Recent Publications

Domestic Law and International Practice

We, the Japanese People: World War II and the Origins of the Japanese Constitution, vols. 1-2. By Dale M. Hellegers. Stanford: Stanford University Press, 2001. Pp. xvii, 826. Price: $99.00 (Hardcover). Reviewed by Jeffrey Wu.

> "[T]he Constitution of a country can achieve the desired ends only when it is adapted to its national circumstances . . . otherwise it will only invite abuses leading to fearful tyranny and misrule." Matsumoto Joji, 1946 (p. 531).

Constitutional law is a curious legal creature. The law ordinarily presupposes enforcement by external authority. Contract law, for instance, relies on the premise that the state machinery, especially the judiciary, can and will assume the duty of enforcement. Constitutional law is different: the state is not external to the constitution; rather, the state itself is defined by the founding document, and it recognizes no higher legal authority. In the absence of external authority, it follows that constitutional rule can survive only through self-enforcement by the people themselves. The spirit of the constitution must permeate the social fabric. Otherwise, constitutional law easily degenerates into irrelevance, as has so often happened in failed democracies throughout the world.

Matsumoto's epigraph, written in 1946 to protest American determination to impose a constitution on defeated Japan, recognized this insight. However, contrary to the expectations of the conservative Japanese politician, the transplanted constitution flourished on Japanese soil, and to this day provides the legal underpinning of Asia's oldest and most stable democracy. As "regime change" is once again a central plank of U.S foreign policy today, it is an opportune time to revisit the history of constitution-making in post-war Japan, both for its own sake and for the heuristic light it may shed on contemporary policy debates.

According to Dale Hellegers's massive monograph, the road to the Japanese constitution began in Casablanca in 1943, as Roosevelt and Churchill announced to the world their intention to wage war until the unconditional surrender of the Axis powers. The doctrine of unconditional surrender was not a carefully conceived instrument for achieving the Allies' objectives for the post-war world. Rather, the Allies adopted this stance precisely because they lacked a coherent vision of the future. Unconditional surrender freed the Allies from commitment to any concrete post-war objective, because any and all objectives were presumably attainable upon the

complete defeat of the enemy. Moreover, unconditional surrender provided a convenient rallying cry for the publics throughout a strained alliance, the moral equivalent of a second front. Although policy-makers hardly realized it at the time, unconditional surrender would eventually provide the theoretical and legal basis for re-engineering the Japanese polity. The doctrine envisaged the complete evisceration of the defeated state's sovereignty, thus giving the victors much more power than occupying authorities typically wielded under customary international law. This, to critics inside and outside of the U.S. government, was the doctrine's fatal flaw. Because the Japanese had to assume the worst about the consequences of defeat, unconditional surrender needlessly prolonged the war by making it nearly impossible for Japan to surrender.

In the absence of a clear statement of U.S. objectives, the doctrine could be seen as a blank check for ruthless revenge. In the Potsdam Declaration, delivered shortly before the tragedy at Hiroshima, the United States finally did provide limited clarification of its post-war intent. But language providing assurances for the emperor—the paramount issue for the Japanese leadership—was stricken from the final draft, even though the United States was already leaning toward retaining the imperial system. It is impossible to know whether peace could have been achieved in time to avert the atomic disaster had the Potsdam declaration stated American aims more specifically; the historical observer can only rue the possible road not taken.

The shibboleth of unconditional surrender left the United States embarrassingly unprepared for the war's end in August 1945. The military's civil affairs units were understaffed, under-trained, and woefully inadequate for the demands of military government. Their manuals and guidelines had assumed that occupation would take place over devastated enemy territories without a functioning government, not in a Japan still unsoiled by land warfare and administered by a unified, effective bureaucracy. Neither had it been decided whether the Army or the Navy, MacArthur or Nimitz, would run post-war Japan. Under a cloud of uncertainty, for the sake of administrative convenience, a decision was made to keep Japan's government apparatus and to use it as an agent of implementation for occupation policies. The same approach was applied to constitutional reform in Japan. Washington policy-makers deemed democratization essential for ridding the process of the shadow of militarism, but Japanese leaders were to be allowed to initiate and shape the reforms themselves. The United States had no intention of writing a constitution for Japan. The only directive on constitutional issues to emerge from Washington provided a general critique of Japan's existing constitution but no detailed blueprint for reform.

