Book Reviews

Edited by

Wendy Lacey

Future Protection: Beyond Refugee Law?

Complementary Protection in International Refugee Law

Jane McAdam

(Oxford Monographs in International Law, Oxford University Press, Oxford, 2007, 320 pp)

International Refugee Law and Socio-Economic Rights: Refuge from Deprivation

Michelle Foster

(Cambridge University Press, Cambridge, 2007, 438 pp)

Seeking Asylum in Australia: Yearning to Breathe Free

Edited by Dean Lusher and Nick Haslam

(The Federation Press, Sydney, 2007, 300 pp)

Although historical and geographic good fortune means that its experience of refugees has been modest in world terms, Australia has been as obsessed as any country with the phenomenon of asylum seekers and forced migration. On the one hand Australians have made and continue to make surprisingly robust contributions to the development of international refugee law.[1] On the other hand, Australia has distinguished itself in recent years by introducing an inordinate number and range of regressive measures to guard against the incursion of asylum seekers and irregular migrants. Australia has what some have termed a Janus face.[2] While it is happy to promote the idea of refugee protection abroad (and the orderly resettlement of such people through regulated programs), it is greatly defensive about the recognition of rights in refugees and irregular migrants on its own territory.

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1 Australia's Doc Evatt, as first Secretary General of the UN, played a significant role in drafting the seminal UN Convention relating to the Status of Refugees; the late academic and consultant to UNHCR, Gervase Coles, helped to shape many aspects of modern refugee law. Australian Erica Feller continues to play a prominent leadership role within UNHCR. In most years the Australians are well represented among the non-government organisations attending UNHCR's Executive Committee meetings in Geneva.

2 See, eg, H Charlesworth, M Chiam, D Hovell and G Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

Australia's love-hate relationship with refugees and the law is well illustrated in three books published in 2007. The first two are the published versions of doctoral theses by two rising stars in refugee law scholarship whose work was supervised by the two leading authorities on refugee law in the English speaking world. Dr Jane McAdam's collaboration with Oxford University's Dr Guy Goodwin-Gill is apparent not only in the book that is reviewed here. In 2007 she also co-authored with Goodwin-Gill the seminal text, *The Refugee in International Law* (Oxford University Press, 2007). Dr Michelle Foster had the equal good fortune to work with Professor James Hathaway, formerly of Michigan and recently appointed Dean of Law at Melbourne University. She has produced a worthy text to complement Hathaway's imposing work *The Rights of Refugees Under International Law* (Cambridge University Press, 2005).

The third book in the trilogy represents a different form of scholarship. *Seeking Asylum In Australia: Yearning to Breathe Free* is a collection of essays on the human impact of Australia's asylum laws and policies written by commentators, politicians, refugee advocates and other human rights icons in Australia. Edited by Dean Lusher and Nick Haslam, the collection provides a compelling critique of certain aspects of Australian law and practice. If these matters are not written down and placed in the national memory through books of this nature, these shameful aspects of our immigration history, especially regarding women and children, are likely to be diminished in time or even pushed to the inner recesses of the national consciousness.

Turning now to examine the books in more detail, the texts by McAdam and Foster both stand out as pieces of cutting edge legal research. Both authors have chosen topics that push the boundaries of understanding about refugee law (Foster in particular) or that raise inevitable questions about what lies beyond or at the edges of this discipline. In both instances the authors' central arguments are of immediate relevance to Australia.

Jane McAdam's book examines the normative or legal frameworks for what is known as 'complementary' protection in international refugee law. In other words, she examines the law governing the grant of protection to people who do not meet the strict legal definition of 'refugee'[3] but who would suffer harm if returned to their country of origin. This involves an exploration of who is eligible for protection and what the content of any 'complementary' status might be. McAdam demonstrates that international human rights law has extended the protections available under classical refugee law in several ways. She accepts Hathaway's contention that refugee status should be understood as 'an amalgam of principles drawn from both refugee law and the [human rights] Covenants'.[4] For individuals recognised as refugees this means that 'as a matter of principle and of law' that 'where human rights law provides more favourable standards [than the Refugee Convention], these should be interpolated to improve Convention rights'. The

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3 See UN Convention relating to the Status of Refugees, Art 1A(2) and its attendant Protocol.

4 See McAdam p 10-11, citing J C Hathaway, *The Rights of Refugees under International Law* (2005) 9.

central problem that she identifies is that while more and more states are prepared to extend the *non-refoulement* provisions of the Refugee Convention to non-refugees,[5] there has been less willingness to define the *status* of the people who are afforded these protections. Sadly, this means that there is no consensus about the entitlements of these quasi refugees, with state practice varying greatly. McAdam accepts that international refugee law is based on an hierarchical understanding of human rights. However, she argues that this area of international law should be regarded as a *lex specialis* within the greater area of human rights law. Her central argument is that all persons entitled to protection should enjoy similar basic entitlements. Put another way, if a person cannot be removed, for one or other reason, then the host state should afford that person the right to live with dignity.

McAdam's book is divided into six main chapters. The first of these discusses the protection deficits in international refugee law, making the obvious point that the Convention definition of refugee leaves many people in situations of dire need without a legal right to protection. Chapter two examines and critiques the moves that have been made by the European Union to address this deficit through a Directive on Complementary Protection. Although welcoming this attempt to acknowledge rights in people who do not have refugee status, McAdam argues that the Directive is disappointingly conservative in the basic obligations imposed on states and in its failure to address questions of status. Chapters 3 to 5 examine in detail other international Conventions that confer protection rights on non-refugees. Chapter 3 begins with the most significant of the *non-refoulement* provisions: Article 3 of the Convention Against Torture. Accepting Hathaway's taxonomy or hierarchy of human rights, the right not to be sent back to a country where a person faces torture or other cruel and inhuman treatment should be uncontroversial. In Chapter 4, the author examines the *non-refoulement* provisions enshrined in the European Convention on Human Rights and in the ICCPR, while Chapter 5 is devoted to the super human rights convention for children, the UN Convention on the Rights of the Child. The book concludes with a chapter arguing that the deficits in state practice should be addressed by conferring a legal status on all persons in need of protection that is based on a minimum standard of treatment.

As McAdam points out, Australia has not taken formal steps to ensure that 'near miss' refugees in this country are afforded protection. Instead, reliance is placed on the ability of the Minister for Immigration to intervene in the exercise of a discretion that is described as 'non-compellable' and non-reviewable. Leaving aside the lack of accountability of such a system, McAdam argues that this is a system that is unreliable in even the most basic obligation not to *refoule* people at risk of torture or even death. In terms of persons given a discretionary right to remain in Australia the current laws also fail to meet basic human rights standards. In this context McAdam's work is acutely relevant to the situations facing failed refugee claimants who Australia is unable to remove from the country. It is also relevant to persons excluded from refugee protection by virtue of their poor

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5 This is the obligation not to send back or *refoule* refugees to countries where they face persecution. See UN Convention relating to the Status of Refugees, Art 33.

criminal or human rights record who would face torture or worse if returned to their country of origin.

The central question addressed by Michelle Foster in *International Refugee Law and Socio-Economic Rights* is the validity of the distinction that is so often made between 'political' and 'economic' refugees and between voluntary and involuntary migrants. In a painstakingly researched and carefully presented book she argues that economic deprivation can be a basis for refugee status. Foster shows that drawing rigid distinctions between political and economic harms has a disproportionate impact on certain groups of people who should be considered for refugee status. She points out that women, children, the aged and the disabled are both less likely to engage in the political activities expected of the archetypical refugee and more likely to suffer harm manifest in economic privations. Building on the work of various academics whose work has been accepted by refugee adjudicators around the world,[6] Foster argues that a more nuanced approach is needed to interpreting the Convention definition of refugee.

This book is also divided into six main chapters. After setting out the framework of her argument in Chapter 1, Foster turns in Chapter 2 to make the case for using international human rights law as the framework for interpreting Article 1A(2) of the Refugee Convention (as amended). Her work in this regard places her firmly in the Hathaway 'school'.[7] The four chapters that follow are structured so as to follow key tenets of the refugee definition. Chapter 3 examines the law on what forms of harm will constitute 'persecution' and identifies problems and difficulties in the traditional refusal to see economic deprivation as persecution. Chapter 4 looks at the place of economic and social rights within the hierarchy of human rights protections, making the obvious point that targeted economic privations can have a devastating impact on a person's ability to subsist. Foster argues for a fundamental shift in the way we should think about violations of economic rights, using two case studies as illustrations – access to education and health care. There follows in Chapter 5 a discussion of the nexus that must be shown between the privations suffered and the convention 'grounds'. The author grapples here with the difficult questions of targeted versus group-based harm, arguing that there is nothing in the wording of the Convention definition that should require individuals to suffer direct and intentionally inflicted harm as individuals (rather than as members of a group). In Chapter 6 Foster examines the five grounds on which persecution must be based. Although she argues that all five can be relevant for individuals suffering economic persecution, the main focus of this final substantive chapter is on persecution suffered by persons by reason of their membership of a particular social group.

Both McAdam and Foster write as 'insiders' in the international refugee law discourse, but both are stunning debut works that are accessible to a wider readership. McAdam writes very clearly: her lucid style makes her arguments very

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6 There is now a considerable body of literature and jurisprudence on women and refugee status. See, eg, T Spijkerboer, *Gender and Refugee Studies* (2000); and H Crawley *Refugees and Gender: Law and Process* (2001).

7 See in particular J C Hathaway, *The Law of Refugee Status* (1991) ch 4.

easy to follow, which is a real asset for an academic wishing to have an impact on law makers. Foster's work is also structured beautifully and shows an impressive grasp of comparative jurisprudence across the common law jurisdictions she studied in her research. Her strong focus on domestic jurisprudence and her insistence on a careful and principled approach to interpreting the Convention definition should be particularly useful for refugee adjudicators.

Both of these books are important and timely in different ways. McAdam's work is significant because of the unjust and arbitrary way in which Australia currently handles the compassionate and humanitarian claims of people who the system judges not to be refugees. This work provides a principled framework through which to approach the task of determining which non-refugees should be allowed to remain in Australia and what their base entitlements should be. Foster's scholarship is of equal if not greater importance because of the tendency that has prevailed in recent years to make sharp distinctions between 'genuine' refugees and 'economic migrants'. This is borne out in a tendency to regard any form of economic motivation for flight as a disqualifier for refugee status. As Foster shows, the distinction is often a furphy that actively works against the recognition of refugee claims in the most vulnerable groups – women, children and the disabled – people who rarely have political profiles.

Written in England and North America respectively, the only slight anomaly in these two excellent books is a tendency in both authors to focus on the European and North American academy at the expense of the growing legal literature on refugee law in Australia. The present author's work aside, Professors Kim Rubenstein and Susan Kneebone have made important contributions to the discourse on citizenship and refugee rights, while Dr Savitri Taylor has also done more important work on the rights of refugees in the areas of temporary protection and offshore processing than is acknowledged in either book. The extensive work of Roz Germov and Francesco Motta might also warrant acknowledgment. In fairness to Foster, it should be noted that she does refer to the work of former Australian students of Professor Hathaway such as Dr Pene Mathews and to Australian-Canadian academic Professor Catherine Dauvergne.

