that the policy of mandatory detention be replaced by a system of conditional release.[6]

Chapter one of *Protection or Punishment*, authored by Senator McKiernan, Chair of the Joint Standing Committee, is uncritical of Australia's detention policy. Senator McKiernan takes an approach typical of government officials involved in immigration and he defends Australia's policy decision as a response to the perceived political imperative to "defend, deter, detain". The Senator points out that the entry of aliens into Australia is a matter of sovereign prerogative; that failure to gain permission to enter is a violation of Australian immigration law; and that Australian citizens and residents are required to present proof of their right to enter Australia at border control areas.

Senator McKiernan's approach avoids the central dilemma explored by other contributors to *Protection or Punishment.* Some potential illegal entrants claim that they should be recognised as refugees in accordance with Australia's international obligations. Along with some 120 other States, constituting three quarters of the international community, Australia has voluntarily ceded a portion of its sovereign prerogative over immigration by becoming a State party to both the 1951 Convention Relating to the Status of Refugees[7] and the 1967 Protocol Relating to the Status of Refugees.[8] Many jurists accept that the basic obligations contained in these instruments have entered the corpus of customary international law and are therefore binding on all members of the international community.[9] Under these instruments, Australia agrees to give the fundamental protection of *non-refoulement* (non-return)[10] to those persons who cannot return to their countries of origin owing to a well-founded fear of persecution on the basis of political opinion, race, religion, nationality, or membership of a social group.[11] Senator McKiernan's insistence on the political imperative to defend Australia's borders overlooks the fact that Australia is also legally bound to provide basic humanitarian protection to refugees.

Through his repeated invocation of the deterrence value of detaining asylum seekers—he claims that Australia's detention policy has avoided the boats of undocumented Chinese that have been intercepted by United States immigration officials[12]—Senator McKiernan appears to assume that no border claimant for refugee status is genuine. The fact that many border claimants have been granted refugee status contradicts this assumption. Furthermore, the Senator fails to acknowledge that there may be valid reasons for refugees to flee their countries of origin without first gaining permission to enter the potential country of

6 Dissenting Report by Senator Christobel Chamarette, in Joint Standing Committee on Migration, ibid, p 201 at 212–14.

7 189 UNTS 150, done 28 July 1951 (entered into force 21 April 1954).

8 606 UNTS 267, done 1 January 1967 (entered into force 4 October 1967).

9 For a detailed analysis of whether the obligation of *non-refoulement* has generated a norm of customary international law, see Stenberg G, *Non-Expulsion and Non-Refoulement* (1989), p 275.

10 Article 33 of the 1951 Convention.

11 Article 1A(2) of the 1951 Convention.

12 McKiernan, "The Political Imperative: Defend, Deter, Detain" in Crock (ed), n 2 above, p 3 at 5–7.

asylum. Obviously the 1951 Convention's requirement that a refugee be outside his or her country of origin precludes applications for entry on the basis of refugee status prior to departure. But application for entry on other bases may also be precluded by the forced, spontaneous nature of the refugee's flight. By definition, refugees are denied fundamental human rights such as the right to leave any country including one's own that is included in the Universal Declaration on Human Rights[13] and the International Covenant on Civil and Political Rights (ICCPR).[14] Any application by a potential refugee for permission to enter another country may be refused and result in further harassment from the home-country authorities. Alternatively, the imminent threat of other forms of persecution may make departure without completing immigration formalities imperative. In addition, the source countries of the world's refugee flows are often in turmoil and official government functions such as issuing passports are either in disarray or subject to corruption. In the case of asylum seekers leaving Cambodia in 1989, Australia has to acknowledge that applying for an Australian visa was not an option due to the absence of an Australian consulate. Such problems with normal immigration formalities are recognised in the international instruments relating to the protection of refugees. Article 28 of the 1951 Convention provides for documentation to be issued to refugees who have none. In addition, article 31 of the Convention provides that refugees entering a country illegally shall not be subjected to penalties on account of their illegal entry and that only necessary restrictions to their freedom of movement are permitted. Article 31, and Conclusion 44 of the Executive Committee of UNHCR, which provides that detention of refugees and asylum seekers should not be the norm, and the prohibition on arbitrary detention contained in article 9 of the ICCPR, provide the basis for the international legal arguments against Australia's detention policy. These arguments are outlined in Chapter 8 by Nick Poynder, Director of Sydney's Refugee Advice and Casework Service (RACS), who has taken the initiative of assisting a Cambodian asylum seeker to make a communication to the Human Rights Committee alleging his treatment in Australia violates the ICCPR.

As well as ignoring the many good reasons which may lie behind the failure of asylum seekers to comply with Australia's immigration procedures, Senator McKiernan pays no attention to the devastating human impact of detention dealt with in part three of *Protection or Punishment*. Senator McKiernan's myopia on this issue may flow from the view that immigration detention is merely protective of a country's borders rather than a punishment imposed on the detainee, although his enthusiasm for the deterrence value of immigration detention belies this explanation. In any event, the ostensible protective function of immigration detention should not blind us to the effects on detainees. The right to liberty may not be absolute, but it is fundamental as it strikes at the heart of what it means to be human. Human beings are social beings. That is why seclusion from the broader community is imposed as punishment of the criminal, as well as for protection of the community. Thus article 9(3) of the

13 Adopted and proclaimed by GA Res 217A(III) of 10 December 1948.
14 999 UNTS 171, done 16 December 1966 (entered into force 23 March 1976).

ICCPR provides that detention prior to trial shall not be the general rule. The crux of the debate in *Protection or Punishment* is whether, when, and for how long, persons who are the subjects of immigration proceedings (which are not criminal trials) may be deprived of their liberty in order that Australia's borders remain secure. How does Australia ensure that only those persons who meet the Convention definition of refugee, or a more generous national definition of persons deserving of humanitarian protection, are given permission to enter the Australian community while those who do not meet such definitions are excluded? How does Australia ensure that those meeting these definitions are not subjected to a further assault on their human dignity through prolonged detention while the Australian determination process is underway? In determining whether detention of asylum seekers is an appropriate policy, what consideration should be given to the humanity of those asylum seekers who do not, at the end of the determination process, satisfy the established criteria?

It seems many in Australia believe that unsuccessful asylum seekers are deliberately flouting Australian immigration laws and deserve detention. Justice Marcus Einfeld (Chapter 6) points out that people who embark on desperate and dangerous journeys to Australia may be worthy of our compassion regardless of whether they meet our immigration criteria. Justice Einfeld is sceptical of the term "economic refugees" so often applied to those asylum seekers who do not meet the legal definition of a refugee. He alludes to the fact that the developing countries of Africa have adopted a definition of refugee which goes beyond the 1951 Convention and includes people fleeing from generalised violence and civil wars.[15] Australia does offer asylum seekers a class of humanitarian status that is supposedly broader than the Convention definition. In real terms, however, the humanitarian criteria have been very narrow, requiring individualised threats to personal security,[16] and they have been made available only selectively. The question of humanitarian status has been determined by the same distinction between authorised and unauthorised arrivals (outlined in Chapter 3) that requires the mandatory detention of boat people while the 80,000 people who have overstayed their visas[17] have generally not been detained. Until the decision in the *Lek* case,[18] briefly analysed by Crock and Griffith in the postscript, it was assumed that border claimants for refugee status were unable to apply for stay on humanitarian grounds because of the legal fiction that they had not entered the country. In *Lek*, Justice Wilcox found that a group of Cambodians were eligible to apply for stay on humanitarian grounds, but the Minister for Immigration subsequently refused to even consider this possibility. Australia should eliminate the discrimination involved in granting humanitarian status. Australia should also acknowledge that where desperate

15 Article 1, Convention on Refugee Problems in Africa, done 10 September 1969, UNTS No 14, 691.

16 See Media release 15/91, Department of Immigration, Local Government and Ethnic Affairs.

17 In Australia, 81,162 people had overstayed their visas as at 31 December 1992. Joint Standing Committee on Migration, n 4 above, p 29.