After rounds of bureaucratic infighting, MacArthur found himself safely ensconced in Tokyo as Supreme Commander, with virtually dictatorial powers over the defeated nation. Even more than his Washington superiors, the general believed firmly in working with the existing Japanese system. Changes emanating from within were more likely to receive popular approval; high-handed impositions from foreign occupiers could only induce discontent and mistrust. However, working with the Japanese did not mean soliciting

opinions from different sectors of society or convoking a constitutional convention, a measure that would have enjoyed widespread popular support. Instead of confronting the uncertainties that a convention would entail, MacArthur was content to leave Japan's conservative leadership with full power to propose constitutional reforms. The Japanese leaders could not have agreed more with this approach.

When the Shidehara cabinet finally emerged with a proposal that entailed only minimal and cosmetic changes to the constitution, MacArthur realized that he could not rely on the Japanese conservatives to change a system that had long sustained them. Instead, the occupation had to impose a constitution of its own. He summoned mid-level occupation staffers to the Dai-Ichi Hotel, where they were given a week to draft a model constitution in complete secrecy, in order for it to be translated and published ahead of scheduled Diet elections. The drafters came from diverse backgrounds and varying levels of experience—from a former Congressman and several veteran lawyers and academics to one drafter who was only twenty-one, and another whose most relevant experience was an undergraduate degree in political science. Experience aside, almost no one was prepared to engage in constitution-making at a moment's notice. Yet they shared a common belief in the power of the law to shape and improve the world. Many were ardent New Dealers, and given the wide latitude provided by their status as occupiers, they crafted provisions that were more liberal even than the corresponding U.S. law. Many sleepless nights and coffee cans later, they delivered a draft to the Japanese government, with a firm order to accept. The cabinet duly complied, with tears.

Hellegers's study is remarkable for its richly detailed descriptions of bureaucratic policy-making and of the historical personalities involved, and for its extensive use of primary materials in both Japanese and English. For all of its length and detail, however, it lacks the structural integrity necessary to sustain a long narrative. The bulk of Volume I concerns the evolution of the doctrine of unconditional surrender. While unconditional surrender surely was a necessary condition for constitutional reform, it had little bearing on the actual content of the reforms. Japan's surrender could have led to a monarchical or a republican form of government. A legislative history of the constitution itself is needed to explicate more fully the origins of the document as it emerged. Hellegers does provide that history, but unfortunately it is buried in appendices and only indirectly woven into the narrative. Indeed, it is a pity that the most exciting part of the book is the appendices, which reproduce various drafts of the constitution, along with copious notes and commentary. For a book that purports to discuss the origins of the Japanese constitution, there is too much about the war and not enough about the constitution itself.

Nonetheless, Hellegers captures beautifully the supreme irony of Japan's constitutional moment. The book's title, "We, the Japanese people," is also the phrase that opens the constitution's preamble. However, as Hellegers points out, no Japanese played an active role in the document's creation. Like the drafters of the authoritarian Meiji constitution before them, American

drafters had worked in secrecy, shielded from public scrutiny. It was not the case that Japanese society had no reformist impulses. Many private groups and advocates had publicized their own drafts and proposals for constitutional reform, but occupation forces made a conscious decision to forego an unpredictable constitutional convention. MacArthur's pretense aside, the constitution was the product of American bureaucrats, not the Japanese people. And herein lies another irony, which relates to the haphazard and contingent nature of bureaucratic policy-making: the constitution was not carefully crafted as part of a master plan for Japan's reconstruction.

Dating from Casablanca, U.S. policy for post-war Japan appears to have been characterized as much by chaos, confusion, and chance as it was by rational planning. Looking back on 50 years of democracy and prosperity in post-war Japan, it is tempting to remember the occupation as an unqualified success, and to speak with confidence of the power of the United States to re-engineer whole nations into democratic mirror images of our own society. But Hellegers's unflattering description of U.S. policy-making challenges our confidence. Perhaps Japan's success can indeed be attributed to the magical efficacy of a document cobbled together on short notice by sleep-deprived bureaucrats. But success was more likely driven by factors beyond the MacArthur draft, factors that had more to do with the internal dynamics of the Japanese political economy. So perhaps Matsumoto was, in a certain sense, right after all: the Japanese may have prospered not because of wise American policy, but because preconditions existed in Japanese society to make the transplanted constitution work. At a time when many American politicians are once again prescribing regime change as a solution to foreign policy problems, the Japanese experience counsels not hubris, but humility.