The essays complied by Dean Lusher and Nick Haslam in *Seeking Asylum in Australia: Yearning to Breathe Free* take us away from the intricacies of legal definitions to the human impact of Australia's asylum laws and policies. This book brings together a diverse range of people who examine the problems facing refugees and asylum seekers from a variety of perspectives. The first chapter of the book explains the operation of the laws, describing the Australian system as 'two tiered'. The four authors identify four areas that present as problems in terms of Australia's compliance with its international legal obligations and basic notions of human rights. These are the regime for the mandatory detention of unauthorised arrivals and other unlawful non-citizens; the grant of temporary visas to asylum seekers recognised as refugees in Australia; and the regime for the interdiction and deflection of asylum seekers known as the Pacific Strategy. There follow two chapters with historical focii. Klaus Neumann contributes an interesting piece on Australia's treatment of asylum seekers from West Papua, while Chelsea Piper

Rodd compares the response to boat people at the federal elections of 1977 and 2001. In Part 2, *Coming to Australia*, Peter Mares provides his assessment of the *Tampa* Affair of 2001, while Arnold Zable gives a typically moving account of the experiences of the asylum seekers caught up in the terrible maritime tragedy that occurred on 19 October 2001 when the mysterious 'SIEV X' foundered with the loss of 353 lives. This section concludes with an essay by Michael Gordon, the journalist who was permitted access to Nauru towards the end of the long process that followed the *Tampa* saga.

Part III of the book deals with the experiences of asylum seekers held in detention and of the debilitating restrictions placed on asylum seekers and failed refugee claimants released into the community on visas that confer no right to work, housing or health care. Part IV contains a more positive series of essays on the people who have worked at the coal face to try and alleviate the suffering inflicted by federal government policies; and on the challenges facing refugees in the process of making a new life in Australia. There follows in Part V interesting contributions on perceptions of asylum seekers within the public, in the media and in the language we use. This section concludes with an essay by Nick Haslam and Anne Pedersen on the social psychology of prejudice towards asylum seekers and refugees. The book concludes in Part VI with contributions from a number of key asylum lawyers and community workers in Melbourne's vibrant refugee advocacy community. The Coordinator of the Refugee and Immigration Legal Centre, David Manne, reflects on improvements made within the immigration bureaucracy in the aftermath of the scandals that erupted in 2005 over the wrongful detention of permanent resident Cornelia Rau and of the detention and removal of Australian citizen Vivian Solon Alvarez. Grant Mitchell and Barrister Julian Burnside offer their reflections on where Australia has gone wrong and on what needs to be done to restore a sense of justice and rationality to Australia's laws and policies relating to refugees.

In light of changed political leadership in Australia following the November 2007 federal election, these three very different books make important and timely contributions to the discourse on refugees and asylum seekers both in Australia and more generally. My personal view is that the three should be compulsory reading for those assigned the demanding task of striking balance between compassion and control in Australia's political and legal response to the phenomenon of asylum seekers and forced migration.

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Bread and Stones: Leadership and the Struggle to Reform the United Nations World Food Programme

James Ingram

(Booksurge Publishing, Charleston USA, 2007, xviii + 342 pp)

James Ingram was indeed an odd person to head a United Nations body! He requested his colleagues not to stand up for him whenever he entered a room for a

meeting. Even more unsettling, after two terms he voluntarily relinquished his position as Executive Director! These two elements are in themselves enough to alert the reader that James Ingram was no typical top bureaucrat in the UN System.

This book is primarily about James Ingram's time as head of the World Food Programme (WFP), one of three critical relief agencies in the UN system. Some indication of the role WFP plays is that the author can describe it as 'the world's largest humanitarian agency. In 2003, it provided food to 110 million people' (p 309).

The tale that Ingram relates in this book is essentially about his efforts to create for the Programme autonomy from the FAO against the very determined efforts of the then Director-General of FAO, Edouard Saouma, who wished to retain an essentially bureaucratic control over WFP. That autonomy in turn made it possible for WFP to expand its humanitarian role, and to develop a style of management distinct from that of FAO.

Running through the book is a highly practical insight into how UN agencies and programmes operate. While some of it will be familiar to bureaucrats anywhere, whether in the national or international arena, the book does reveal extremely well the added nuances (sometimes much more than that) which drive the UN as a whole, whether you are talking about the UN in New York or one of its specialised agencies or programmes. The fascinating mix of nationalities, groupings, shifting loyalties, the impact of different cultures and sometimes simply the need to operate in several different languages, together combine to make the situation within the UN markedly different from a national bureaucracy. Although, as the author notes, there are attempts to improve the system of appointment of heads, in general terms it remains a very erratic process. Once elected, it is often difficult – almost impossible – to dislodge the incumbent. In fact, Ingram, having served two terms and refusing to seek re-appointment, speaks with a considerable moral authority here.

One comment he makes will certainly ring true with all seasoned bureaucrats, whether within the UN or in national bureaucracies: 'Procedural discussions are always the liveliest in UN committees, since no expert knowledge is required, everyone has an opinion of equal value and opportunities for mischief abound' (p 208).

The most telling part of the book is the struggle with Edouard Saouma, the then Director-General of FAO, who was in that post for 18 years. The struggle to achieve greater autonomy for WFP, and the tactics used by Saouma are well illustrated by frequent quotes throughout the book from the diaries kept by Ingram.

Some indication of the problems that Ingram had to encounter can be seen vividly in the saga of the rental of premises by WFP and the negotiations of the new headquarters agreement. It is best to quote the words of Ingram himself:

> As I looked into the history of our accommodation I found that FAO had cheated the programme of its fair share of the subvention paid by Italy to FAO to compensate for the organization's expenditure on rental of outside premises. Further, it emerged that FAO was overcharging us for the space occupied using a formula that was inequitable even if Italy had not been subsidising FAO! In short, we suffered under

> double financial disability. FAO went to extraordinary lengths to deny there was a legitimate issue about property and to block every attempt to resolve it (p 214).

And later:

> Following my urging that he look into the facts surrounding the Italian subvention, the external Auditor discovered later in 1986 that some $3.8 million had been provided for the rent of F building [where the WFP offices were located] but, unknown to Italy, not used for that purpose (p 217).

Ingram's book documents how the slow process of negotiation eventually led to the establishment of a new headquarters agreement for WFP. However, along the way, FAO, largely at the instigation of its Director-General, did much to slow down the process: 'Nevertheless, by delay and obstruction at every turn, FAO dragged out negotiations and found excuse after excuse to delay signature for another two and one half years' (p 220).

At one point in a meeting at FAO on the delays encountered in finalising the headquarters agreement, the Canadian delegate tore up a Canadian five dollar note to illustrate 'the approximate cost, minute by minute, to the programme of rent which had been incurred since the Director-General personally stopped finalisation of the agreement in 1988' (p 261).

However the book is about more than a long bureaucratic struggle between two bureaucracies, for the author has added much on certain aspects of reform within the UN. In his final chapter, 'Lessons from the battlefield', the author lists a number of ideas relevant to the reform of the UN system. Much of this has been covered in earlier reviews of the UN, however, the special value of Ingram's recommendations is that they are shaped by direct experience from within the UN system as head of a programme with a large budget, and which had an uncomfortable parentage having been brought into existence by joint resolutions of the UN General Assembly in New York, and the FAO Conference in Rome.

This final chapter contains both some passing gems and some very substantive recommendations. One gem is the comment that developing countries had 'confused a tactical weapon, solidarity against the developed countries, with a policy' (p 313). However, that is preceded by a comment that member governments, including the United States, 'pursued separate strategies formulated without a coherent overarching policy in relation to the system as a whole' (p 313). In fact this is a theme that runs through the book: members exercise very little effective control over these UN bodies, with their focus elsewhere much of the time, and are often at the mercy of the Secretariats in the setting of the agenda and the slant that the reporting takes.

Ingram points out that there are 40 distinct organizations reporting to the Economic and Social Council (ECOSOC):

> The core of the system's problem lies in the desire to encompass, no matter how superficially, the whole corpus of issues that can be said to have some effect beyond a single state. It is in large measure tokenism at its worst, since many of these entities have no discernible impact (pp 324-25).

Ingram paints a depressing picture of the twin failure of the system: on the one hand governments not willing or able to exercise control over the direction the

various bodies take; on the other, the lack of effective accountability of so many heads in the UN system, and consequently of the programmes or agencies they head. He thus calls for more 'leadership' by the agency and programme heads (along the lines that he provided to free WFP from FAO control).

Finally, Ingram puts forward views on the benefits of limited terms for agency heads (favouring single terms of seven years) (p 331), rotation of the nationality of heads of agencies (p 332), recruitment of heads for chief executive posts, and improving accountability. Realistically, in his conclusion, he recognizes that the reforms he proposes would be very difficult to achieve across the system as a whole, and he acknowledges that it is more practical to work institution by institution, with executive heads taking a leadership role here.

The book is well worth reading for those with an interest in the operation of global institutions (whatever their particular mandate). Its value lies in the two themes running through the book. One concerns the battle to achieve autonomy for WFP – indeed, a rare case of significant reform succeeding in the UN system – while the other is the discussion of specific problems of the UN system, and the reforms, which would go some way to overcoming them. In both of these aspects the book is a most welcome addition to the literature on the workings of the UN system and global institutions generally – but with the significant additional benefit of direct experience.

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Truth Commissions and Procedural Fairness

Mark Freeman

(Cambridge University Press, New York, 2006, 316 pp)

The emphasis on the 'right to know'[1] as a crucial aspect of ending impunity has lead to a greater focus on the necessity of holding truth commissions. As many authors in the fields of transitional justice and international criminal law have noted mass atrocities occur where there has been a breakdown of social order and significant numbers of individuals commit horrific crimes.[2] The sheer number of participants means it is unlikely that all of those involved will be brought to trial. To understand the events that precipitated the disintegration of the social fabric

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1 Updated set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1 (Part II, Principles 2-5).

2 See eg, M Minow, *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence* (1998); C Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 95 *American Journal of International Law* 335; C Cunneen, 'Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights' in H Strang and J Braithwaite (eds), *Restorative Justice – Philosophy to Practice* (2000) 83; M Osiel, *Mass Atrocities, Collective Memory and the Law* (1997); and S Garkawe, 'The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?' (2003) *Melbourne University Law Review* 14.

becomes a crucial element in the restoration of the rule of law as well as the transition to democracy.

The central theme of the book is that such commissions must conform to minimum standards of procedural fairness if the findings of a commission are to be considered credible by both national and international observers of the process. Given the fact that such commissions are being held to educate the public about past events and to ensure that the country has an accurate historical record, it is vital that the outcome be viewed as reliable and relevant. The author nominates five areas he considers crucial to the work of such commissions: 'the taking of statements, the use of subpoena powers, the use of powers of search and seizure, the holding of public hearings, and the publication of findings of individual responsibility in a final report.'[3] Each of these areas is examined in detail in separate sections of the book.