18 *Lek Kim Sroun v Minister for Immigration, Local Government and Ethnic Affairs*, unreported, Wilcox J, Federal Court, 8 October 1993.

departure journeys are embarked upon, asylum seekers are not simply trying to flout Australia's immigration laws. Rather, the asylum seekers may have a genuinely felt need to leave an intolerable home situation and may be unaware that they do not meet internationally and nationally accepted definitions of refugee or humanitarian status. Thus, even those asylum seekers who prove unsuccessful in their applications for entry to Australia do not deserve prolonged detention.

It might be said in defence of governments such as the Australian Government that takes a hard line on "border" claimants, that neither the 1951 Convention nor the Protocol (which simply lifts temporal and geographic restrictions on the application of the Convention) were designed to deal with border claimants. The Convention, drawn up in the aftermath of World War II, was designed to deal with refugees who had already secured entry, lawful or unlawful, to the territory of another State. The situation of border claimants is not expressly dealt with in the Convention and the *travaux préparatoires* are somewhat ambiguous on this issue as the framers of the Convention were anxious to protect sovereign control over immigration. This ambiguity is one reason for the United States Supreme Court decision that *non-refoulement* has only territorial application and does not extend to the High Seas.[19] The decision has been condemned by respected international lawyers.[20] There is also no provision in the Convention or Protocol dealing with determination procedures. Therefore, it is commonly said that national refugee status determination procedures are merely declaratory of refugee status. In other words, a person is a refugee and entitled to all the protections contained in the Convention, as soon as he or she meets the Convention definition. Governments are generally willing to accept that asylum seekers should be presumptively treated as refugees in so far as the protection from return is concerned since compliance with the fundamental obligation of *non-refoulement* is impossible unless the asylum seeker is allowed to remain in the country for the purposes of refugee status determination procedures. (The push-backs of boatloads of asylum seekers by some South-East Asian countries and the interdiction of Haitians without hearings by the United States, are notable exceptions to this general acceptance.) However, governments seem most unwilling to grant all the protections which refugee status entails without first carrying out national determination procedures. Despite the adoption of Conclusion 44 by the Executive Committee of UNHCR, which can be viewed as a clarification and interpretation of the 1951 Convention, some States have introduced policies of detaining asylum seekers for the duration of determination procedures because they fear asylum seekers may abscond and that "generous" treatment of asylum seekers will attract yet more asylum seekers.

Yet these fears must be weighed against the detrimental effects to detainees. In the case of the Cambodians who inspired the legislation for mandatory

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19 *Sale v Haitian Centers Council, Inc,* 113 S.Ct. 2549 (1993).

20 See for example, the comments of Louis Henkin, then President of the American Society of International Law, in the (September-October 1993) *Newsletter of the American Society of International Law* 1 at 7.

detention, the initial determination of refugee status took over a year. Internal review of the refusal of refugee status and judicial scrutiny followed. The asylum seekers were in detention for the duration of these procedures. During that time, as Andrew Biro writes in Chapter 12, the morale of the asylum seekers sagged. While the present reviewer hopes that the conditions of detention in Australia are somewhat better than the appalling conditions prevailing elsewhere,[21] detention itself is the key issue not merely the conditions of detention. Nick Poynder explains this is why arguments concerning conditions of detention have deliberately been omitted from the communication to the Human Rights Committee.[22] As documented in Chapter 10 by Becker and Silove, experts in psychology and psychiatry, detention may compound the trauma experienced in the asylum seekers' countries of origin or on the journey to the country of asylum. The anecdotes of suicidal behaviour amongst immigration detainees in Australia described in Chapter 11 by Kessels and Eftimiou, both immigration lawyers, provide chilling and convincing evidence that alternatives to detention must be considered.

Apart from the detrimental effects to the health of the asylum seekers, many of the contributors to *Protection or Punishment* demonstrate that the deterrence function of detention may be illusory and is unjust to those detained. Even the immigration department acknowledges in the submission to the Joint Standing Committee (extracted in Chapter 4) that "[i]t is very difficult to judge the effectiveness of detention as a deterrence measure *per se*".[23] In fact, despite the various restrictive policies adopted by many countries such as detention, carrier sanctions and interdiction, the number of asylum seekers around the world seems to be steadily increasing.[24] Desperate people will leave their countries no matter what barriers are put in their paths. Senator Chamarette (Chapter 7) points out that although detention is presumably aimed at deterring future asylum seekers from seeking entry, the brunt of the policy falls on those asylum seekers who have already reached Australian shores. This is unjust and may result in the repugnant situation of genuine asylum seekers dropping their claims and returning home to an unsafe future. I would add that since deterrence measures cannot discriminate between genuine refugees and the so-called "economic refugees", which governments are ostensibly concerned about, deterrence is simply an inhumane attempt to keep the persecuted at home. Senator Chamarette advocates deportation for those who do not meet Australia's immigration criteria as a fairer form of deterrence of future asylum seekers who do not meet Australia's criteria. It should be noted that in the United States,

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21 The reviewer has witnessed such conditions first-hand while working with Vietnamese asylum seekers in Hong Kong.

22 Poynder, "Human Rights Law and the Detention of Asylum Seekers" in Crock (ed), n 2 above, p 60 at 63.

23 Department of Immigration and Ethnic Affairs, "Rationales for Detention" in Crock (ed), n 2 above, p 21 at 22.

24 Gil Loescher writes that "[d]espite deterrent measures, the number of asylum applications in the West rose from 95,000 in 1983 to about 548,000 in 1990". Loescher, "Refugees and the Asylum Dilemma in the West" (1992) 4 *Journal of Policy History* 1 at 3.

Senator Chamarette's argument is often met by the criticism that the process of judicial appeal means that asylum seekers, who are not *bona fide,* may enjoy the benefits of living in the United States for a long time before they are deported. As documented by Mary Crock in Chapter 5, judicial scrutiny has created much resentment on the part of Australian policy-makers, which helps to explain the move from a policy that "favoured detention in practice, to one that forbad release in virtually all circumstances".[25] While the argument that bogus asylum seekers seek the temporary benefit of living in the country of asylum for the duration of determination procedures may have some validity in a country with land borders, it is ridiculous to argue that boat people risk their lives to travel to Australia for some temporary and uncertain benefit while a bogus asylum claim is heard.