Cloak and Dollar: A History of American Secret Intelligence. By Rhodri Jeffreys-Jones. New Haven: Yale University Press, 2002. Pp. x, 357. Price: $29.95 (Hardcover). Reviewed by Andrew Goldstein.

Just after the terrorist attacks of September 11, critics of the U.S. intelligence community and Americans looking for someone to blame wondered out loud how the most powerful nation in world history could have been so unprepared. Given the $30 billion or so the United States spends on intelligence each year—more than Russia spends on its entire military—shouldn't we have seen this coming? In the weeks that followed, news leaked that al Qaeda had in fact left plenty of clues and that U.S. intelligence agencies had picked up many of them. But no one had put the puzzle together. On the defensive, the three pillars of U.S. intelligence—the Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Agency—quickly promised sweeping reforms. They'll share more now. They'll put more people on the ground and invest more resources in analysis. And one more thing, of course: to make all these changes they'll need a lot more money from the American taxpayer. What better way to respond to failure than to reward it?

Such has been the pattern of U.S. intelligence for more than a century, argues British historian Rhodri Jeffreys-Jones in *Cloak and Dollar*. The bloated U.S. intelligence budget is the product, he writes, of "a longstanding conspiracy of spies, a great confidence trick designed to boost the fortunes of the spy rather than protect the security of the American people" (p. viii). The assassinations of Presidents Lincoln, Garfield and McKinley, the bombing of Pearl Harbor, the hostage crisis in Iran—tragedies, yes, but for the intelligence community, these events have provided opportunities. After all, fear pays the bills. Jeffreys-Jones does not say intelligence failures are deliberate. Rather, the lack of meaningful independent oversight, coupled with America's infatuation with espionage, leaves intelligence agencies with little incentive to keep costs under control.

As such, the book offers a timely warning for the latest wave of intelligence boosters, but as a thesis Jeffrey-Jones's central argument is not terribly earth-shattering. As Jeffreys-Jones admits in his opening chapter: "all bureaucracies [have a tendency] to grow in a self-perpetuating and self-propagating manner" (p. 3). And when you give a bureaucracy minimal oversight and a secret budget, any exercise of self-restraint would be the real surprise. What is novel about Jeffreys-Jones's analysis is his contention that America's inflated intelligence operation is a special case because of "the emergence, within intelligence circles, of the confidence man" (p. 3). From Allan Pinkerton's supplying of false information to General George McLellan during the Civil War to J. Edgar Hoover's exaggeration of the "Red Menace," Jeffreys-Jones argues that intelligence leaders have been especially deft at conning the country. But are they really that much better at playing the self-propagation game than, say, the bosses at the Pentagon (annual budget: $360 billion) or the department of Health and Human Services ($490 billion)?

Jeffreys-Jones is so enthralled with his analogy of spy boss-as-conman that he begins the book with an utterly misplaced story about his grandfather giving up snooker for the Church. Jeffreys-Jones questions the version of events his family told him as a child and concludes: "All this suggests the Confidence Man is rather a pervasive character" (p. viii). Really? After reading *Cloak and Dollar,* it's hard not to wonder whether Jeffreys-Jones chooses his episodes of history simply because they fit what he thinks is a nifty metaphor. Indeed, Jeffreys-Jones spends much of his 357 pages hammering home the spy boss-conman theory, yet he never makes the case that the leaders of America's spy organizations have really been more successful manipulators of public relations than any other savvy Washington hands.

That aside, *Cloak and Dollar* does include a series of powerful stories detailing the growth of the U.S. intelligence bureaucracy. A pivotal moment came in September 1901, when William McKinley became the third president in 36 years to be assassinated, despite a guard of three secret agents and 100 on-site security officers. Secret Service director John Wilkie deflected blame by exaggerating the danger posed by "anarchists" such as McKinley assassin Leon Czolgosz. Congress in turn boosted Wilkie's budget. Soon there were so many agents that the Service began lending men to other government

departments at a 33% price premium—a sort of in-house mercenary program. An appalled President Theodore Roosevelt tried to rein in the practice, but instead of cutting back on the Secret Service, he established another intelligence bureaucracy: the Bureau of Investigation, which became the FBI.