Before examining the specific procedural standards central to a fair process, the author examines the concept of a 'truth commission', offering an analysis of previously published definitions and setting out what the author considers to be a more refined definition, partly in an attempt to distinguish truth commissions from other types of inquires such as those undertaken by national human rights bodies:

> A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.[4]

The distinction between human rights inquiries and truth commissions is evident in the focus the definition gives to recent patterns of violence. A range of individuals in what have become called 'settler countries' have suggested that commissions of inquiry are necessary to deal with the experiences of indigenous populations as well as those subjected to slavery. As direct witnesses to the events in issue would be unavailable in the majority of cases, commissions focussing on historical events with ongoing consequences would fall within the rubric of human rights inquiries. This is not to suggest that one form of inquiry is superior to another, but rather, that being clear about the nature of inquiry should assist those establishing the relevant body to focus on its methods of operation as well as its composition.

The text offers a comprehensive overview of the commissions that have taken place thus far; the footnotes are extensive and provide the reader with a treasure trove of information. It also offers a salutatory reminder on the limits of what such commissions can accomplish. Just as criminal trials for war crimes and crimes against humanity are an exercise in 'partial justice'[5] the author observes that 'every

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3 M Freeman, Truth Commissions and Procedural Fairness (2006) xv.

4 Ibid 18.

5 G Simpson, 'War Crimes: A Critical Introduction' in T McCormack and G Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 1.

truth commission will fall short even in the realm of historical clarification.'[6] A range of factors contribute to this systemic problem: insufficient cooperation from perpetrators, incomplete testimony from victims and witnesses, gaps in documentary evidence, insufficient time to complete what is a complex and time-consuming task and resource limitations on the number of cases that can be investigated. There is also the issue of a truth commission's relationship with the criminal process; whilst acknowledging that some governments may attempt to utilise a truth commission to avoid holding criminal trials the author argues that in the majority of cases truth commissions have complemented rather than undermined the work of the criminal justice system.

The discussion of the relevant international standards could have been expanded: there is no examination of the interplay of rights and specifically how one could develop a sophisticated understanding of how to resolve apparent conflicts between the rights of victims and the rights of suspected perpetrators. Having emphasised the point that truth commissions are not criminal trials and therefore should not attempt to resolve questions concerning the legal responsibility of suspected perpetrators, the author does not offer the reader an analysis of how the interests of victims and of the larger society can be fostered during this process, while at the same time respecting the general due process (or natural justice) rights of suspected perpetrators. Whilst arguing that the full panoply of due process (or natural justice) rights are not necessary in the truth commission process, the recommendations made later in the text are, at times, more focussed on the rights of suspected perpetrators rather than the needs and interests of victims. The role of the victim in giving evidence is acknowledged, as is the importance of having procedures that respect the dignity of the victim, but the concern with the formalities of the process may have the effect of losing sight of the individuals who, for a moment in time, are an essential part of that process.

As the author moves to an examination of specific aspects of procedural fairness the main text becomes over-general in its descriptions of what is required to ensure that due process norms are observed. Although it would not be possible to describe each of the examples the author canvassed when compiling the information for the book, the text would have had more 'life' to it if there had been more discussion of case examples. However, the reader willing to give close attention to the footnotes will be rewarded, as the materials described therein are replete with concrete examples of both positive and negative processes that will assist them to understand more fully the concerns being raised by the author.

The author's depth of knowledge is reflected in the diversity of the issues he highlights including some that might not have occurred to a non-expert, such as: the importance of publicity campaigns including amongst exiles; the location of commission offices in areas deemed safe and accessible by the local population; warning witnesses if there is a possibility that information cannot remain confidential due to lack of proper storage facilities and coding mechanisms; the

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6 Freeman, above n 3, 39. See also pages 65-87.

selection process for choosing witnesses to appear at public hearings; and when to hold in-camera hearings and the grounds for judicial review.

This book will be a useful addition to university libraries and to the collections of those engaged in research relating to transitional justice. It is well-researched, highly readable and contains a vast array of source material.

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Watching Brief: Reflections on Human Rights, Law and Justice

Julian Burnside

(Scribe Publications, Carlton, 2007, x + 310 pp)

Each generation produces its own voice of the public conscience. In many instances, these come from the midst of the ruling class itself. Those most eloquent in attacking the social ills of their age will frequently speak the same language, attend the same schools, and work closely with the very group they critique. It should thus come as little surprise that one of the most trenchant and persuasive critics of the policies of the Howard government was drawn from the Liberal establishment's heartland. A graduate of Melbourne Grammar with a Liberal family background, Julian Burnside had voted Liberal in every election until and including 1996, a fact he relates in the preface to this collection of speeches and essays as a rejoinder to the accusations of Labor Party bias commonly levelled against him by those he labels dismissively as the 'pro-Howard commentariat'.[1] This privileged upbringing features in the opening chapter, 'School Days', its autobiographical tone providing one of the few glimpses into the make-up of the personality behind the papers that follow. Burnside describes Melbourne Grammar with a mixture of melancholic fondness and still tender grievance. Staffed by well-meaning 'masters' who groomed their wards to be largely blinkered towards the privilege and power they were expected to inherit, Burnside managed to be both one of the school's academic successes and social casualties, leaving without the requisite confidence instilled in so many of his peers and with a strong sense of both personal inadequacy and injustice. The implicit message is that these are the traits that have driven him ever since.

Little known outside the field of commercial law within which he had risen to the rank of Queen's Counsel by 1989, Julian Burnside shot somewhat reluctantly into the public spotlight during the *Patrick Stevedores Case* in 1998.[2] As Burnside has noted in subsequent interviews,[3] the case was a turning point for him. Shocked by what he saw as a conspiracy between the government and Patrick Stevedores group of companies to break the law, Burnside's faith in government was

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1 At viii-x.

2 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1.

3 See transcript from the interview with Peter Thompson on the ABC on 31 March 2008, *Talking Heads*, <http://www.abc.net.au/tv/talkingheads/txt/s2198807.htm>.

irreparably shaken. The fact that he was then to become a target of both the government and its public supporters appears to have forced Burnside, until then apolitical and somewhat politically naïve, into a fighting pose.

What is clear from this collection is that Burnside has remained a traditional liberal thinker, where being a liberal, to borrow from Maurice Cranston, is to be a person who believes in liberty.[4] For Burnside, writing within the social contractarian tradition, 'the people agree to limit their freedoms' by giving government the power to act for the collective good.[5] A just society – the uniting theme behind this otherwise disparate and inevitably repetitive collection of essays – is one where 'the powerful recognize, and respect, the limits to their own power'.[6] The danger to democracy lies in an imbalance occurring in the tension between government power and individual freedom.[7] Consistent with his interest in the power of language, Burnside frequently focuses on how the rhetoric of recent times has provided government with the metaphors with which to merge these two poles: what he calls 'authoritarianism in the name of freedom.'[8] The conditions that allow this to happen include real or imagined civil emergencies, the absence of an effective political opposition, and a weak or compliant press. The result is the disempowerment and literal alienation of already 'voiceless minorities':[9] notably asylum-seekers, indigenous peoples, and those suspected of terrorism. For Burnside, as with many proponents of bills of rights, this goes to a fatal flaw in majoritarian democracy: '[i]t is the mark of an authoritarian state to accord inferior rights and freedoms to those minorities not favoured by the government'.[10] And it is by reference to our treatment of these groups that Burnside assesses whether we are indeed a just society.

For the most part, Burnside avoids intricate legal analysis to make his points. Those seeking a detailed discussion of the applicability of international human rights law domestically will be disappointed. Instead, readers are exposed to the very human consequences of the policies he critiques. It is here that the bite of what Burnside has to say is most potent: in the stories of detainees held for over four years in the awful conditions of Nauru, of children held in solitary confinement at the Baxter Immigration Detention Centre, of the horrendous treatment of the Tipton Three in Guantánamo Bay, or the historical miscarriages of justice that Burnside uses to warn us of their contemporary parallels, Burnside's

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4 M Cranston, 'Liberalism' in P Edwards (ed), *The Encyclopedia of Philosophy* (1967) 461.

5 At 31.

6 At 54.

7 This is not an unusual theme in contemporary human rights discourse. For a recent controversial critique of the 'zero sum game' that it often implies, see P Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (2008) ch 5. For a more sophisticated analysis, see J Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *The Journal of Political Philosophy* 191; and J Waldron, 'Safety and Security' (2006) *Nebraska Law Review* 301.

8 The title of ch 3. Burnside has also written *Wordwatching: Fieldnotes of an Amateur Philologist* (2004).

9 At 32.

10 At 33.

concern throughout is with the human condition. The essays are in this sense infused with an implicit Kantian ethic: nothing can justify a policy where people are treated merely as means to an end. The value of personal liberty that forms the core of Burnside's ethic could just as easily be retagged as autonomy, the basis of all human dignity.[11]

Kantian arguments are, of course, in vogue at the moment, not least in the torture debate where utilitarian arguments have been used by some to open up a relaxation of the absolute prohibition of the *jus cogens* norm.[12] An argument based on human dignity presents a deal breaker when it comes to certain core rights. But there are other reasons why Burnside would have appealed to humanity more than black-letter law: these essays are rhetorical documents, representing an exercise in persuasion that is as much affective as it is intellectual. Even those unconvinced that mandatory detention falls foul of Australia's human rights obligations cannot but be moved by the human consequences of the policy that ring out in the stories he relates.

International human rights law, while undoubtedly a good thing, takes a back seat to (or perhaps is a mere reflection of) the more fundamental imperative of human dignity. Preambles of major instruments figure as prominently as their substantive provisions. Burnside's plea to allow asylum-seekers 'into our country and into our community' is justified not just because of our formal obligations under international law, but 'because they are human beings. We must treat them decently: for the sake of their humanity, and for the sake of our own humanity.'[13] This call for empathy, for recognition of our interconnected humanity, is seen in Burnside's response to a letter from a Port Hedland detainee. After quoting the letter (with its final statement 'please don't forget us we are humans'), Burnside asks a question that goes to the heart of his despair with the contemporary state of our political morality:

> How is it that, in a time of peace and great prosperity, we can take a tiny fragment of damaged humanity and drive them to the point that they need to remind us – ever so gently and politely – that they, too, are humans?[14]

Sometimes, the rhetoric misses the mark, preaching more to the converted than that part of the Australian community whose complacency so exercises and disturbs the author. With respect to Orwellian 'doublespeak', for instance, Burnside notes that '[t]he Nazi regime were masters at it … The Howard Government is an enthusiastic apprentice',[15] an observation that might lose his less

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11 The term is used frequently by Burnside who, although not referencing Kant in these essays, has done so elsewhere, albeit with the caveat that 'Kant is brilliant but almost unreadable'. See 'Julian Burnside vs Amanda Vanstone', <http://www.safecom.org.au/>. For Kant, freedom, both internal and external, was a necessary condition for moral reasoning, and thus forms the basis of all human dignity.

12 See, eg, D Sussman, 'What's wrong with torture?' (2005) 33 *Philosophy and Public Affairs* 1; C Kutz, 'Torture, Necessity and Existential Politics' Research Paper No 121, December 2005, *UC Berkeley Public Law Research Paper Series*.