In the face of the arguments against the effectiveness and justice of detention as deterrence and the evidence of detrimental effects on asylum seekers, the all-important question of alternatives arises. Parts IV and V of *Protection or Punishment* provide perspectives on this question. Part IV deals with international practice. In Chapter 13, Arthur Helton, former Director of the Refugee Project for the US based Lawyers Committee for Human Rights, analyses the US pilot parole programme, which has selectively permitted the release of asylum seekers to community groups with substantial success in terms of appearance at immigration hearings. Helton has been one of the most active proponents of the view that detention of asylum seekers amounts to arbitrary detention. He was involved in the litigation concerning detained Cuban asylum seekers in the United States and recently coordinated the submission of a communication to the UN Working Group on Arbitrary Detention on behalf of detained Vietnamese asylum seekers in Hong Kong.[26] Many of the contributors to *Protection or Punishment* acknowledge Helton's work. In Chapter 14, Margaret Piper, Executive Director of the Refugee Council of Australia, undertakes a survey of detention practices in other countries. Her survey indicates that Australia's policy is one of the harshest and most inflexible in the Western World. This alone should give pause. It should be noted, however, that many of the countries surveyed use other methods to restrict the entry of asylum seekers. The members of the European Community are cooperating to ensure that asylum seekers who enter member States unlawfully will have their claims determined by the first country to which they gain access. European Community members are also moving to implement uniform visa regimes and carrier sanctions. In addition, some of the countries surveyed conduct summary hearings of asylum seekers' claims. These practices have been much criticised by human rights advocates on the bases that they seek to limit the ability of the persecuted to leave their home countries; unless uniform and fair procedures for determination of refugee status are adopted there is potential for return of refugees without redress; and the summary hearing does not acknowledge the

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25 Crock, "A Legal Perspective on the Evolution of Mandatory Detention" in Crock (ed), n 2 above, p 25 at 32.

26 Copy on file with author. The author assisted in the preparation of the communication.

natural fear of authorities which renders many asylum seekers unfit subjects for summary procedures.[27]

Part V continues with different perspectives on the alternatives to detention. These perspectives are a further extract from the Department of Immigration's submission to the Joint Standing Committee (Chapter 15); an examination of the potential for a parole system by Catherine De Mayo, a journalist who has consistently focussed critical attention on the Australian Government's treatment of asylum seekers, and Philippa McIntosh, formerly of Sydney's RACS (Chapter 16); an account of the support given by the St Vincent De Paul Society to asylum seekers (Chapter 17); and an examination by Marion Le of the limitations of a parole system in which only non-government organisations participate (Chapter 18). De Mayo and McIntosh, like Senator Chamarette, draw attention to the exorbitant economic cost of detention to the Australian community. The message that emerges strongly from this part of the book is that the Government is not necessarily upholding its responsibilities to the Australian community by insisting on the expensive option of detention and that it should not "pass the buck" by paroling out asylum seekers to community groups without government support.

Taken in its entirety, *Protection or Punishment* demonstrates that policy decisions on the issue of detention of asylum seekers in Australia are currently not made on the basis of a calm appraisal of all sides of the issue. One theme that carries through from part one of the book is that policy has been dominated by the desire of policy-makers to keep the issue away from lawyers and courts. In Chapter 5 and the postscript, attention is drawn to the battle between courts and parliament, particularly in relation to the legislature's most recent attempts to cut down judicial scrutiny of asylum seekers' claims in the Migration Reform Act 1992 (Cth). Justice Einfeld notes in Chapter 6 that lawyers and the appeals process have frequently been blamed for the endemic delay in Australia's refugee status determination procedures. This is despite the fact that many of the lawyers working for the Cambodian asylum seekers have done so on a voluntary basis and obviously not for personal gain. In Chapter 2, Margo Kingston documents the fears of public opinion that may drive politicians' unwillingness to adopt a more compassionate policy in relation to asylum seekers. It is perhaps not surprising then that the Migration Act 1958 (Cth) remains a piece of machinery legislation that attempts to retain almost unlimited power in the hands of immigration officials. But the lack of public support for asylum seekers makes it imperative that there is judicial scrutiny in order to protect asylum seekers who do not enjoy the benefits of citizenship in Australia or, in practical terms, their countries of origin.

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27 For some of the criticisms of European Community member States' policies, see Melander, "'Country of First Asylum' Issues: A European Perspective" in Coll and Bhaba (eds), *Asylum Practice in Europe and North America: A Comparative Analysis* (1992), p 101, and Gamrasni-Ahlen, "Recent European Developments Regarding Refugees: The Dublin Convention and the French Perspective" in Coll and Bhaba (eds), ibid, p 109.

It would seem from the restrictive policies adopted in other countries that the Australian Government is not alone in its efforts to keep tight control over policy regarding asylum seekers. All States are keen to guard the right to deal with matters that impinge on immigration as they see fit. It is apparent from the contribution in Chapter 9 by George Lombard of UNHCR, that UNHCR is often prevented from challenging States on their restrictive responses to asylum seekers because of tensions between the humanitarian concerns of some officials on the one hand and the more conservative pronouncements of UNHCR's Executive Committee, comprised of governmental officials, on the other. Thus it is crucial that something akin to judicial scrutiny takes place on the international stage, placing external pressure on governments to adopt humane policies regarding asylum seekers. Hopefully, the communication to the Human Rights Committee on behalf of the Cambodians in Australia will result in such scrutiny, with a proper weighting of the human dignity of asylum seekers against governmental assertions of the need to control borders.

Whatever the outcome of the communication to the Human Rights Committee, it is questionable whether immigration detention or any other aspect of immigration, being such an important form of Australian self-definition, should be excluded from open, intelligent debate because of the factors described by Kingston:

> There appears to be a shared fear by pro and anti-detention forces that there is a dark underbelly of Australian opinion, fed by racism, resentment at outsiders demanding resources in desperately hard times, and fear of "queue jumpers" subverting our laws which, if prodded, could explode into an ugly, perhaps uncontrollable, force in Australian politics.[28]

Protection or Punishment certainly lifts the prospects of informed debate.

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Butterworths Guide to the European Communities

Edited by Dr Rebecca Wallace and Mr William Stewart
(Butterworths, London, 2nd ed (1992), xxxv and 369 pp)

This second edition has been prepared with the assistance of two legal academics. Dr R Wallace (consultant editor) and Mr W Stewart (technical editor) are both at Strathclyde University. However, the book under review aims at a wide audience of legal practitioners, business people and students. Its stated goals are twofold. The book seeks to present the fundamental principles of European Community law in a concise and easy-to-follow format. But it also wants to be a "comprehensive pocket reference source"—so reads the publisher's note—of legislative provisions and judicial decisions at Community level. This dual objective has largely been achieved.

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28 Kingston, "Politics and Public Opinion" in Crock (ed), n 2 above, p 8 at 9.

The book is divided into four parts. The first part is quite short (11 pages) and gives some introductory information about the Community and its legal order. The orientation of this first part is English (understandably) and at times even Irish (surprisingly). In particular "Application of Community Law" (Chapter 4), refers to the incorporation of Community law into the national law of the United Kingdom upon ratification of the Treaty of Accession and the adoption of the European Communities Act 1972. On the other hand, paragraph 4.3 discusses the enforcement of European Community law through actions brought against Ireland. Needless to say, the enforcement of Community law takes place by application of the same rules for all member States!

The second part is slightly longer. It gives a good overview of the main Community institutions. This reviewer is not entirely happy with the balance that has been struck between the need to avoid unnecessary specificity as well as unhelpful generalities. For instance "European Parliament" (Chapter 7) discusses the administrative apparatus by reference to the Bureau of the Parliament which is said to consist of a President, 12 Vice Presidents and 5 questers elected for a term of two and a half years. Given the traditionally low status of the Parliament in the institutional structure of the Community, this concern for detail is questionable. On the other hand, the Single European Act 1986 has made important inroads towards raising the profile of the Parliament. Yet, the so-called cooperation procedure adopted to that effect is mentioned without any further discussion whatsoever (para 7.3).