Less than a decade later, lurid press reports of "white slavery," in which young girls were abducted into brothels, gave the FBI a pretext to open field offices around the country. When skeptical members of Congress asked why state police could not do the job, Stanley Finch, the FBI's first director, played to America's fears: "Unless a girl was actually confined in a room and guarded, there was no girl, regardless of her station in life, who was altogether safe" (p. 87). In his typically exhausting prose, Jeffreys-Jones explains, "Finch was attempting to make the FBI a people's agency by making it the savior of America from a universal threat that was at least in part his own invention" (p. 87). Indeed, hyperbole had fast become the standard way of doing business. In 1922, President Warren Harding appointed FBI director William Burns, who promised to place less emphasis on the overblown threat of bolshevism in America. But after two years in the agency, Burns had become co-opted, telling the House Appropriations Committee: "Radicalism is becoming stronger every day in this country. . . . They are going about it in a very subtle manner. For instance, they have schools all over the country where they are teaching children from 4 to 5 years old" (p. 95).

Most relevant to the September 11 attacks—and to those concerned with the United States' penchant for using its intelligence agencies to violate international law—is the history of the CIA. The agency was created in the wake of the invasion of Pearl Harbor, but Jeffreys-Jones argues that "Pearl Harbor did not justify the CIA, or its expansion, or its questionable activities—or even its good practices" (p. 116). But rather than supporting his powerful contention, Jeffreys-Jones lays out the conflicting arguments of a series of historians and investigators—from those who believe intelligence experts gave plenty of warning (which President Roosevelt may have deliberately ignored), to those who call Pearl Harbor the biggest breakdown of intelligence in American history—and then simply notes which of these he agrees with, without providing additional evidence.

The analysis he likes most, Roberta Wohlstetter's argument that "there is no fail-safe means of guarding against surprise attack," (p. 120), could have key implications for an analysis of what went wrong on September 11. Wohlstetter says America's decision makers had plenty of intelligence leading up to Pearl Harbor; in fact, the intelligence bureaucracy was so large that its size was an impediment to efficient functioning. The real problem, she argues, was that it was impossible to single out the real and significant "signals" from all the background "noise." Sound familiar? That's why it's such a shame Jeffreys-Jones doesn't explain why he thinks Wohlstetter is right.

The strongest sections of *Cloak and Dollar* detail the resilience and expansion of the CIA despite a series of cascading scandals. In the wake of the agency's disastrous incursion into Cambodia, Congress specifically prohibited it from spending funds on paramilitary operations. But soon word leaked that the CIA had helped to engineer the 1973 overthrow of Chile's

democratically-elected Salvador Allende and to usher in the totalitarian regime of Augusto Pinochet. Then in December 1974, investigative journalist Seymour Hersh published a story on the front page of the *New York Times* declaring: "The CIA, directly violating its charter, conducted a massive illegal domestic intelligence operation during the Nixon administration against the anti-war movement and other dissident groups in the United States" (p. 212). Suddenly, it was open season on the CIA. But what came of all the fury? Congress launched two substantial investigations, but, writes Jeffreys-Jones: "[T]he investigators became mesmerized by the very hype they were supposed to counter" (p. 214). Both investigations found that "in general, the foreign intelligence community collected too much pointless information and then failed to make sense of it" (p. 220) and that "too much money was being spent on collection, too little on analysis" (p. 223). (Again, shades of Pearl Harbor and September 11 come to mind). But instead of demanding real reform, Congress created two committees to oversee the intelligence community. Jeffreys-Jones notes that even this was a significant accomplishment, given the agency's history. But by 2000, the oversight committees had morphed into intelligence boosters, criticizing the president for underfunding the agencies they were supposed to be scrutinizing.