13 At 42.

14 At 77.

15 At 99.

sympathetic readers. More apt are his comments on the political abuse of such non-legal terms as 'illegals' and 'queue jumpers,' and the absurdity of labelling the 9000-volt electric fence around Baxter Detention Centre as a 'courtesy fence.' He is also undoubtedly correct to accuse the former government of suppressing those stories that would have exposed the inhumanity of their policies to public scrutiny. As Burnside notes, during the *Tampa* episode the government controlled media and legal access to the refugees, thereby enabling it 'to advance its cynical objectives unembarrassed by facts. Although the misery of the refugees' situation was obvious enough, none of them could be seen as human beings. None of them could tell their stories.'[16] Yet would access have made a difference if, as Burnside laments,

> the mainstream press is too frightened, too weak, too compliant, or too stupid to bother reporting [the situation facing refugees] … If the tragedy of the present regime is told dispassionately decades from now, the silence of the press will be seen as part of our national disgrace.[17]

This focus on personal stories and political rhetoric does not mean there is no legal content. There is plenty, not all of it is as persuasive as it could be, and some of it rather sloppy. For instance, Burnside's introduction to the first part of the book starts with the assertion: 'The Universal Declaration of Human Rights (UDHR) is the most widely accepted international convention in human history. Most countries in the world are parties to it.'[18] From a lay perspective, this may be fine; from an international lawyer's perspective, it raises hackles: not only is the UDHR not a convention to which a state becomes a party (and thus not a legally binding agreement), but most countries are not 'parties' to it. Indeed, as a United Nations General Assembly resolution, it is not something to which a state becomes a party.[19] Sometimes, the legal analysis is left for the keen footnote reader, as with the exposition of the status of combatants captured in Afghanistan and the notorious torture memos.[20] Instead of the law, the author is concerned to contrast the 'above the law' sentiment in these documents with the very real torture experienced by the Tipton Three at Guantánamo. In other places, the law is unstated, as in his description of detention conditions so appalling that asylum-seekers have felt compelled to return home: conduct that effectively amounts to constructive *refoulement*.[21] Other statements leave the international lawyer anxious for

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16 At 56.

17 At 82. See also Burnside's observation (at 67) concerning the caption for a letter from Stewart Foster of the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) about the attempts by journalists to enter Nauru, headed 'Unauthorised journalist entry into Nauru'. Burnside responds as follows: 'In what sense was their entry unauthorized? What legitimate interest does the Australian Immigration department have in whether journalists visit the sovereign republic of Nauru?'

18 At 23.

19 Rather, most of the 198 countries that currently sit at the UN were either not present or not in existence in 1948 when the General Assembly voted on the resolution. It passed by a unanimous vote of 48-0, with eight abstentions.

20 See ch 10, and the fns at 306-8.

21 At 74-6.

elaboration, as with the repeated insistence that Philip Ruddock and John Howard are guilty of crimes against humanity, based on what Burnside admittedly describes as a 'simple analysis' of the definition that appears in section 268.12 of the Criminal Code Act 1995 (Cth). A more persuasive account would address the applicability of a 'widespread and systematic attack' and the policy and mental elements of the definition.[22]

The author is stronger when critiquing the regime of mandatory detention,[23] the flaws in a determination regime in which members on the 'independent' Refugee Review Tribunal are encouraged to make government-friendly decisions if they wish to be reappointed,[24] and the threat to fair trial rights evident in the secrecy provisions of the anti-terrorism laws.[25] The latter theme – of secret evidence, secret hearings and secret detention – appears strongly in Part III, titled 'Human Rights in an Age of Terror'. In this Part, and in the short case studies that feature in Part IV (titled 'Justice and Injustice'), the author takes a specifically historical bent, using events and cases largely from common law criminal and constitutional history to highlight the perils of undermining the protections of the judicial system at times of crisis. As with other contemporary liberal thinkers, seventeenth century England figures prominently as a warning against the dangers of unchecked executive power, providing the background to the human rights fundamentals of *habeas corpus* and judicial independence so central to the author's arguments.[26] The Dreyfus affair is elegantly recounted as a morality tale for the perils of secret evidence in times of racial and religious intolerance;[27] and the *Dred Scott Case*[28] is presented as standing for the excesses of 'strict constructionism',[29] perhaps echoing the author's oft-stated consternation at the approach taken by the High Court of Australia in providing its imprimatur to Australia's mandatory detention regime.[30]

Ultimately, these essays remind us of the ease with which human rights abuses can become normalised in societies that otherwise pride themselves on exemplifying

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22 The point is made in the introduction, and chs 3, 4 and 5 (which actually is entitled 'Australia's Crimes Against Humanity: not "interesting"'). The legislation is set out at 28. The definition reflects the definition that appears in the Rome Statute, art 7 (1)(e). Burnside argues that by applying a policy of mandatory detention, a Minister responsible for the legislation in some instances 'severely deprives one or more persons of physical liberty'. The interpretation of 'severely deprives', however, is unsettled. And with respect to whether the s 268.12(1)(c) is met – the requirement that conduct be 'committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population' – Burnside merely notes that '[a] representative of the International Criminal Court has expressed privately the view that asylum seekers as a group can readily be regarded as "a civilian population".' He does not address the jurisprudence on widespread or systematic attack.

23 At 33-41.

24 At 52.

25 At 146f and also 199f.

26 See esp, ch 15.

27 Ch 16.

28 *Scott v Sandford* 60 US (19 How) 393 (1857).

29 At 279.

30 The decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 comes in for particular critical attention at 100, 160, and 222.

the rule of law. For Burnside, this is clearly a source of great sorrow as much as anger. While indicting the Howard government for its cynical distortion of the truth and its silencing of the real stories of human suffering, Burnside cannot avoid facing the complicity of the Australian people. Repeatedly documented in his speeches over the last half of the Howard era is 'a humanitarian catastrophe from which the government makes political capital; a humanitarian catastrophe which most Australians are prepared to ignore.'[31] As he enigmatically notes in his introduction, '[i]t is hard to understand how Australia got itself into this position. Part of the difficulty I think, is that we lack the imagination to understand the realities of our policy of mandatory detention.'[32] More than any new legal perspective or insightful analysis, it is this call to awaken our 'imagination to understand the realities' that is likely to be Burnside's legacy.

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The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings

Gideon Boas

(Cambridge University Press, Cambridge, 2007, xviii + 306 pp)

On 11 March 2006, Slobodan Milošević died at the detention centre of the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. At the time, he was engaged in a trial in relation to 66 counts of very serious crimes, including genocide and crimes against humanity – a trial that had commenced in February 2002, over four years earlier. Not only did his death represent a disappointment to the many thousands of victims and their families who had been affected by his actions, depriving them of the opportunity for finality and a sense of real justice, but the fact that his trial had continued for so long and was still some time away from completion at the time of his death also portrayed the system of international criminal justice that has evolved over the past 15 years in a none too positive light.

Indeed, following his death there were many who argued that the (failed) trial had simply demonstrated the inadequacies and inefficiencies of international criminal law and that to accord him with the opportunity to defend himself fully and to guarantee his rights as an accused had been a waste of time and an inappropriate way of dealing with someone who was 'clearly guilty'.

As Geoffrey Robertson notes in the foreword to the book, quoting the chief prosecutor at Nuremberg, Robert Jackson, 'courts try cases, but cases also try courts'. Certainly the Milošević trial highlighted the imperfect and still evolving nature of international criminal justice and our attempts to bring to account those most responsible for crimes of concern to the international community as a whole. Yet the very fact that the system is imperfect is itself a reason to learn from, and improve upon, what has (and has not) been achieved thus far.

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31 At 75.
32 At 25.

This book sets out in comprehensive detail the many complex legal, procedural, logistical and political issues that all contributed to the conduct of the trial, highlighting several significant mistakes that were made along the way. The author had been the senior legal advisor to the Judges of the Trial Chamber for the duration of the trial and was therefore in a unique position to describe the way it unfolded. As the title suggests, the stated purpose of the book is to analyse those lessons to be learnt from the Milošević trial and which could be used to improve the conduct of subsequent complex international criminal trials of senior political (and military) accused – lessons that, in the author's words, would lead to 'best practice'.

The author provides a detailed description of the background facts and procedural nuances that dogged the trial. Milošević was a defiantly uncooperative accused in many respects, initially refusing to recognize the legality of the Tribunal, insisting on his right to self-representation, often ignoring the orders of the Tribunal while, at the same time, facing ongoing and escalating health problems. Coupled with this, the Prosecution made what the author regards as a 'profound error' by undertaking an expansive case against the accused, seeking his conviction on many counts in relation to a vast number of events. In addition, the conduct of the trial was not helped by the fact that the initial Presiding Judge, Judge Richard May, died part way through the proceedings.

The author is also highly critical of a number of decisions by the Appeals Chamber of the ICTY, which overturned several Trial Chamber decisions (for whom the author worked) with the result that Milošević was able to continue to manage his own case by representing himself in the proceedings. In this role, Milošević, himself a trained lawyer, was extremely adept at gaining every possible advantage that he could from the legal processes of the Tribunal. He made every effort to transform many aspects of the proceedings into a 'media event'.

At the same time, the world was watching and it was therefore essential that Milošević be accorded with a meticulously fair trial so as to minimise any suggestion that this was in some way a 'foregone conclusion'. Indeed, one of the primary justifications of the system of international justice is that it ensures a fair trial for all accused – even those accused of the most heinous of crimes – so that the credibility of the process will itself reinforce the importance of the decision and the historical record that arises from the evidence presented.

It is in this respect that the author concentrates his analysis. The achievement of 'best practice' requires an appropriate balance between the fairness of the process and the expeditiousness of the trial, in all of the circumstances. The book describes the issues associated with both of these elements and provides a number of suggestions as to how this balance can be best achieved. Clearly the Judges of any international criminal Tribunal and or Court must be in a position where they can exercise what the author describes as both 'macro' and 'micro' case management, in order to keep the proceedings under control, while at the same time not unduly compromising the minimum guarantees and fundamental rights of the accused. These are not easy skills to acquire and, as is demonstrated in the Milošević trial itself, different Judges often have very different views as to how this control should be exercised.

At the same time, trials of this nature – indeed the very notion of international criminal 'justice' – represent much more than a 'simple' examination of the criminal responsibility of an individual accused. Due to the complex factual matrix that invariably underpins the international trial of a senior political or military official, many people are vitally interested in how the proceedings are undertaken and what its consequences will be. Questions of reconciliation, closure, reparation, retribution and a search for the 'truth' all add a great deal of complexity to the already difficult process of proving (or otherwise) that an international crime as defined in the relevant Statute has been perpetrated by the accused. The highly flawed process in the Saddam trial before the Supreme Iraqi Criminal Tribunal – not to mention the horrible images of his subsequent execution – illustrate all too vividly that much more is at stake than just the fate of the individual accused.

The author is to be congratulated for not only providing an expert description of the process and the rules regulating it, but also for addressing these broader issues in the search for a more appropriate trial methodology in the future. Unfortunately, it is all too clear that these lessons must be heeded quickly, since other current (and no doubt future) accused would undoubtedly have taken note of the 'success' that Milošević had in 'hijacking' the process as much as he did. Indeed, the ICTY is presently faced with an equally uncooperative and disruptive accused – the Serb nationalist Vojislav Šešelj – and, as the author describes, the Tribunal must take every effort to ensure that his does not follow a similar path to the Milošević trial, although it seems that many of the same mistakes are still being made.