Part three is the largest of the four parts. It lists 18 Community policies, ranging from free movement of goods to consumer protection. Not covered are the "new" areas of the Maastricht Treaty on European Union: a common foreign and security policy, and cooperation in the fields of justice and home affairs. It was a laudable initiative of the publisher to make available the texts of not only the EEC Treaty (as amended by the Single European Act 1986) but also the European Union Treaty. In fact the Appendices take up two-thirds of the total book. Part four rather oddly follows after the Appendices. Part four, entitled "Fact File" contains addresses of Community institutions and interest groups, official Community publications, and a glossary.

It is clear that this is not your ordinary textbook on EC law. As its title suggests, the book under review guides the reader through an increasingly complex body of law. The main value of the book lies in the fact that it informs the reader as to where to find the important provisions and decisions. The sheer volume of EC law has been produced over the past four decades makes this publication timely. While not everyone may like the telegram style of writing, this undoubtedly was the price to be paid in order to keep within the bounds of a pocket-size publication.

The biggest asset of a book like this must lie in its user-friendliness. A definite plus in this regard is the listing of cases of the European Court of Justice both by reference to the parties and by their number. It is somewhat irritating, though, to find that some of the more detailed aspects of the book are wanting. For instance, paragraph 24.4 refers to paragraph 28.4 for a discussion of current proposals as regards European company law. Presumably, the reference instead

should have been to paragraphs 24.6 and 24.7. In any event, no paragraph 28.4 exists. Similarly, the entry for Community law—Directives in the Index refers to a non-existent paragraph 3.15 rather than 3.11. Furthermore, "Social Policy" (Chapter 22) incorrectly states that articles 188a and 188b of the Single European Act 1986 deal with health and safety issues and the relationship between management and labour, respectively (see, p 79 at para 22.2). This is plainly wrong. The correct provisions are articles 118a and 118b of the EEC Treaty, as amended by articles 21 and 22 of the Single European Act 1986.

None of the above-noted errors are major ones. But they point at improper haste in putting together the book, and they ought to be remedied in a future edition. A third edition may also wish to tackle the lack of consistency in the layout of the book. It has already been mentioned that the Table of Contents lists Part four before the Appendices, whereas the actual sequence of their presentation is in the reverse. Also, case citations should avoid referring to parties and number some of the time, and to the parties only, at other times (for example, para 21.3). Finally, it is not entirely clear why paragraph 18.3 is entitled "General Provision", whereas the heading used in other chapters indicates it should read "Secondary Legislation", if only for the sake of consistency.

To finish on a positive note, it is noteworthy that included with the book under review is a set of distance teaching diskettes. The program runs on IBM or IBM compatible systems and two sizes of discs (one 3.5" and two 5.25" discs) are conveniently provided.

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Manual of European Environmental Law

By Alexandre Kiss and Dinah Shelton
(Cambridge: Grotius Publications, Ltd, in association with The Standing Conference of Rectors, Presidents and Vice-Chancellors of the European Universities, 1993, xxxvi and 525 pp)

International law is not a "course"; it is a curriculum.

(L Henkin, R Pugh, O Schachter, H Smit)[1]

The General Assembly...request[s] the Governments of Member States...to extend the teaching of international law *in all its phases*, including its development and codification, in the universities and higher educational institutions of each country...

(United Nations General Assembly)[2]

1 Henkin L, Pugh R, Schachter O, and Smit H, *International Law Cases and Materials,* 3rd ed (1993), p xviii.

2 GA Res 176 (II) (21 November 1947) (emphasis supplied), quoted in Lachs M, *The Teacher in International Law,* 2nd rev ed (1987), p 170. In his role as Professor of International Law, Lachs, the late President of the ICJ, also refers to a

Up until quite recently environmental law was not a subject for which the curriculum of international law had much time.[3] Aspects of environmental law have been canvassed in subjects involving common heritage[4] and transborder resources and disputes,[5] but for the most part environmental law—as a subject in its own right—has remained on the periphery of international legal teaching and scholarship since the 1972 Stockholm Conference first focused international attention on the importance to the world order of the environment.[6] Recently, however, international environmental law[7] has come into its own in the academy. In the wake of the 1992 United Nations Conference on Environment and Development (UNCED), more and more law schools are accepting the pedagogical challenge[8] of international environmental law and are dedicating

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number of subsequent General Assembly resolutions calling on States to promote the teaching of international law.

3 See Sands, "Environment, Community and International Law" (1989) 30 *Harvard International Law Journal* 393 at 394, n 3. Sands notes that as late as 1989, the leading treatises and textbooks on international law "fail in their index to make any mention of the words 'environment' or 'pollution'", Ibid. As recently as 1984, James Crawford's study on the teaching of international law revealed that only one Australian University offered a course that included consideration of international environmental law. The course offered by the Department of Legal Studies at La Trobe University examined comparative and international environmental law and policy. See Crawford, "Teaching and Research in International Law in Australia" (1987) 10 *Aust YBIL* 176 at 197, Appendix 1.

4 For example, subjects involving the high seas, Antarctica and outer space often examine related environmental issues.

5 Subjects examining the topics of transboundary inland waters, territorial seas, transfrontier pollution, and State responsibility have often included environmental considerations.

6 The 1972 Stockholm Conference (the United Nations Conference on the Human Environment), is generally regarded as the event that firmly placed environmental law on the international agenda. See eg Hassan, "Toward an International Covenant on the Environment and Development" (1993) 87 *American Society of International Law Proceedings* 513 at 514. See generally, *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1973), reprinted in (1972) 11 ILM 1416. It is interesting to note, however, that in the spring of 1968, the Council of Europe adopted the first general environmental texts promulgated by an international organisation: the Declaration on Air Pollution Control and the European Water Charter. See Kiss A and Shelton D, *Manual of European Environmental Law* (1993), p xx (Chronological Table of International and EC Documents) [hereafter "*Manual*"].

7 The use of the term "international environmental law" has come under criticism. Critics argue that the term is a misnomer because the field does not comprise a distinct "body of law with its own exclusive sources and methods of lawmaking deriving from principles peculiar or exclusive to environmental concerns". See Birnie PW and Boyle AW, *International Law and the Environment* (1992), p 1. The term, however, is commonly used to refer to the body of international law pertaining to environmental issues, and while there is some merit to the criticism of the term, it is used in this review for ease of reference in the same way that "international human rights law" or the "law of the sea" are used.

8 Agenda 21, one of the so-called "soft" law documents produced at UNCED, calls on States to promote environmental awareness through, *inter alia*, education. Agenda 21, Chapter 36, UN Doc A/CONF.151/PC/100/Add.36, reprinted in final

entire courses to the subject.[9] Moreover, the literature covering the field continues to grow exponentially,[10] and academic and professional conferences considering international environmental law and related economic, political and social issues abound.[11]

In early 1994, in the atmosphere of heightened interest in environmental law as a subject in the curriculum of international law, a discussion about course books and materials appropriate for teaching international environmental law and policy took place in "cyberspace" via electronic mail on the ENVLAWPROF list—the electronic global conference that is dedicated to environmental law professors and lecturers.[12] Having just read the Kiss and Shelton, *Manual of European Environmental Law* for this review, I did not

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form in Johnson SP (ed), *The Earth Summit: The United Nations Conference on Environment and Development* (1993), pp 473–80. Chapter 36 refers specifically to the use of tertiary education and the promotion environmental awareness. Ibid, Chapter 36, §§36.5(i) and (j).

9 Indeed, four law schools of which the author is aware (the University of Washington in Seattle, Georgetown University in Washington DC, Pace University in New York, and the University of Calgary) have developed or are in the process of developing entire LL.M. programs focused exclusively on international environmental law. Many others (including the University of Melbourne, the University of Adelaide, the University of Wollongong, and the University of Dundee) offer graduate law degrees or diplomas in international law or natural resources, in which international environmental law figures prominently.