There is much that is fascinating in *Cloak and Dollar*—as you would expect in a book about secret intelligence. Unfortunately, Jeffreys-Jones clouds much of it by continually harping on his confidence-man metaphor, at the expense of all else. Much of Jeffreys-Jones's book was written before the attacks of September 11 brought these issues into focus. As a result, several crucial questions are mentioned but left unanswered: Does the United States collect too much intelligence? Is there a better way to analyze the information that comes in? How big of a problem is competition between the intelligence agencies? Is there an oversight system that might actually work? Despite these flaws, Jeffrey-Jones does leave Americans with an important message as Congress reexamines the intelligence bureaucracy in the wake of September 11: watch the budget and beware of those who exaggerate the threat.

Aid and Intervention

Eyewitness to a Genocide: The United Nations and Rwanda. By Michael Barnett. Ithaca, N.Y.: Cornell University Press, 2002. Pp. xiii, 215. Price: $25.00 (Hardcover). Reviewed by Stephen I. Vladeck.

Nine years later, there is little remaining doubt that the United Nations and the U.S. government knew, not long after the beginning of the genocide on April 7, 1994, that something horrible was unfolding in Rwanda. Nine years later, journalists and historians too numerous to count have chronicled the terrifying speed of the events, including the desperate pleas for help from General Romeo Dallaire, commander of the U.N. peacekeeping force in the central-African nation, both before and during the brutal campaign that left over 800,000 dead. Nine years later, the argument that most of the violence

could have been thwarted by rapid, decisive intervention by either the United Nations or the United States is accepted almost without challenge. Nine years later, the failure of the United Nations to so intervene still haunts Michael Barnett, who, at the time of the genocide, was a political officer for the U.S. mission to the United Nations responsible for overseeing the operation in Rwanda.

Barnett, today a professor of political science at the University of Wisconsin-Madison, describes his new book as "an ethical history of the U.N.'s indifference to genocide" (p. 4). Yet it is much, much more. It is a ringing indictment, not of the United Nations' indifference to the Rwandan genocide itself, but of the extent to which that indifference was a result of *conscious* decisions in New York not to intervene, rather than unconscious choices resulting from incompetence and ignorance, as others have previously argued. It is an ethical history, therefore, of the United Nation's institutional moral culpability in the Rwandan genocide, especially evident after April 21, 1994—two weeks into the mass killings and the day the U.N. Security Council voted to *reduce* the Rwandan peacekeeping mission from several thousand to 270, rather than expanding it in an attempt to thwart the genocide. In this regard, Barnett offers a new take on what is otherwise an old theme—the role, or lack thereof, of the United Nations in the Rwandan genocide—with implications that, in an age of increasing international institutionalization, cannot be ignored.

The analysis, such as it is, weaves together the bureaucratic maneuvering behind the scenes in New York with the well-established history of what happened in Rwanda. Barnett begins in Chapter One with an overview of United Nations peacekeeping operations in the early-1990s and the bureaucratic strategy that went into each decision concerning the placement and control of the U.N. forces. Chapter Two provides a short synopsis of the historical background in Rwanda, while Chapter Three focuses on the period leading up to the genocide, from the October 1993 Resolution authorizing the creation of a U.N. Assistance Mission in Rwanda (UNAMIR) to immediately before the outbreak of hostilities on April 6, 1994. Yet, it is Chapter Four, which covers the two-week period from the beginning of the genocide to the Security Council's decision to scale back UNAMIR rather than reinforce it, that underscores what is so novel and disturbing about Barnett's work.

In tracing the reaction in New York to events in Rwanda, through secondary sources, first-hand recollections, official and internal U.N. documents, and interviews with key players such as General Dallaire, Barnett argues that there was a systematic reticence, both in the Secretariat and the Security Council, to potentially dangerous peacekeeping operations that could be depicted as external intervention in an internal civil war. Highlighting the lack of effective leadership from Secretary-General Boutrous Boutrous-Ghali, Barnett's conclusion, in Chapter Four, is that the Secretariat, rather than presenting an effective case for intervention to the Security Council, consciously depicted the situation in Rwanda as one of "chaos" and "civil war," providing an institutional framework for opposing intervention by

deliberately withholding information to the contrary. As such, instead of presenting the Rwandan situation as a developing crime against humanity, the key players gift-wrapped a justification for those countries that opposed intervention, including, most notably, the United States. The United Nations's role, as Barnett encountered in the hallways of the New York Headquarters, was to attempt to broker a cease-fire, but to otherwise do nothing, tacitly allowing the violence in Rwanda to run its course.