Overall, this book represents an excellent discussion of what may turn out to be a seminal event in international criminal justice. The book goes to great lengths to provide all relevant material in relation to the principal legal and procedural issues – this is certainly not a 'light' read designed for someone merely wishing to gain a brief overview of the trial. But neither is the underlying subject matter a simple issue. There are important reasons why we need to continue to develop the system of international criminal justice. We must understand the frustration of those who wanted to see the Milošević trial reach its finality. We must ensure that trials of those who are charged with the most heinous of crimes are carried out expeditiously. We must not, however, compromise the fundamental rights of an accused – any accused – to a fair trial in accordance with all relevant human rights norms.

As the author suggests, if the lessons from the trial are heeded, then the international community will have made some progress in its quest to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.[1] It is in this regard that the Milošević trial 'will have offered some good for the future of humanity', despite its unsatisfactory and untimely conclusion.

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1 Rome Statute of the International Criminal Court (17 July 1998), 2187 UNTS 3. preambular [5].

Targeted Killing in International Law

Nils Melzer

(Oxford University Press, Oxford, 2008, 468 pp)

Targeted killing is not an easy topic to write, or read, about. The more examination given to the issue of whether a state has the legal, or even moral, right to kill, the more complex the arguments on both sides become. It is an issue located between politics and law, and a clear example of the inherent tension between limits of state sovereignty and universal humanitarian concerns. So it was with some degree of trepidation that I commenced reading Nils Melzer's *Targeted Killing in International Law*. My concerns were unfounded. The book is a well written, clearly structured, thoughtful and measured account of issues such as current state practice, judicial consideration and relevant international law. Melzer focuses his legal reflection within this theme in the examination and comparison of two major normative paradigms, that of law enforcement and that of the rules relating to the conduct of hostilities. The large book (over 500 pages) concludes with a plea for scrupulous interpretation of the existing normative legal framework rather than the development of a new doctrine. The author expresses his apprehension on the use of targeted killing as a method of law enforcement and argues for caution when placing such acts within the paradigm of the conduct of hostilities. In essence *Targeted Killing in International Law* is a book about balance and the desire for careful consideration before the application of policies involving the destruction of lives.

Melzer deals with each of the legal issues involved in targeting killing with clarity and precision. For example Chapter XI deals with the principles of distinction under international humanitarian law (IHL). A fundamental element of this area of international law and a crucial part of the targeted killing discourse, the chapter provides an eloquent description of the '*jus cogens*' nature of the principle of distinction (in essence permitting direct attacks only against the armed forces of the parties to the conflict and sparing the peaceful civilian population) as well as examining the complexity involved in connected issues such as 'direct participation in hostilities'.

Noting the lack of definition of this term, the author reviews international criminal jurisprudence, domestic cases (such as the Israeli Supreme Court) and refers to military manuals to demonstrate the genuine absence of clarity of this important principle which can result in the attribution, or loss, of protection. The lack of agreement on what constitutes direct participation troubles Melzer and he notes that the diverging interpretations can lead to 'extreme ends' of the spectrum gaining acceptance: the military arbitrarily targeting civilians or organised groups abusing their protective status. He urges for clarification of this concept to be undertaken 'in good faith, and in accordance with the ordinary meaning to be given to the terms in their context, and in the light of the object and purpose of the notion within IHL' (p 334). To support this request Melzer provides the reader with the two major current doctrinal approaches to direct participation in hostilities ('restrictive' and 'liberal') as well as the range of other views, contrasting and

comparing the strengths and weakness of each opinion. A discussion on the principle of proportionality follows, demonstrating the tight nexus to be found between the various principles of IHL and the similar thematic difficulties involved in highlighting 'absolute' rather than 'relative' limits in this area of law. The text balances the difficult practical realities of inevitable temporal restrictions of decisions made 'in the heat of the battle' with the author's belief in the need for careful and clear planning.

In the introduction to his book, Melzer is explicit with his reasons for exploring such unpalatable terrain as issues surround targeted killing and writes (p vii):

> I felt that there must be a measure of legitimacy to all views involved, and that it must be possible to find a common denominator in universal, inherently human values.

This search for the 'middle ground' continues. He quickly identifies the crux of the difficulty when dealing with arguments surrounding the use of targeted killing. This difficulty is the paradox that those arguing passionately on 'each side' argue the same point from contrary perspectives; the necessity to protect life. For those who view the use of targeted killing as a valid measure the legitimacy of such acts lies in the protection of those considered under threat from the 'targeted'. For those who argue against such a policy, moral and legal legitimacy is grounded in the protection of those 'targeted'. There is a constant tension throughout the book of muted frustration and restrained passion by the author, despite claims of total impartiality. But it is this friction, reflective of the subject matter itself, which adds significant interest and a layer of complexity to the superb technical analysis.

Targeted Killing in International Law provides no clear answers. With such a theme anyone who claims moral and legal certainty is to be deemed naive or lacking practical understanding of one of the most controversial concepts in international law and politics. However, Melzer's detailed examination is a large step forward in the development of a better understanding of the issues and particular pressure points that daily engage advisers, courts, international lawyers and politicians when trying to determine when the state is in the position to take lives.

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A Common Law of International Adjudication

Chester Brown

(Oxford University Press, Oxford, 2007, liii + 303 pp)

The rise and rise of international courts and tribunals in the past few decades has led to a wealth of scholarly studies, the establishment of academic institutions, seminars and publication series. Debates continue over the possibilities, threats and implications thrown up by states and other subjects of international law increasingly being able to address grievances before third party dispute settlement

bodies. An area of this debate that has not received much attention so far relates to the procedures, practices and remedies of the international adjudicative bodies hearing these disputes. This area of international law is not often given the prominence it perhaps deserves, and can offer insights into the degree of convergence, or fragmentation, of the range of international courts and tribunals and their decisions.

Chester Brown's new work tackles this area of law with a view to examining developments in the context of the proliferation of international adjudicative bodies. The book is a revised and expanded version of Dr Brown's doctoral dissertation submitted to Cambridge University in late 2004. It is published by Oxford University Press as part of its *International Courts and Tribunals Series*, under the general editorship of Cesare Romano and Philippe Sands. The *International Courts and Tribunals Series* encourages the publication of works that address, in critical and analytical fashion, the legal and policy aspects of the functioning of international courts and tribunals, including their institutional, substantive and procedural aspects.

Dr Brown's central thesis is that international courts and tribunals often utilise similar approaches to address procedural issues they face. International courts and tribunals look to each other for guidance on procedure and remedies in a manner that results in a significant commonality of practice. In Dr Brown's view, this commonality and cross-fertilisation has given rise to a 'common law of international adjudication'. This common law, while not universally applied, is evidence of a more coherent international legal order than perhaps such a decentralised and fragmented adjudicative architecture would tend to indicate.

The book begins with an explanation of the intended scope of the study, and the procedures and remedies and the form and types of international adjudication it covers. For instance, the author does not attempt to consider every aspect of international adjudication, but rather focuses on a number of key matters faced by international courts and tribunals in the realm of procedure and remedies. The author chooses a number of topics that have typically required courts and tribunals to consider their role, availability and applicability as they are often not clearly defined in the bodies' constitutive instruments. These topics are: aspects of the rules of evidence; the power to grant provisional measures; the power to interpret and revise judgments and awards; and remedies. The author does not use the term 'common law' with any reference to the Anglo-American legal tradition, but means it to refer to the increasingly homogenous rules applied by international courts and tribunals to questions of procedure and remedies.

The book sets its contextual background as the proliferation of international courts and tribunals and the much-debated concerns about fragmentation of international law. Despite the self-contained nature of most of these courts and tribunals, their jurisdictional overlaps and the absence of hierarchical systems familiar in domestic legal systems, there is still similarity between them that is capable of producing common approaches. In a separate chapter, the book examines the methods used by international courts and tribunals to engage in cross-fertilisation. The author takes these principally to be their common sources of

law, such as the interpretation of constitutive instruments and custom, and the inherent powers of international courts and tribunals as judicial bodies. International courts and tribunals use various methods of treaty interpretation to have regard to other bodies' practice. They also apply general principles of law and the author looks extensively at cases where courts and tribunals have relied on their inherent powers and jurisdiction to exercise powers, including powers not expressly conferred on them.

The book then devotes a chapter to each of the key procedural issues faced by international courts and tribunals where there is evidence of cross-fertilisation. The first looks at aspects of evidence in international adjudication. The author discusses the sources of rules of evidence, a range of evidential issues, such as admission of evidence, burden and standard of proof, and powers of international courts regarding evidence. The author concludes that international courts and tribunals have adopted similar approaches to the admission of evidence and the allocation of the burden of proof. In a very useful survey of the jurisprudence, the author finds that on the standard of proof required, international courts and tribunals have not adopted a clear and consistent rule as it tends to differ depending on the gravity of the claims. International courts and tribunals also generally consider they have the power to take judicial notice of facts, to request further evidence from the parties, to draw adverse inferences, to make site visits and to allow some form of expert participation in a dispute. The author concludes that international courts and tribunals have broadly similar approaches to these questions, but there is not complete consistency.

In another interesting survey of the practice of international courts and tribunals, the book examines their power to grant provisional measures. The chapter looks at the power to grant provisional measures within constitutive instruments and rules of procedure, under general principles of law and as an inherent power. This is an area where international courts and tribunals have considered that they generally have a power to grant provisional measures, whether it has been expressly provided for or not, and have made extensive reference to the jurisprudence of other courts and tribunals in exercising it. This has led to a substantial commonality in the granting of such measures.

Two post-adjudicatory powers are then discussed, the powers to interpret and revise judgments. Included is a short policy and legal discussion on principles impacting on these powers, principally *res judicata*, and the limitations of such principles. Again the chapter looks to constitutive instruments, rules of procedure and inherent powers of international courts and tribunals in finding the source of the powers. Relevant issues for the use of these powers are discussed, including the jurisdiction and composition of individual courts and tribunals, scope of the powers and conditions for their exercise. Dr Brown suggests that all international courts and tribunals can exercise the power of interpretation, even if not conferred expressly, as it is necessary for their functions in the settlement of disputes and it assists the good administration of international justice. With respect to revision, the author finds that the case law is not as conclusive on the existence of the power but, as a matter of principle, it should be considered as an inherent power in order

to safeguard against unjust decisions made on the basis of incomplete or fraudulent evidence. Further, the jurisprudence shows that where these powers have been exercised they are generally exercised in a consistent manner by international courts and tribunals. The chapter considers the WTO dispute settlement system separately and finds that, despite the differences between the operations of the WTO dispute settlement and other international courts, WTO panels and Appellate Body might nonetheless have the powers of interpretation and revision.

Remedies are the final issue considered in detail by the author in assessing a developing common law of international adjudication. The book assesses the power to award remedies across a number of international courts and tribunals and the principle of reparation as a remedy in international law. The three main components of reparation, namely restitution, compensation and satisfaction, are examined. Dr Brown finds that while there is much common ground in the award of these remedies, there is less consistency in the manner in which they are awarded. Differences appear, for instance in the award of compensation, including between human rights courts and the limited practice so far before the International Tribunal for the Law of the Sea. Many international courts and tribunals are also recognising that they have a power to make mandatory awards (such as specific performance, negative injunctions and orders indicating the conduct required of a state), but differences remain between courts on the preparedness to issue such orders. While the book considers that the remedial regime applicable in the WTO dispute settlement system differs from the law on reparation, as a *lex specialis*, it is not immune from influence of general international law on remedies.