10 See generally the author's forthcoming bibliography Anton DK, *International Environmental Law: A Bibliography and Primer* (forthcoming, 1994). It is interesting to note also the recent appearance of several journals dedicated specifically to international environmental law. See *Colorado Journal of International Environmental Law and Policy* (Colorado University School of Law); *Environmental Law and Policy* (IOS Press for the International Council of Environmental Law) (the original international environmental law journal); *Georgetown International Environmental Law* (Georgetown University School of Law); *International Environment Reporter* (Bureau of National Affairs); *Review of European Community and International Environmental Law* (MA: Blackwell Publishers for the Foundation of International Environmental Law and Development).

11 Indeed, the author is aware of two workshops that have been devoted entirely to the teaching of international environmental law. One was held at the Institute of Comparative Law at McGill University in October 1992. The other was held at the 88th Annual Meeting of the American Society of International Law in Washington, DC, in April 1994. Additionally, a workshop on teaching environmental law, sponsored by the Australian Centre for Environmental Law in Adelaide in May 1994, devoted a significant amount of time to international environmental law.

12 Teachers of environmental law interested in subscribing to the ENVLAWPROFS list can do so by sending a message via email to the list mailserver. The message should be addressed to: mailserv@oregon.uoregon.edu. The message should read: subscribe envlawprofs your name (see example that follows). So, for example, when the reviewer subscribed he sent the following message to the mailserver: subscribe envlawprofs Don Anton. It should be noted that when subscribing, the subject heading for the message should be left blank. Once added to the list, messages can be sent internationally to all list members by addressing them to: envlawprofs@oregon.uoregon.edu.

hesitate to add it to the discussion. Professors Kiss and Shelton, both well known figures in international environmental legal circles,[13] state that their purpose in writing and compiling this *Manual* "is to provide teaching materials and a reference work for University and professional courses in environmental law" (p xviii). They succeed admirably in almost all respects.

As a teaching text, one is reminded of Georg Schwarzenberger's classic, *Manual of International Law*[14] when examining the structure and organisation of the Kiss/Shelton *Manual*. Both are student-oriented, multidisciplinary in scope, and contain problems and questions drawn from contemporary legal issues that are intended to provoke classroom discussion as well as stimulate outside research. Both also contain good bibliographies that relate to each subject area encountered. Kiss and Shelton, however, go further than Schwarzenberger. The Kiss/Shelton *Manual* includes case studies to illustrate the practical application of abstract and often ambiguous norms. It also includes selected primary documents for study and teaching purposes.[15] All these features, as Schwarzenberger points out, enable students to first develop and then deepen and widen their knowledge. They also provide excellent teaching materials for use in the classroom.

The Kiss/Shelton *Manual* was developed in response to the "Angers Appeal", which itself was a product of a 1991 international colloquium on environmental law held at the University of Angers in France.[16] The Appeal recommended "that the study of environmental law should be systematically incorporated as a compulsory subject in different university curricula..."(p xv). It is hard to argue against such a recommendation when confronted with the myriad challenges raised by environmental degradation and "sustainable

13 Professor Kiss is considered by many to be one of the most eminent scholars in the field of international environmental law. He has published many influential works, including most recently *Droit International de l'Environnement* (1989). Professor Shelton, in addition to her expertise in environmental law, has also done considerable work in the field of human rights.

14 Compare the progression of the Schwarzenberger Manual from the first edition Schwarzenberger G, *A Manual of International Law* (1947) to the last edition Schwarzenberger G and Brown ED, *A Manual of International Law*, 6th ed (1976).

15 These documents primarily include treaties, European Council Directives and Regulations, OECD Decisions, various declarations and charters, and municipal legislation and cases from European States. Additionally, the *Manual* contains a Chronological Table of International and EC Documents, as well as Table of National Law and Cases.

16 The case studies included in the *Manual* are drawn from papers presented at the Angers colloquium. The authors of the case studies include: Ludwig Krämer, Tullio Scovazzi, Cyril de Klemm, Michel Prieur, Said Mahmoudi, Stefano Burchi, Mary Sancy, Harald Rossmann, Zdenek Madar, Maria Teresa Mosquete Pol, Owen Lomas, Meinhard Schröder, CP Naish, Jose Juste, ME Williams, Marianne Sillen, Tamás Prajczer, Jean Gottesmann, AN van der Zande, AR Wolters, Antti Haapanen, Alberto Lucarelli, H Hacourt, M Forster, FAM de Haan, SEATM van der Zee.

development"[17] that seem to grow ever more complex. These challenges make it essential that environmental law is studied at all levels of promulgation and application—local, municipal, regional and international.

While the title of the Kiss/Shelton *Manual* indicates that it is geared to specific regional law (European), it nevertheless contains a substantial amount of material that is applicable in broader contexts—across regions and internationally. With the present dearth of texts devoted to the teaching and study of regional[18] and/or international environmental law, the Kiss/Shelton *Manual* will provide a much needed and extremely valuable tool for the pedagogical task of transmitting to students the complex working and interplay of the dynamics of all levels of environmental law (international, regional, municipal and local). There is no doubt that the *Manual* will be received enthusiastically by international law (and environmental law) teachers and students alike.

The *Manual* is divided into three primary parts:

(1) an overview of the development and status of environmental law generally and within the European context

(2) an examination of "sectoral protection" and

(3) a discussion of "transsectoral issues".

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17 The Brundtland Commission postulated the now famous definition of sustainable development as the use of resources in a way that maintains and/or enhances a resource base and which meets the needs of the present generation without compromising the ability of future generations to meet their needs from the same resource base. See UN Doc A/42/427 (4 August 1987). It is often difficult to postulate how all these goals can be reconciled and met in concrete cases. Nevertheless, the concept was brought centre stage and placed prominently on the international agenda by the Rio Declaration on Environment and Development. See UN Doc A/CONF.151/5/Rev.1 (14 June 1992), reprinted in, (1992) 31 ILM 874. See Sand, "UNCED and the Development of International Environmental Law" (1993) 3 *Yearbook of International Environmental Law* 3 at 17. Indeed, some have argued that the doctrine of sustainable development threatens to undermine environmental law as an autonomous and distinct discipline through the incorporation of strands of the law of international development and international economic law. It is feared that this incorporation will leave environmental law subordinated to economic rationality. See Pallemaerts, "International Environmental Law from Stockholm to Rio: Back to the Future?" (1992) 1 *Review of European Community and International Environmental Law* 254.

18 Indeed, in the context of European regional law, one just need look at several of the recent casebooks and texts on European Community Law to see how environmental law is neglected. None have more that about 10 pages that touch the subject. See eg Weatherill S and Beaumont P, *European Community Law* (1993); Wyatt D and Dashwood A, *European Community Law*, 3rd ed (1993); Lasok D and Bridge JW, *Law and Institutions of the European Communities*, 5th ed (1991); Slynn G, *Introducing a European Legal Order* (1992); Snyder F, *New Directions in European Community Law* (1990).

The first part of the *Manual* defines the scope of its coverage,[19] and examines the milieu within which environmental law operates.[20] It looks at the history of European environmental law and the legal framework within which it has been constructed—national, regional[21] and international. It then goes on to explore "fundamental concepts",[22] "techniques of environmental law",[23] and national, regional and international institutions involved in European environmental protection. After laying these foundations, the Kiss/Shelton *Manual* turns its attention to how they apply to specific sectors of the environment.