The violence, as is all-too-well known by now, eventually did run its course, which Barnett traces in Chapter Five before turning to his search for moral responsibility in Chapter Six.

What truly haunts Barnett, as we finally learn in the concluding moments of his analysis, is that, if the United Nations—an institution born out of the ashes of World War II and the Holocaust—does not exist exactly for situations like Rwanda, then what is its purpose in the first place? Indeed, if the United Nations understood, from the first moments of the genocide, the importance of what was going on, and if the decision not to intervene was based on a perceived higher commitment to deeper institutional principles, then how can its failure to act be explained in any other way than that it is not the moral institution that, at its core, it is supposed to be?

As Barnett himself writes, "[t]he U.N.'s involvement in Rwanda is dreadfully disturbing precisely because, in the main, these were highly ethical and decent individuals who believed that they were doing the right thing" (p. 180). Barnett thus concludes, in the end, that the bureaucratic morality (or lack thereof) of the United Nations superseded the private moralities of those in decision-making positions during the genocide. This bifurcation resulted in decisions that, though they may have made sense on an institutional level in New York, made little sense anywhere else, including in Rwanda, where the results were indescribable. The *true* "lesson" of Rwanda, therefore, is that moral international institutions like the United Nations must begin and end with individual responsibility and private morality, or else what happened in Rwanda could easily repeat itself somewhere else.

Yet, ending with such a conclusion is perhaps the one major shortcoming of Barnett's otherwise concise 215-page work. Aside from his analysis of how and why the United Nations failed to intervene in Rwanda, Barnett does not get into the specifics of what can be done in the future to prevent the same institutional inertia from reoccurring in a similar context. Indeed, even in his plea that decision-makers rely more on their personal morality than on institutional criteria in such situations, Barnett seems more concerned with placing blame for what happened in 1994 than with suggesting what the United Nations must do, on an institutional level, in the future. Given how much of his analysis draws on particular institutional idiosyncrasies unique to the United Nations, it is unlikely that this is a conclusion applicable to other international organizations apart from the sweeping suggestion that individual moralities have a place in more fundamental organizational ideologies. Indeed, even with its focus on the United Nations, the conclusion wants for a strong statement of what today's United Nations can do, at a structural level, to allow for the interjection of

more private morality into decision-making. Instead, Barnett's institutional recommendations read as abstractions, making both his target audience and his larger implications difficult to discern.

Nevertheless, Barnett's conclusions are significant in their own right, for they turn the almost decade-old arguments that that United Nations was ignorant and incompetent in dealing with Rwanda on their head. As such, though Barnett's book seems to be directed toward his former superiors at the United Nations, it is also a worthwhile analysis for students and historians studying the Rwandan genocide and trying to answer the difficult questions Barnett raises. *Eyewitness to Genocide* is an argument that the United Nations was *too* competent and placed broader institutional considerations ahead of riskier, short-term actions. In that sense, the book interrogates the fundamental purposes of the United Nations by asking questions that are not easily answered. Yet, *this* is precisely what is so haunting about the genocide in Rwanda. Nine years later, there are still too many questions, and Barnett's provocative contribution notwithstanding, not enough answers.

Condemned to Repeat? The Paradox of Humanitarian Action. By Fiona Terry. Ithaca, N.Y.: Cornell University Press, 2002. Pp. xiv, 282. Price: $42.50 (Hardcover). Reviewed by Ethel Higonnet.

Fiona Terry's *Condemned to Repeat? The Paradox of Humanitarian Action* is a searching but profoundly flawed critique of the global aid industry, which accuses international aid organizations of contradicting their fundamental purpose by prolonging the suffering they seek to relieve. Through in-depth examinations of intervention by aid organizations, Terry underscores the political consequences of giving aid. In a controversial claim, she suggests that aid agencies often blind themselves to the moral quandaries of their work, behaving as though the decision to supply aid could exist independent of ethical discussion. Terry concludes that aid agencies cannot hide behind the humanitarian imperative and say blindly that the duty to alleviate human suffering in the immediate sense comes before all other considerations. She emphasizes the need to quantify potential benefits and potential harm, set limits of acceptable compromise, and take a rights-based approach to humanitarian action, privileging solidarity with victims.