The final two chapters of the book examine the reasons behind the developing common law of international adjudication, its limitations and implications. The author distils a number of reasons behind the common law on procedure and remedies, such as: the similarity (in drafting and/or interpretation) behind the constitutive instruments of international courts and tribunals; the courts and tribunals taking into account developments in other bodies and (theoretically universal) customary international law rules; the exercise of inherent powers; the exercise of essentially similar functions by each court and tribunal; and the common legal experience of a relatively small pool of international law practitioners. Limitations identified by the author include: the specific provisions of the constitutive instruments of the international courts and tribunals; the specific agendas and functions of each court and tribunal; and whether, normatively, it is desirable for each judicial body to use the same procedures and remedies given that special procedures may be appropriate for the dispute or negotiated by the parties to the dispute. In terms of implications, Dr Brown suggests that international adjudicative bodies faced with jurisdictional competition could exercise powers more familiar to domestic lawyers, such as suspend or dismiss proceedings, or order that parallel proceedings be discontinued. A more profound realisation of the book's analysis of the common law of international adjudication is that the courts and tribunals operate as a community whose practices and procedures are relatively coherent, which in the author's view demonstrates systemic features in international dispute settlement.

Dr Brown's detailed study of the commonality in the procedure and remedies applied by a broad range of international courts and tribunals is to be welcomed. It is an insightful and thoughtful work that is clearly and concisely written. The author has undertaken a mammoth research task and condensed it into an approachable and lucid study. In his analyses, the author has succeeded in drawing perceptive linkages between areas of diverse jurisprudence. While primarily focused on an explanation of the law and practice of international courts and tribunals, the book is also usefully informed by normative assessments of the exercise of certain powers and the courts' and tribunals' role in the administration of international justice. The book also contains helpful comparisons with domestic legal systems on questions of procedure and remedies, with equal attention paid to common law and civil law approaches.

Despite considering it a first-rate book, it is worth mentioning a couple of minor quibbles. It perhaps says more about this reviewer's language aptitude, but the practice of quoting commentators in their original French, adopted a few times by Dr Brown, adds a level of incomprehension. Publishers may be alienating potential readers by requiring them to be bilingual to have a full understanding of a book, an increasingly rare skill amongst young international lawyers. This could be relatively easily remedied by perhaps paraphrasing the foreign language excerpt for the simpleton English-only reader. At times the book could also have usefully expanded on the factual situation behind some of the leading cases and explored the judgment in more detail to emphasise the point being made – however this is of course a balancing exercise with overall length.

The book will be a useful addition to the library of all international law practitioners and academics who work in the field of dispute settlement or who negotiate the treaties establishing adjudicative bodies. Its overview and comparative assessment of key procedure and remedial issues facing international courts and tribunals will be essential for any international litigator. In a time when compulsory jurisdiction is more available than ever before, it is a reminder that procedures, practices and remedies of international courts and tribunals can and should shape states' choice of forum and the prayers for relief sought. Australian practitioners will no doubt be reaching for it as a research and reference tool the next time they are advising on a potential dispute.

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Re-Envisioning Sovereignty: The End of Westphalia?

Edited by Trudy Jacobsen, Charles Sampford and Ramesh Thakur

(Ashgate Publishing, London, 2008, xvi + 357 pp)

At the time of the writing of this review article, the onset of this year's 'global economic failure' is rapidly rendering this summer's (hopefully the Australian reader will forgive the author's northern orientation on the matter of seasons) 'crisis of Westphalian sovereignty' a distant memory. How fast 'the West's' much lamented inability to check Russia's imperialist designs on her 'near abroad' gave

way to a new round of popular and media recriminations aimed at the United States government's inability to 'bailout' failing investment banks. Now that the rhetoric of crisis has shifted from the vagaries of international law to United States capital markets, and by extension, to the 'global economy', the stakes appear to be higher. Faced with the spectre of world market catastrophe, the furore of the summer months now seems laconic by comparison! Is it possible that below their apparently very different, even incongruous surfaces, both crises are symptoms or markers of something larger? In what follows, I shall review Trudy Jacobsen, Charles Sampford and Ramesh Thakur's edited anthology, *Re-Envisioning Sovereignty: The End of Wesphalia?* (hereinafter referred to as '*Re-Envisioning Sovereignty*').

My critique of the contributions to this anthology hinges on their failure to address what I have described as a crisis of meaning, rather than any particular instance of rhetorical crisis. The rhetoric of crisis emerges wherever we rely on the antiquated imagining and creaking lexical infrastructure of Westphalian sovereignty. This too infrequently remarked upon reliance, makes its presence felt in the endless chain of existential 'crises' that connect the period between 9/11 (or the end of the Cold War, depending on which historical markers are preferred) and the present. Russia's recent incursion into Georgian territory and the current instability in world financial markets are only the most recent instantiations of the peculiar narrative in which we find ourselves written. My aim is to consider the implications of this against the backdrop of the volume under review.

Because appraisals of one's own epoch are necessarily limited wherever they are posed exclusively in one register, I begin with a journalistic, rather than strictly academic theorisation of sovereignty. It is hoped that this approach might reveal certain hitherto unremarked upon convergences between the various analytical postures adopted toward the concept of sovereignty and the various discursive forums in which they find themselves being taken up. Writing in the *National Post* (Canada's 'right-of-centre' daily broadsheet), immediately prior to the implosion of global markets, columnist George Jonas fulminated loudly over events in an area of the world known only weeks before with far less specificity than the suddenly familiar references to South Ossetia and Abkhazia would suggest.[1]

Jonas' column begins by relating an incident in which Harvard Human Rights guru and current Canadian prime-ministerial aspirant, Michael Ignatieff, is purported to have conceded that his early idealism was now debunked: 'in the grim present, humanitarian intervention feels like an idea whose time has come and gone'.[2] Seizing on this comment, Jonas reminds readers of his own consistency in having opposed the logic of humanitarian intervention: even as far back as the misty-eyed institution-building nineties, in other words, prior to the events of 9/11 and the subsequent resurgence of realpolitik. What is missed in this critique, however, is that the liberal interventionist theories of the nineties have not been vanquished! The neo-Conservative cabal soon to exit the White House (hopefully

1 G Jonas, *National Post* (13 September 2008).
2 Ibid.

not to be replaced by another) has rearticulated sovereignty in still unfolding ways. Jonas is wrong to congratulate himself for his prescience because he was by no means alone in sensing a crisis in the offing.

Although curmudgeonly, less than original (and surely conservative), Jonas' gripe is not wholly without merit. However, it is also important to remind ourselves that Ignatieff's Kosovo-era understanding of the 'new world order' has been tested and proved both resilient and extraordinarily malleable. So much so, that its logics and rhetoric were quite easily reshaped for propaganda purposes in both Afghanistan and Iraq. But, after the debacles of the Bush years the international system has undeniably been reshaped. Importantly, however, this reshaping erased nothing of the interventionist and sovereignty busting language of the nineties (this puts the Blair back in the 'Bush-Blair years'). This is what makes it possible for Jonas to launch an attack on themes as wide-ranging as the UN-sponsored International Criminal Court and NATO's interventionist tendencies, while simultaneously basking in the glow of Ignatieff's admission that the recent conflagration between Russian and Georgia confounds 'humanitarian impulse', asserts the 'unyielding power' of determined military action and embodies the 'world-weary realism' of the current epoch.

While it is doubtful that Ignatieff has really been converted to a realist worldview, Jonas does capture something of our own (admittedly very western and hubristic) zeitgeist when he writes:

> If anything, brave-new-world doctrines like "responsibility to protect" handed an entire garbage dump full of justification to ursine Russia for grabbing South Ossetia from Georgia. Humanitarianism became the free gift of a casus belli from the idealistic Mr. Ignatieff and his ilk to pragmatic Russian leader Vladimer Putin & Co. Prince Metternich, the grandfather of all realists must be smiling.

Whatever one's opinion toward Russia's muscle-flexing in the caucuses, we cannot ignore the deeper question: what is the status of state sovereignty in our era? It is no coincidence that this question always takes us back to the Treaty of Westphalia. Signed in 1648 the Treaty of Westphalia is a touchstone of modernity. It is known to students of history, political science, law and international relations as the founding moment of the International (albeit exclusively European) state system. A state system originally conceived to squelch the scourge of religious wars gripping the continent. Its strategy was to secularise emergent forms of civic institution-building by submitting the anarchic international environment to the rule of law. Perhaps even more importantly, however, the treaty is generally seen to birth the nation-state as the base unit of government and the repository of sovereignty. Without stopping to assess the mythological quality of this narrative, it is worth recognising the significant symbolic power that links our own international system to the Treaty of Westphalia. It should therefore come as no surprise to learn of a new anthology compiled by an interdisciplinary group of legal and political theorists that addresses this most topical of queries.

The volume under review consists of over 19 different articles all based on papers presented at a conference held at the Australia National University in 2005. Although the contributors to this volume offer a variety of erudite and critical

interventions into the status of sovereignty, few, if any, manage to get beyond some version of the neo-liberal versus neo-conservative debate exemplified in the editorial pages of prominent western newspapers such as Canada's *National Post*. In what follows I shall consider some of the arguments advanced in this volume with and against what I believe to have been the volume's most glaring weakness: a failure to seriously consider a new grammar of politics and law in the hybrid field of constitutionalism.

If the Westphalian system can be said to be in crisis it is because the existing discourse of sovereignty remains wedded to a decisionistic tendency to reconcile the many in the one. Although this predilection was by no means ignored by early modern and anti-Enlightenment thinkers, it was never permitted to take root in mainstream political or legal theory. Now, more than ever, we cannot afford to ignore, or worse, take for granted, an unproblematic marriage of power and governance. Today, the author who most eloquently, if at times challengingly, presses this point is Antonio Negri.[3] It is therefore more than somewhat regrettable that his name is cited nowhere in the 357 pages of *Re-Envisioning Sovereignty*.

The omission of Negri's name from the anthology stands alongside a similar failure to theorise what he describes as the 'postmodern caesura'. The postmodern caesura is marked by the confounding of the link between power and governance. This confounding is triggered wherever the diverse or multiple singularities of a population are assumed to cohere under a particular 'schema of reason'.[4] For Negri, populations tend to cohere only in the sense that they confront each other, compete, cooperate and coordinate actions in 'the common'. The common is the shared realm of the multitude and it is precisely the terrain on which sovereignty is being renegotiated, reshaped and contested.[5]

One need only peruse a newspaper or look to academic commentaries, including many of those presented in the volume under review, to conclude, alongside Negri, that contemporary society is engulfed in a 'whirlwind of sovereignty'.[6] Oceans of ink have been spilled bemoaning (or extolling) the advance (or retreat) of a particular transnational institution or groups of institutions. The frequently unsubtle subtext is that sovereignty (rightly or wrongly) escapes the confines of the state (not to mention its hyphenated paring in the perhaps more resilient 'nation-state'). Rarely, if ever, do commentators ask whether the language of sovereignty is truly adequate to the descriptive challenge of our times. What the Treaty of Westphalia ought to remind us is that the modern (European) system of nation-states is by no means hardwired into the human animal. There is no reason to continue speaking and writing as though it were.