The second part of the *Manual,* covering "sectoral protection",[24] constitutes the major portion of the text. Kiss and Shelton recognise, of course, the problems associated with cross-media pollution and the transferability of pollution between sectors, (pp 7–8) but nevertheless have organised part two of the *Manual* according to the rules relating to specific sectors; presumably because the regulation of concrete environmental problems still remains largely within the sectoral framework. The second part of the *Manual* brings together the necessary headings of an environmental legal and policy study at any level—national, regional and international. It examines and analyses measures to protect and enhance biological diversity, including habitats and ecosystems, as well as specimens and species of flora and fauna (Chapter V). It also looks at mechanisms designed to limit soil erosion and contamination (Chapter VI). It considers the problem of protecting freshwaters, both internal and transboundary, and then examines the multitude of issues connected with the

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19 The study of "European environmental law" poses initial definitional problems and Kiss and Shelton set out the multiple meanings of basic terms like "European", "environment" "pollution" and "law".

20 Kiss and Shelton highlight the interdisciplinary nature of environmental law and the flexibility and precautionary essence required of environmental legal norms because of the dynamic nature of the environment and the scientific uncertainty that often accompanies environmental policy choices.

21 For those interested specifically in European Community environmental law, see Johnson SP and Corcelle G, *The Environmental Policy of the European Communities* (1989); Krämer L, *EEC Treaty and Environmental Protection* (1991); Vaughn D (ed), *Current EC Legal Developments in Environment and Planning Law* (1990).

22 The "fundamental concepts" that Kiss and Shelton examine include various aims of environmental law and key principles of environmental protection. They also review the debate on the controversial right to an environment of a certain quality within Europe. For an informative outline of the issue with repect to the European Community specifically, see Shelden BS, *Environmental Protection in the Jurisprudence of the European Court of Justice: Will a Fundamental Right be Recognized?,* paper presented at a San Francisco Regional Meeting of the American Society of International Law, 18 March 1994 (copy on file with the reviewer).

23 The techniques that Kiss and Shelton consider include various legal mechanisms to avoid or reduce the risk of environmental harm, such as licensing and environmental impact assessment, methods for implementing environmental laws, enforcement and remedial measures and specific economic and market devices.

24 By "sectoral protection" Kiss and Shelton mean generally the specific regulation of the "broad sectors of the environment—oceans, inland waters, air, soil, and wildlife..." Kiss and Shelton, *International Environmental Law* (1991), p 155.

marine environment (Chapter VII and VIII). Finally, it reviews problems and measures associated with atmospheric pollution, including acid rain, ozone layer depletion and climate change (Chapter 9).

The third part of the *Manual* addresses "transsectoral issues". It recognises that the general trend in environmental law is towards "integrated" approaches to environmental protection.[25] Indeed, it devotes an entire chapter to the concept of integrated environmental protection (Chapter XI). It also looks at the regulation of sources of environmental harm, including hazardous substances, processes and activities; nuclear radiation; wastes and by-products and noise (Chapter X). Finally, it discusses and evaluates the role of the public and non-governmental organisations in environmental protection (Chapter XII).

The documents and materials included and referred to in the text constitute a wealth of information for the student or researcher. For example, any one studying or conducting research on atmospheric pollution will find a plethora of material and references touching on all the important aspects of the problem—municipal, regional, international.

The authors have recognised the difficulty and danger in compiling a teaching manual in a field where the enormous scope of the subject and rapid developments make it impossible to canvass every issue and include the most up-to-the-minute materials.[26] Accordingly, Kiss and Shelton warn those who are considering using the materials for class that it is likely some of the materials included in the *Manual* have been amended or superseded, so that supplementary materials will need to be gathered. This phenomenon, however, is common to general international law courses or any other subject in the curriculum of international law.[27]

If there is any criticism this reviewer has of the *Manual*, it is that Kiss and Shelton fail to put their subject (European environmental law) in political and social context, despite the fact that much of the text has an interdisciplinary bent. They fail to point out, for example, the differences that exist between western and eastern European States in the importance they attach to various environmental problems, or the microcosm that exists within Europe of the debates that raged at UNCED between "developing" and "developed" States in connection with economic and environmental priorities and, of course, financing.[28] The important implications that these problems raise are simply not

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25 For an in-depth assessment of this trend from various viewpoints, see the "Symposium on Integrated Pollution Control" (1992) 22 *Environmental Law* at i–348.

26 Anticipating full European union, for example, Kiss and Shelton substitute the term European Community (EC) throughout the *Manual* to refer to the present Communities. Kiss and Shelton, n 6 above, at xvii.

27 See eg the comments by Edwards and Chen on the problem of legal developments out-pacing teaching materials in "Teaching International Relations and International Organizations in International Law Courses: Constructing the State-of-the-Art International Law Course" (1993) 88 *American Society of International Law Proceedings* 398 at 417–18.

28 For a good treatment of these issues see Spear, "The Environment Agenda" in Wyn Rees G (ed), *International Politics in Europe: The New Agenda* (1993),

considered. This is by and large, however, a mere peccadillo that should not detract from an excellent introductory text.

As noted, this is not the first collaborative effort by Kiss and Shelton. In 1991, they published an introductory treatise on international law and the environment.[29] It offered a concise, insightful introduction to this relatively nascent field of law. With their *Manual on European Environmental Law*, Kiss and Shelton demonstrate that their partnership bears consistently good fruit. They have produced a highly valuable text for courses in this field. It is to be hoped that they continue their joint efforts into the future.

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The Peacetime Use of Foreign Military Installations Under Modern International Law

By John Woodliffe,
(Martinus Nijhoff, Dordrecht, 1992, 360 pp)

When I first became aware of the existence of this book I was not sure what to expect from the substance of it. The title conjured up images in my mind of controversies in host States over activities within secretive, foreign military installations in the host State's territory (such as Pine Gap in Australia) and international legal regulation of both the activities of the facility and the means of resolving any disputes. It soon became clear to me that my understanding of the term "foreign military installation" was a parochial one and much narrower than the meaning given that term in the book.

The author adopts a broad definition of "foreign military installation" to incorporate some element of permanency in the stationing of troops abroad. The author's definition of "installation" extends beyond the sort of United States facilities at Pine Gap and Nurrungar to include, for example, the extended stationing of troops in other States. The definition does not extend, however, to the transit of troops across another State's territory or the sending of troops in response to another State's request for military assistance on an *ad hoc* and short term basis. Using this definition the author cites a 1982 survey that identified almost 3,000 foreign military installations and bases located in 58 States! While it is true that as a result of the end of the Cold War that number has been reduced significantly (at the time of the survey 30 States were host to US forces and 12 to Soviet forces) the number of foreign facilities is still much

p 111. See generally Havel, "How Europe Could Fail (Address to the General Assembly of the Council on Europe, Vienna, 9 October 1993)" reprinted in 19 *New York Review of Books* 3 (18 November 1993); Hoffman, "Goodbye to a United Europe?" 10 *New York Review of Books* 27 (27 May 1993).

29 Kiss A and Shelton D. *International Environmental Law* (1991). For reviews of this first collaborative effort see Mann, (1991) 2 *Yearbook of International Environmental Law* 476; Ward, (1992) 3 *Colorado Journal of International Environmental Law and Policy* 627.

higher than might be expected. The sheer number of bases and facilities has resulted in a substantial body of practice for the author to draw upon, although he concedes that access to information about Soviet bases was extremely difficult to obtain. Consequently, the author relies on the practice of Western States almost exclusively—particularly the United States because of its relatively prolific establishment of overseas bases.