To demonstrate the difficult trade-offs aid agencies face, *Condemned to Repeat?* sketches general arguments on humanitarian action before exploring concrete examples of how aid contributed to conflicts in Pakistan, Honduras, Thailand, and the Congo. Terry demonstrates in each case how humanitarian aid benefited refugee-warriors and how much aid organizations knew about this, analyzing how they chose to participate or refuse by weighing duty to a population in need against moral principles. She posits that non-governmental organizations (NGOs) often distribute humanitarian aid based on political favoritism, and at the expense of core concepts of impartiality, need, and neutrality.

This book debunks widespread assumptions about the unprecedented challenges and "complex emergencies" taxing the post-Cold War international aid regime, arguing that conflicts are not more barbarous than before, and that complex emergencies and refugee-warriors are not another symptom of the new world "disorder" but long-standing features of wars (though the international response itself has become more complex). Skillfully exploring numerous precedents to recent crises, Terry asks why humanitarian agencies do not learn from experience—why the paradoxes of humanitarian aid recur. In this vein, Terry explores some practical guidelines for practitioners seeking to address the paradox of aid. She emphasizes that humanitarian groups face political rather than technical challenges, and that codes of conduct and technical guidelines give an illusion of enhanced responsibility without ensuring that aid is truly humanitarian.

Moreover, Terry raises another option that humanitarian agencies can—indeed must—consider, namely the choice to withdraw from unacceptable situations. Terry's position here is a highly personal one, drawing on her own controversial experience withdrawing Médecins Sans Frontières France from Rwandan camps in Zaire. The option of withdrawing or suspending activities is typically analogized to a nuclear weapon, which exists but should never be used. However, Terry thoughtfully probes at the differences between a neutral stance and passivity and argues that at times, withdrawing upholds ideals of neutrality, honesty, and morality.

Adept at ostrich-like self-deception, humanitarian agencies typically deny that their interventions can prolong or fuel wars. Most explain their failings by blaming the insufficiency of aid rather than its misdirection. As a book from an insider in the aid industry, Terry's work plays a vital role in efforts to self-critique and hold agencies accountable.

However, Terry's examination of dysfunctional aspects of aid falls short of a serious, practical study of potential solutions. Terry hardly mentions the roots of the "humanitarian paradox" stemming from the very nature of humanitarianism. While the book raises profound questions and contributes to meaningful soul-searching in the aid industry, it fails in critical ways to speak to the professional humanitarian workers who should be its primary audience. For experienced practitioners, the central premise of this work has been obvious for decades. Saying that humanitarian action is political is like saying blue is a color: true, but not very illuminating. Indeed, humanitarian agencies have become a fixture in political, diplomatic, and media circles through fieldwork, lobbying, and fundraising.

Any intervention contributes to the way conflicts play themselves out. The very presence of humanitarian agencies is political, reinforcing as it does clienteles of power, recognizing protagonists avid for international recognition, legitimizing intermediaries, and allowing for population control by fixing people in proximity to distribution centers. Concentration of aid attracts not only victims, but also with them belligerents and hosts of bandits. Moreover, this concentration encourages construction of camps with perverse effects on the social fabric of traditional societies. Aid changes the balance of power among competing actors and the rules of the game by which they

compete. Mary Anderson's famous do-no-harm-approach is a naïve, impracticable critique of aid agencies.

Terry fails to offer any quantitative evaluations of the impact of assistance on war economies. Without concrete information on this issue, practitioners cannot minimize negative effects of aid. Emergency aid automatically feeds war, but how many lives does it save, and at what price? Do downsides outweigh benefits? What are practical solutions to minimize aid diversion and ensure that humanitarian action prolongs suffering as little as possible? What tactics have been successfully used in the field to widen the "humanitarian space?"