Our challenge is not to move back to 1648 and reshuffle the deck. Even if that were possible, it certainly would not be desirable. Wayne Hudson's opening

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3 A Negri, The Porcelain Workshop: For a New Grammar of Politics, transl by N Wendell (2008).
4 Ibid 138-39.
5 Ibid.
6 Ibid 140-41.

chapter, 'Fables of Sovereignty',[7] is to be applauded for setting a nuanced tone for the volume by both debunking the Eurocentric myth of Westphalia (as the purported uncontested genesis of the modern nation-state) and by emphasising that the actual genealogy of sovereignty is 'muddy at best'.[8] Many of the subsequent contributions also go some way toward making this point. I am thinking in particular of the second part of the volume (chs 4-6), which the editors wisely assigned to consideration of explicitly non-European interfaces with sovereignty.

In his chapter entitled 'Westphalian and Islamic Concepts of Sovereignty in the Middle East', Amin Saikal avoids caricatures of Islamic law by emphasising the crucial distinctions between orthodox Jihadi and secular Ijtihadi theories of sovereignty.[9] Though he opens up a variety of important questions, Saikal's article is ultimately too brief to substantiate his more interesting and controversial assertions. This is especially true of the claim that Jihadism shares an unexpected consonance (and an equally predictable tendency toward rivalry) with the 'extremism of re-born Christians, neoconservatives and right-wing nationalists who dominate the Bush Administration from the US side and intense religious Zionists from the Israeli side'.[10] Without explaining what particular logical formations or linguistic turns render one's theorisation of sovereignty extremist or fundamentalist, it becomes difficult to fully embrace Saikal's idea of a 'clash of extremisms'.[11] After all, would it not be just as easy and potentially more accurate to assert that sovereignty is by definition an extremist concept? Is not Sovereignty, with its tendency ultimately to consolidate decision-making capacity, necessarily absolute, fundamental and even extreme?

The question that Saikal, and others, ought to have addressed, but did not, was the question of how the neoliberal articulation of sovereignty, which so dominated the nineties, came to coexist with, and even justify, the neoconservative policies of the Bush years? Stated differently, what is the peculiar language or grammar of sovereignty that makes it possible to situate the pairing of power and governance within such apparently different ideological settings? This line of inquiry is best unpacked before, or at least alongside, any broader inquiry into the durability and familial resemblances of sovereignty across various cultural, historical and religious settings.

Equally importantly, to what extent is it really possible to make culturally-specific or religiously particularistic statements about the concept of sovereignty itself? Saikal circumvents this crucial question in his eager defence of secular Islam: 'Ijtihadi Islamists' position on the question of state and sovereignty is supportive of that which prevails in the world' and has aided 'the bulk of Muslims to come to terms with the Westphalian concept of sovereignty as a given

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7 W Hudson, 'Fables of Sovereignty' in T Jacobsen, C Sampford, R Thankur (eds), *Re-Envisioning Sovereignty: The End of Westphalia?* (2008) 19.

8 Ibid 24.

9 A Saikal, 'Westphalian and Islamic Concepts of Sovereignty in the Middle East' in Jacobsen, Sampford and Thankur (eds) above n 7, 73.

10 Ibid 81.

11 Ibid.

reality of historical change'.[12] While this may or may not be true, it fails to explain what links all theories of sovereignty and makes it possible to address them as diverse, albeit commensurable, phenomena. As I have suggested, following Negri, one potential answer might lie in the hypothesis that sovereignty is cognisable only in wholly naturalised linkage of power and governance.

Like Saikal, See Seng Tan's contribution, 'Whither Sovereignty in Southeast Asia Today?' is simultaneously at its best and worst where it demonstrates the extent to which a non-western (in this case, Southeast Asian) theory of sovereignty might be uncoupled from the state. It is true. Deterritorialisation is ultimately the thread that runs through virtually every contemporary commentary on sovereignty. The Southeast Asian *mandala*, with its 'multiple centres of authority'[13] like the Islamic *Ummah*, 'the borderless domain of the Muslim faithful',[14] displaces the Westphalian nexus between territory and central governmental power. But, where does this take us?

Saikal and Tan offer no explanation as to what makes concepts such as the *mandala* or the *Ummah* amenable to theorisation under the heading of sovereignty. How can sovereignty be seen to exist or even be articulated by any speaker? What are its conditions of possibility? What makes it cognisable at all? It is only the willingness to glide over these questions that ultimately makes it possible for so many contributors to avoid asking whether or not the existing language of constitutional theory and international law is adequate to the task of theorising non-western societies or the evolving structure of the global system.

If, following so many of the contributions in *Re-Envisioning Sovereignty*, we allow that sovereignty is a fully cognisable object of study (or at least a recognisable artifice or heuristic device), we might take up the idea of the *mandala* or the *Ummah* as a dialectical opposite to Westphalian sovereignty and exalt it or critique it accordingly. However, we might instead consider more closely the conditions that make it possible to enter into any discourse addressing itself to a common imagining of sovereignty. The philosophical and legal linkage between territory and sovereignty are well known and their apparent decoupling is the hallmark of virtually all professional and lay commentary. But what is to be gleaned from this rather obvious and non-controversial fact? What is so obvious that it can be easily assumed in the mainstream media and in the academic publication under review? Briefly, the answer is deterritorialisation. Deterriorialisation is the most obvious and clearly articulable symptom of globalisation.

If, following Negri, we reformulate our research in order to consider the movement of governance and power, both within and against the recognisable, and still very much alive, modern tropes of sovereignty (where deterritorialisation is understood by transnational institutionalisation and the proliferation of supranational institutions), the hope is that we might uncover a new language and

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12 Ibid.
13 Ibid.
14 Ibid 74.

new logic from which to think and argue. Rather than merely attacking or defending emergent sites of transnational governance, we might then consider, how, if at all, it might upset the modern marriage of power and governance to see its own logics outside of a strictly Westphalian setting.

Perhaps we should also consider whether we cannot perceive a rapid fire and repetitive cycle of the decoupling and subsequent reconstitution of power and governance in the movement of time. This is clearly the case relative to rhetoric of crisis. It is also precisely what makes it possible for William Maley, in his contribution, 'Trust, Legitimacy and the Sharing of Sovereignty', to imagine that states may have differing balances of juridical and empirical sovereignty.[15] Certainly this would be a difficult calculation to make. It would depend on whether you measured symbolic sovereignty in terms of positive law and empirical sovereignty based on coercive power. It would also depend on whether you were willing to include the structural imperatives of capital within your calculation. He might also concede that few countries have a low degree of juridical sovereignty today. As soon as any 'fledgling democracy' takes to its feet or is offered a debt bailout package it is delivered into the hands of hungry policy analysts, consultants, lawyers and bankers. A very high degree of both juridical and empirical sovereignty indeed!

One can hardly choke back scepticism long enough to agree with Maley that it was ever possible to construct a 'neutral security and institutional development' apparatus.[16] A security apparatus is by definition partisan and an institutional apparatus is by definition productive and invasive. What is clearest in Maley, however, is by no means absent in the other contributions to the volume under review. The implausibility of convincingly measuring any real or symbolic gap between legal norms and political reality, particularly on the terrain of international law is everywhere on display. This should of course not be surprising because international law is the precise point of contact between legal and political normativity. Without addressing and accounting for this point, it becomes impossible to consider the fulsome implications of the recurring nexus of governance and power in virtually every theorisation of sovereignty. To his credit, only Wayne Hudson's first chapter, 'Fables of Sovereignty', takes a step in this direction:

> Indeed, much of the Anglophone discourse about sovereignty oscillates between sovereignty in the sense that *there is a supreme power within a body politic*, sovereignty in the sense that *power coordinates with territoriality*, and sovereignty as a way of *regulating the relations between states*, without explaining why these were so hard to relate to each other [citation omitted, emphasis in original].[17]

Unfortunately, Hudson's ultimate proposal backs off any further inquiry and reverts to the established language of modern constitutionalism:

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15 W Maley, 'Trust, Legitimacy and the Sharing of Sovereignty' in Jacobsen, Sampford and Thankur (eds) above n 7, 287.

16 Ibid 292.

17 Hudson, above n 7, 23.

> [A] constructive historical reading of the historical record strongly suggests that experimental practices may be able to be introduced that overcome current confusions of sovereignty with misinterpretations of the political theology of *monarchia*. Once we recognise that the historical record abounds in emergent institutional *personae*, it may be possible to conceive of new forms of sovereignty based on emergent institutional *personae*.[18]

Something more is required beyond the banal conclusion that 'it should be possible to re-theorise sovereignty in new ways, even though nation-states will continue to dominate the international system in the immediate term, despite the partial emergence of an international or global civil society'.[19] It is not enough to re-theorise sovereignty by retelling its legend. It is also of little value to prognosticate on the durability and competitive prospects of the nation-state as against its imagined rivals (whether in transnational institutions, corporations, NGOs, global 'civil society' or any other upstart). What is instead needed is a new thinking about how institutionalisation, like deterritorialisation, has become indissolubly linked to our collective understanding of sovereignty.

Any potential path to a new language of law and politics would require consideration of a possible exodus from sovereignty. The path of any such exodus would necessarily lie in the refusal of the exclusivity of the nexus between governance and power. Such an exodus or refusal would undoubtedly undermine or otherwise render problematic those definitions of sovereignty that animate so many of the contributions to the volume under review. Many of which, like C Raj Kumar's 'Corruption and Transparency in Governance and Development', are prone to believing 'sovereignty is about the state taking responsibility to govern' and ensuring 'that the state has the capacity to govern and is able to exercise its powers and use its resources for the benefit of the people'.[20] What is missed in each of these familiar configurations is the caesural moment in which the multitude of singularities (or simply, 'the multitude') interjects itself into the productive circuitry of the hitherto exclusively sovereign nexus of governance and power.

For Negri, the crisis of modern sovereignty is marked by the tendency of governance and power to escape the hegemonic clutches of the modern nation-state. This crisis implies a concomitant impossibility of recomposing the people via any form of transcendental unification. The multitude, unlike '*the People*', the citizenry or the public writ large, resists and confounds the logics of sovereignty because it cannot abide absorption within any singular jurisdictional structure of governance or power.[21] Although it contains no theorisation of the multitude, some of the contributors to *Re-Envisioning Sovereignty* touch on this point to greater or lesser degrees.

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18 Ibid.
19 Ibid. Citation omitted.
20 C R Kumar, 'Corruption and Transparency in Governance and Development' in Jacobsen, Sampford and Thankur (eds) above n 7, 253.
21 Ibid 134-35.