In the first part of the book (Chapters 1–7) the author establishes the framework of international legal principles governing the peacetime use of foreign military installations. Because every case of foreign military installations known to the author is governed by a bilateral treaty between the two States involved, the author's analysis in this first part of the book is largely descriptive. States are free to make their own treaty arrangements and in the absence of a critical theoretical analysis of the role and place of such installations it seems to me that the author is unable to do much more than describe State practice. The author does discuss the principle of consent between two States for a bilateral arrangement and raises the question of unequal treaties given the reality of the fact that many foreign military installations are established by a more powerful State in the territory of a weaker ally. However, the author's conclusion is that there is no evidence of unequal treaties because of the benefits that accrue to the weaker State and the fact that the receiving State is often as enthusiastic about the installation as the more powerful State.

The second part of the book (Chapters 8–11) contains a review of the nature of the legal relations between the sending and receiving States. Again the author provides a largely descriptive analysis of State practice focussing on the issues of criminal jurisdiction for offences committed by personnel both within and outside the confines of a facility; the settlement of civil claims; and the issue of responsibility for the security of the installations. There have been a number of disputes between receiving and sending States on these issues and the author examines the dispute resolution methods as well as the actual terms of the settlement.

In the third part of the book (Chapters 12–13) the author moves beyond the principles of treaty law applicable *inter partes* to discuss issues of State responsibility and the legal effects of the bilateral relationship on third States. Here the analysis becomes more than descriptive as the author poses the question: in a situation of foreign forces lawfully on the territory of a foreign State which commit acts that violate the right of third States, is it the sending or receiving State that is responsible for the international wrong? The author considers both the International Law Commission's Draft Articles on State Responsibility and general international law principles of joint responsibility and then applies the principles to examples from State practice such as the "U2" incident of 1960 (not a rock concert provided by the great Irish band but involving a US reconnaissance aircraft permanently based at a Turkish airfield shot down while illicitly flying over territory of the former Soviet Union); the unsuccessful Iran hostages rescue mission in 1980; and the US bombing raids of Libya in 1986.

The final section of the book (Chapters 14–15) focuses on the management of change—in relation to the theory and practice of the termination of facility agreements and the implications of the end of the Cold War for the future of such agreements. It was this final section that I found most interesting as the author was able to draw on his considerable research in the rest of the book to project future trends in basing policy. The author recognised that the unprecedented international cooperation achieved in the collective action against Iraq in the Gulf War relied heavily on the utilisation of a global network of mainly US overseas bases and that reliance of a similar nature (not necessarily involving the same bases, or even primarily US bases) would be likely in future collective security action.

It is difficult to imagine this book becoming a best-seller because of its relatively specialised subject matter. However, the book provides one international legal perspective on the ways governments regulate the establishment and operation of foreign military bases. Academics, military personnel, practitioners and students with an interest in the subject will find the book very helpful. The author is certainly methodical, logical and thorough in his approach to the material and has presented that material in an accessible, highly readable form.

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International Law and the Rights of Minorities

By Patrick Thornberry
(Clarendon Press, Oxford, 1991, xii and 451 pp)

International Law and the Rights of Minorities discusses the type and extent of protection that international law offers to minority groups and their members. Part I addresses the history of minority protection in international law in the different stages before the creation of the United Nations system. Thornberry notes that from 1660 until the creation of the League of Nations there was a gradual trend from protection of particular groups to protection of a more universal nature. He comments that this history shows that there is "a tradition of minority protection in international law" (p 32) by treaty, even if its implementation did not live up to the professed standards. In relation to the system of protection under the League of Nations,[1] Thornberry comments that the League system was not intended for general application—just application to those minorities specifically addressed—and that, despite the protection offered, "[i]nternational law did not then exhibit a general and fundamental commitment to human liberty and equality" (p 50).

The rest of the book concerns the system of protection under the United

1 That system included the minority protection guarantee in the League Covenant, the various particular instruments devised under the Covenant, the petition process, and decision by the Permanent Court.

Nations, with the different parts addressing different types of rights. Part II addresses the right of minorities to existence as a group. After an introduction to the issues relating to existence and its protection in international law, the focus is on the prohibition of genocide. The matters addressed are the Genocide Convention,[2] whether the prohibition against genocide binds all States as customary international law, and the content of that customary international law. Thornberry concludes not only that "the prohibition of genocide is fundamental to international law—its illegality is beyond question" (p 95)—but also that it has attained the status of *jus cogens*.

Part III addresses the positive protection of minorities and their identity, and the more general principle of non-discrimination, assessing the approach taken toward each in the Charter system. This part focuses on the early days of the UN system, setting the scene for the later detailed discussion, in Parts IV and V, of the current international law in relation to these rights. In relation to the Charter, Thornberry comments that the active protection of minorities loses out to the more general principle of non-discrimination.[3] Providing a useful illumination of the approach then taken by States, Thornberry describes the (unsuccessful) attempts to include an explicit article on the protection of minorities in the Universal Declaration on Human Rights, including the arguments made and the positions taken by States during the drafting. Thornberry also provides a useful description of the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and its relationship with the other bodies in the human rights system. Particularly interesting is the description of the Sub-Commission's difficulty in working on active protection in the face of disapproval by the Commission—disapproval to the extent of temporary liquidation of the Sub-Commission and reinstatement only upon instructions to concentrate more on the prevention of discrimination (p 130). Thornberry comments that the Sub-Commission, not surprisingly, currently does more work on discrimination than protection, although protection has not been completely eliminated (p 132).

Part IV addresses in detail what Thornberry summarises as "the right to identity" in international law. The focus in this part is article 27[4] of the International Covenant on Civil and Political Rights and the positive right of

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2 Convention on the Prevention and Punishment of the Crime of Genocide (1948) 77 UNTS 277. The aspects Thornberry addresses include: the term "genocide" its history as an international crime before the Convention; the preparation of the Convention; the substantive provisions of the Convention relating to minorities; and the various methods of enforcement and implementation.

3 This is despite both having been made a focus of the work of the Human Rights Commission, particularly through the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

4 Article 27 reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

minorities to protection of their group identity. After an introduction to the Covenants and the Human Rights Committee, article 27 is discussed in detail: its drafting history and the scope and intended meaning of the various component phrases of article 27. This includes arguments over the definition and coverage of "minorities", membership of a minority, the tension between group and individual rights, and the extent to which article 27 imposes on States a positive duty to adopt specific measures to implement its guarantees. Thornberry argues that article 27 provides such a positive duty (p 180). Further, he argues that it is a duty relative to the strength and resources of the minority in question: "the more a minority is able to fulfil the task of retaining its essential identity through its own resources, the less onerous will be the duties devolving upon the State party" (p 186). What these aspects encompass, how they might be implemented and the challenges posed for States are addressed in separate chapters on culture, religion and language.

The exercise, and limitations on exercise, of these minority rights are also addressed. This discussion focuses on the treatment of article 27 by the Human Rights Committee under the Optional Protocol, principally the cases *Lovelace v Canada*[5] and *Kitok v Sweden*.[6] Thornberry also considers whether the Helsinki Final Act 1975 assists the interpretation and application of article 27. Unfortunately, he concludes that while it is "a welcome recognition" and "encouraging" (p 254) it is no more than that: it is no more clear or detailed than article 27, so cannot provide any real assistance.

In addition to the focus on the interpretation and application of article 27 itself, Part IV addresses the attainment of customary international law status of the Universal Declaration of Human Rights and the positive right to identity contained in article 27. Thornberry concludes that there is "strong evidence that the Universal Declaration has become part of customary international law" (pp 237–38), but that article 27 "appears to be a right granted by treaty without wider repercussions in customary law" (p 246).

Part V addresses the negative right not to be discriminated against, both in relation to UN instruments and customary international law. The UN instruments discussed include the Declaration and the Convention on the Elimination on All Forms of Racial Discrimination, the UN Covenants on human rights, the 1960 UNESCO Convention Against Discrimination in Education, the UNESCO Declaration on Race and Racial Prejudice, and the European Convention on Human Rights. The discussion consists of description and evaluation of the coverage of the different provisions—including the range of minorities and the type of protection offered—and of the treatment of some of the claims arising under them. The primary issue addressed is the instrument's approach to equality and difference, and thus also to assimilation and respect for diversity. Thornberry concludes that the different instruments

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5 Human Rights Committee, *Selected Decisions Under the Optional Protocol* (2nd to 16th Sessions), UN Doc CCPR/C/OP/1 (1985), p 10 (admissibility), p 37 (interlocutory decision), p 83 (views of the Committee).

6 Human Rights Committee, 33rd Session, UN Doc CCPR/C/33/D/197/1985 (10 August 1988).

adopt a variety of approaches, ranging from strict equality to the positive right to diversity and development of that diversity.

The discussion of the customary international law status of the principle of non-discrimination focuses on Judge Tanaka's dissent in the *South West Africa* case,[7] on the Advisory Opinion on Namibia, and on State practice since then. Thornberry concludes that the prohibition of racial discrimination is truly customary international law and, in relation to extreme circumstances, the prohibition could constitute *jus cogens*.[8] Thornberry considers that, unfortunately, the same cannot be said for bases of discrimination other than race.

Part VI concerns the separate rights of indigenous peoples. Most of what is said in this Part is now primarily of historical value, as the instruments discussed have been superseded. Indeed, while Thornberry does discuss the movement for and process of reform, International Labour Organization Convention 169 (1989) (which is not discussed) had already been adopted by the time this book had been published. Since publication, international law has progressed even further, with the UN Working Group on Indigenous Peoples also having finished its work on the Draft Declaration on the Rights of Indigenous Peoples. Thus, while Thornberry makes some good comments on and criticisms of the old International Labour Organization Convention 107 (1957), this part is not as helpful as it might be.

Thornberry concludes with discussion of the trends in the international law of minorities, a criticism of the heavy focus on individual as opposed to group rights, and identification of a number of defects in the present level of minority rights protection in international law. He suggests that only the creation of "new, more specific instruments" can adequately protect minority rights and thereby take that important "first step in securing justice for minority groups and their members" (p 398).

Thornberry's project is a valuable one and his method provides useful analyses of and information about the laws being discussed. The primary positive aspects of Thornberry's work are the thematic analyses that flow through the book and the use of history in his discussion. The main issues addressed thematically are: whether the rights considered are aimed at protecting individuals or groups; whether the rights considered espouse a positive right to identity and difference or simply a negative right to non-discrimination and protection from other-than-equal treatment; and whether the remedies for the implementation of the rights in question are effective. The use of the various *travaux prèparatoires* and the historical detail of debates, particularly overdrafting, illuminate well the intended meanings of the provisions being discussed.

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7 *Ethiopia v South Africa; Liberia v South Africa Preliminary Objections*, ICJ Rep 1962, p 319.

8 Thornberry suggests that "it would probably relate, in the *lex lata*, to cases where the denial of rights on a racial basis was so extreme as to contain within it aspects of the genocidal process". Thornberry P, *International Law and the Rights of Minorities* (1991), p 328.

There are various (comparatively minor) problematic aspects of the work. These include Thornberry's habit of quoting French works without providing English translations, sometimes rendering the whole point being made completely unintelligible to those who do not speak fluent French,[9] and the occasional lack of citation references.[10] There are also various editorial improvements needed such as correction of punctuation[11] and footnote reference mistakes.[12]

Thornberry's approach is certainly European-oriented. When he considers regional systems of human rights protection he does not consider those of the Organization of American States (OAS) or Organization for African Unity. Given the longer history of minority protection and anti-discrimination in Europe, this is certainly understandable. Perhaps even more so when one considers the reluctance of the States of at least the OAS to accept that they have minorities that need protection. However, a word on the reasons for the coverage chosen and/or discussion of the drawbacks of the other regimes would be helpful.

Thornberry's approach is also fairly traditional. For example, he adheres to the *lex lata/lex ferenda* distinction and emphasises the textual provisions considerably more than other aspects of customary international law. However, he does discuss customary international law and his approach accords with the operation of the international legal system of minority protection. He thus provides useful information for those wishing to study the present system in order to use it as well as to reform it. Further, while the conclusions he draws are certainly quite cautious, most of the conclusions he draws on textual interpretations and on the status of minority protection in international law are sound. In this area, ambitious conclusions are not always helpful as they often overstate the extent of protection offered and thus play down the need for reform. Thornberry cannot be faulted for that in this work. He has both explained well what international law currently provides and suggested what more will be necessary in respect of the adoption of better provisions as that "first step in securing justice" (p 398).

The biggest drawback to this work, however, is the updating needed. In addition to the changes that have occurred in relation to the rights of indigenous peoples, there have been other decisions of human rights bodies, particularly the

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9 The worst offenders are seven relatively large quotes see ibid, pp 27, 30, 49, 62, and 96.

10 For example, Thornberry uses quotes from Judge Tanaka's dissenting opinion in the *South West Africa* cases without citing where, in the judgment, they are located (see ibid, pp 314–16). Thornberry quotes Belgium on the Belgian thesis without citing even the document from which the quote is taken (see ibid, p 16).

11 See for example, ibid, p 253 (last sentence in the 2nd para). The lack of punctuation in a sentence concerning the interpretation of a legal text makes it difficult to follow.

12 See for example, ibid, p 309 at footnote 54, which refers to Thornberry, "*supra* n 52" instead of n 53.

Human Rights Committee, on claims made by minorities,[13] the General Assembly has now also adopted a UN Declaration on Minorities,[14] and the Vienna World Conference on Human Rights made some important statements on the rights of minorities.[15] Those who want to obtain an accurate picture of minority protection in international law today need to know about such developments. A second edition should include such discussion.[16] However, I also caution about a second edition being written too soon because, at the time of writing this review, the Human Rights Committee was due to deliberate on at least one fundamental minority protection issue, and the draft Declaration on the Rights of Indigenous Peoples had not yet been finalised in the form to be adopted by the General Assembly. Discussion of these matters should be included in any update.

International Law and the Rights of Minorities is a valuable addition to the literature, and a useful guide to the topic for those who wish to find more detail on the rights of minorities than a general human rights text can provide. In a climate where national and international security is being seen more and more as depending on national harmony, and where injustice suffered by minorities can lead to a breach of that security, a work that aids our understanding of the law and the issues relating to the treatment of minorities can only be helpful. This is particularly so in a country such as Australia which is composed of many different minority groups and peoples. This work is a useful reference, but readers must also make themselves aware of developments that have occurred since publication.

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13 See for example, the *Lubicon Lake* case, *Report of the Human Rights Committee, GAOR*, 45th Session, UN Doc A/45/40, vol II, p 1.

14 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in GA Res 47/135 (18 December 1992).

15 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (12 July 1993).

16 I note that Thornberry has analysed the provisions of the UN Declaration, and the debate over them, in a more recent work: "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations," unpublished manuscript on file with author (1993), 58 pp.