Jan Aarte Scholte's contribution, 'Civil Society and Sovereignty in a Post-Statist Circumstance' argues that 'governance over the past half-century has acquired a decidedly post-statist character'.[22] Scholte is by no means the first to recognise that our epoch is crosshatched by a variety of polycentric or 'different constructions of sovereignty'. He is also not alone when he muses that sovereignty may no longer be observable (if it ever was) in any singular, localisable or absolute 'site of final societal authority'.[23] Writing from an impressive variety of disciplinary perspectives and substantive areas of expertise, other contributors to this volume make strikingly similar observations. Joseph Camilleri, in his 'Sovereignty Discourse and Practice – Past and Future', even muses that it may now be time to eschew the language of sovereignty altogether.[24] Well beyond Scholte's polycentrism, he adds that 'the world is now comprised of multiple "autonomies", which make for growing complexity and heterogeneity'.[25] Unfortunately, Camilleri's most provocative remarks are reserved for his final paragraph and are not further developed:

> This world is no longer "sovereign", in any plausible sense of the word. For the ensuing plurality is at the same time held together by numerous connectivities (economic, technological, scientific and even cultural) [citation omitted].[26]

This passage is highly reminiscent of Negri's theorisation of the multitude. For Negri, the multitude is nothing less than the cooperative, albeit never universalising, democratic potentiality of the many: '[t]he multitude is a collection of singularities, a cooperative fabric that links together infinite singular activities.'[27] Camilleri's words are equally reminiscent of Negri's work with collaborator Michael Hardt, in which they describe the multitude as that which escapes and resists the logics of sovereignty 'through communication and collaboration to converge toward a common social being'.[28]

Regrettably, what is almost uniformly overlooked in the pages of *Re-Envisioning Sovereignty*, despite those contributions such as Camilleri's which contain significant, albeit all too fleeting, moments of insight, are the more radical implications that flow from the theorisation of concepts such as polycentrism and heterogeneity. Specifically, if it is no longer possible (if indeed it ever was) to assume a single or uniform dynamic of power and governance in any particular institutional arrangement, how can the modern lexicon of sovereignty continue to be both meaningful and relevant?

One possible answer is that in order to keep pace with the rapidly changing human environment it hopes to describe, the modern lexicon of sovereignty is in

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22 J A Scholte, 'Civil Society and Sovereignty in a Post-Statist Circumstance', in Jacobsen, Sampford and Thankur (eds) above n 7, 331.
23 Ibid.
24 J Camilleri, 'Sovereignty Discourse and Practice – Past and Future, in Jacobsen, Sampford and Thankur (eds) above n 7, 43.
25 Ibid 49.
26 Ibid.
27 Negri, above n 3, 71.
28 M Hardt and A Negri, Multitude: War and Democracy in the Age of Empire (2006) 159.

need of a major overhaul. At first blush, this is actually less radical than Camilleri's musing that we might even jettison the language of sovereignty altogether. It certainly does not seem too far afield from what the editors of *Re-Envisioning Sovereignty* explicitly set out to do: '[t]he ultimate goal is to examine emerging conceptions of sovereignty and to craft a coherent concept that can respond to the multiple challenges [to sovereignty] and then to consider the institutional structures that would realise such a reconceived sovereignty'.[29] Upon closer reading however, it might be argued that the editors of this volume, like so many of its contributors, inadvertently foreclosed on the possibility of articulating any genuinely post-Westphalian theory of sovereignty (even before they have begun to try!).

It is not sufficient to simply remark upon the de-centreing or de-privileging of the state as the locus of governance and power. What is required can be summarised in three words: genealogy, deconstruction and invention. The genealogical move asks how the sacrosanct modern link between governance and power came to be transported from the Westphalian model to the purportedly polycentric and heterogeneous post-Westphalian model. The deconstructive move requires the theorist to query, decouple, destabilise and otherwise problematise the link between governance and power wherever it is found (whether in the Westphalian state or some other more recent institutional incarnation). However, it is the inventive move which is of primary interest to me. Invention requires the bringing of new languages and conceptual apparatuses to bear on an otherwise exhausted field of inquiry (in this case, the inquiry into the status of sovereignty in the first decade of the new millennium). This is what Negri may have had in mind when he titled his most recent book, *The Porcelain Workshop: A New Grammar of Politics*.[30] The language and logics of politics (or for that matter law) is fragile. Like porcelain it is subject to shatter when used roughly. Ultimately, Negri teaches us that when we find ourselves gazing down at the shattered language of Westphalian sovereignty, our best option might be to throw it back into the kiln.

Inventive ways of theorising sovereignty require correspondingly alternative logical and lexical points of entry into the subject matter. The multitude may be one such point of entry because it offers a line of site into the dynamic qualities of human life that cannot be easily distilled or otherwise subject to the taxonomies and techno-bureaucratic logics of institutions.[31] Even the most benign or 'progressive' theories of governance (usually those that temper power within the rubric of institutions) necessarily fall short. Even with its representative aspiration toward the '*the People*', popular sovereignty will not suffice to express the impulse

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29 M Lewis, C Sampford and R Thakur, 'Introduction', in Jacobsen, Sampford and Thankur (eds) above n 7, 2.

30 Negri, above n 3.

31 See, M Hardt and A Negri, *Empire* (2000) 60-1 (caution is however merited: although the multitude resists the expanding institutional apparatus of sovereign power or 'Empire', it should not be oversimplified or misunderstood as dialectical opposition, the multitude is both '*within* Empire and *against* Empire' – the multitude cannot be distilled into purely negative principle because it as much anti-sovereignty as it is creative refutation or constituent power).

of the multitude. Wherever the nexus of governance and power is expressed in the institutional form the people are everywhere accompanied by the spectres of poverty, destitution, environmental degradation and war. It is here that the nexus of governance and power in sovereign institutions might finally emerge as a problematic in its own right. It is equally here, that power might finally be considered in terms of the capacity to resist rather than merely the capacity to govern or even more minimally, to decide.

Many of the contributions to the volume under review, like so much of the popular discourse on sovereignty, takes as its interest the tendency of governance and power to find an infinite number of institutional expressions, many of which escape the rubrics of the state. Oceans of ink have been spilled on the outsourcing of sovereign power to non-state entities ranging from NGOs to private corporations. Undoubtedly, an extraordinarily complex and varied map of regional, global, sub and supra state institutions have sprung up everywhere. But, what can be said that is genuinely new or original about this phenomenon? Those contributors, who like Scholte, argue that a post-statist civil society is now emerging to fill the void left by the retreat (albeit by no means the demise or undifferentiated weakening) of the Westphalian state, ultimately fail to face the more fulsome implications of their hypothesis. The familiar nexus of governance and power in the institutional form can no longer be easily relied upon to describe our own epoch.[32] Few of the contributors to *Re-Envisioning Sovereignty* attempt to re-articulate or imagine sovereignty it relation to governance and power and this oversight must be addressed in any subsequent volume.

For his part, Negri is not guilty of any such oversight, '[t]he Crisis of sovereignty becomes most explicit when, *in modern theory* and following that, in Empire, government becomes the fundamental – and single – element in the management of power and when the concept of democracy is entirely subordinate to the maintenance and reproduction of a unilateral exercise of power (that is, in its most dramatic form, in the nationalisms and colonialisms of the modern period).'[33] The point I have been pressing is that this imagining of the crisis of sovereignty characterises the postmodern caesura and is unsatisfactorily addressed in the volume under review. Moreover, certain logical and lexical hegemonies that prevail in almost all of the contributions to the volume impede the cognition of alternative avenues of analysis and expression beyond the usual recourse to the Westphalian imagining.

If there is a genuine 'crisis of sovereignty' it lies precisely at the postmodern caesurae and hinges on the poverty of the linguistic and communicative tools inherited from our very recent past. If we are to penetrate the haze surrounding what we might loosely perceive as an emerging post-Westphalian sovereignty, it will be because we found a means to contest and de-centre the descriptive and normative vocabulary of modern political and legal theory. Such an ambitious project goes well beyond the scope of any single book and requires more fulsome

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32 See eg, Scholte, above n 22, 337.
33 Negri, above n 3, 134.

analysis of the monochromatic configuration of sovereignty, from its absolutist instantiation in Bodin and Hobbes to its ostensibly republican instantiation in Rousseau.[34]

Those contributors to the volume under review, who, like Scholte and Camilleri, remark that the institutional apparatus of sovereignty is now characterised by increasing polycentrism and heterogeneity, are by no means in error. However, not unlike the commentary littering the pages of the bourgeois media, there is little to this diagnosis that genuinely assists the reader to decipher an agenda for political or legal action. The gravest risk is that the commonplace analytic posture becomes so concretised that lexical or logical recourse to anything outside a reinvigorated pragmatics of modern governance strikes the reader as unthinkable, impracticable or nonsensical.[35] In hope of avoiding this state of affairs I have introduced Negri's concept of the multitude in the course of this review article.

What is critical to Negri's theorisation of the multitude is that it opens up logical and lexical space otherwise precluded by the more established language of Westphalian sovereignty. Taking a partially familiar 'anti-Enlightenment' or minoritarian view of modernity, Negri follows Machievelli, Spinoza and Marx before him to imagine 'absolute democracy' as something other than a mere 'form of government'. Rather than being a mere form of government, state-centred, transnational or otherwise, the multitude expresses a material and ontological resistance to any formation of sovereign power that poses itself as transcendent and institutionally hardened.[36] Among the contributors to the volume under review, only Gerry Simpson's 'The Guises of Sovereignty',[37] begins to open this line of inquiry and it is for this reason that I will treat it last.

Prior to addressing Simpson's contribution and concluding, it is necessary to apologise to the authors of the many chapters of this anthology left un-reviewed. It goes without saying that their contributions were no more or less worthy than those of their colleagues. However, due to the impossibility of rendering all of them their due in such a brief review, I instead endeavoured to explore one or two critical themes in a sustained manner against the backdrop of the most representative articles. What is remarkable about Simpson's contribution, however, is that it breaks the mould and presents sovereignty in rather more disjunctive and altogether more challenging manner.

Speaking of 'the spaces that seem to fall through the cracks of statehood and sovereignty', Simpson is perhaps the only contributor to this volume who hones in on diverse, and under-theorised, nodes of intense globalisation, such as

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34 Hardt and Negri, above n 31, 85-6 (the authors argue that Hobbesian absolutism is virtually indistinguishable from Rousseau's Republican absolutism: in each case the many are made to forfeit their power to the transcendent *One*, whether in the form of the monarchical or ostensibly democratic republican state).

35 Negri, above n 3, 134-35.

36 Ibid 138-39.

37 G Simpson, 'The Guises of Sovereignty', in Jacobsen, Sampford and Thankur (eds) above n 7, 51.

international airports, refugee camps and free trade zones. All of which, he argues, make explicit, or otherwise underwrite the absoluteness of the Westphalian (read: *modern*) rendering of sovereign power.[38] Simpson implicitly recognises that even where sovereignty is taken out of its familiar territorial frame it cannot escape the reflexive institutional pairing of governance and power. Although both his language and illustrative examples are closer to Giorgio Agamben than they are to Antonio Negri, more than any other contributor, he brings us to the terrain of the multitude, at least insofar as he faces up to the logical and lexical limits of sovereignty: a set of limits that emerge within and against the material and immaterial spaces of globalisation.

Localities as diverse as airport breezeways, holding cells and decreed economic free trade zones are as much physical instances of sovereignty as they are imagined ones. What Simpson grasps with unmatched acuity is that even where the imaginative hold of modern sovereignty becomes tenuous, its hold on the experience of life and language is rarely permitted to follow suit. In the post-Westphalian, albeit persistently sovereign spaces of globalisation, a simultaneously logical and lexical confounding is always afoot. Airports, refugee camps and free trade zones are both confounding and caesural because they are spaces in which contradictory modern multiplicities can no longer be collected under any 'schema of Reason'.[39] It is precisely within this space that the deeper crisis of sovereignty emerges and the theorisation of the multitude must begin.

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38 Ibid 53.
39 Negri, above n 3, 138-39.