More preoccupying than the absence of concrete solutions to the problems of misdirection and politicization of aid is the lack of explicit reflection on flaws inherent to aid agencies, without which Terry's analysis on humanitarian agencies rings hollow. Three basic observations can be made. First, humanitarianism is fundamentally reactive, providing short-term emergency relief to save human lives, often in a context of extreme instability. The hyperactive pace stemming from humanitarianism's very nature evidently limits the capacity to learn from experience. Second, high staff turnover is a characteristic of the vast majority of aid organizations. Staff who view an agency's approach critically often leave, rather than try to achieve change from within. High turnover and a loss of dissatisfied, critical personnel negatively impact an organization's learning capacity. Third, humanitarian organizations often fail to store knowledge on a structural level. Prevailing logic dictates that all available money should be spent on direct alleviation of human suffering rather than educating staff, developing expensive research units, and gathering, evaluating, and diffusing information. The capacity to learn has no marketing appeal with donors—indeed, it is often perceived as evidence of a bloated bureaucracy.

Agencies cannot financially resist donors' strategic, political injunctions or maintain their independence and ability to disengage from unacceptable situations. Most NGOs' economic imperatives prevail over the interests of supposed beneficiaries of aid, as the multiplication of humanitarian agencies leads to frantic competition in a limited market of donors and project redundancy.

Most disturbing of all, Terry focuses on the responsibility of humanitarian agencies rather than that of governments and armed groups, despite the overwhelming burden of the latter. Terry argues that while aid only causes a small degree of harm to developing countries, even this is unacceptable; aid's raison d'être is to alleviate suffering. However, she produces no hard evidence that aid substantially prolongs conflict in the long run. Why then, has she chosen to focus on this aspect of the issue?

Contributing to the rising tide of criticism of humanitarian action, Terry holds aid agencies responsible for problems largely attributable to government and corporate activities. She critiques aid agencies for fueling conflict, but fails to sufficiently emphasize that cash inflows such as ransoms, asset stripping, and predatory appropriation of local resources like opium, cocaine, or diamonds dwarf the value of aid to combatants. Terry also insufficiently

condemns government complicity in camp militarization and in hijacking aid, neglecting the fact that the real culprits in this story are governments across the world, cynically manipulating the suffering of vulnerable populations in crises to promote their own interests. Understanding the vital nature of Terry's critiques of aid is impossible without appreciation of the full context of other actors' responsibilities. Holding aid to impossibly high standards, she catapults its failures to the forefront of international debate, without a parallel challenge to the misdeeds of donor governments.

International Human Rights and Humanitarian Law. By Rene Provost. Cambridge, U.K.: Cambridge University Press, 2002. Pp. xxxix, 418. Price: $75.00 (Hardcover). Reviewed by Hillary Forden.

Since World War II, we have witnessed the establishment of numerous norms and standards in both human rights and humanitarian law, all aimed at better protecting the integrity of the human person. However, in spite of the emergence of this large body of law, armed conflicts and egregious human rights violations continue to plague populations around the world. In his new book, *International Human Rights and Humanitarian Law*, Professor Rene Provost examines many of the factors that distinguish these two legal regimes in order to "achieve a greater understanding of each of these systems" (p. 2). By comparing three transversal themes—normative frameworks, reciprocity, and characterization—Provost concludes that the distinctions between human rights and humanitarian law are far from merely "semantic and contextual" (p. 343). Instead, each is a clearly-defined legal system that has been crafted to meet specific societal needs during peace and armed conflict.

In this detailed comparison of the international legal institutions in human rights and humanitarian law, Provost aptly demonstrates that while connected in their purpose, these two legal systems differ in their formulation, structure, application, and enforcement. Provost suggests that by comparing the existing human rights and humanitarian law systems, the possibility for cross-pollination between the two systems arises. However, while Provost identifies current examples of such cross-pollination, he fails to suggest ways in which one system may continue to adopt concepts and solutions from the other. In addition, while the author presents a sophisticated and compelling analysis of the two legal regimes, he does not explain how this comparison may be used to develop new principles of human rights and humanitarian law. Instead, Provost concludes that each legal system is best suited to achieve the goals for which it was designed. While cross-fertilization between the two regimes is occasionally desirable, the distinctions between the two systems must be preserved in order to protect the integrity of the human person through political stability and armed conflicts.

This book is divided into three parts, each of which corresponds to one of the three transversal themes. In Part I, the author looks at the normative frameworks of these two legal systems. He suggests that while both

international human rights and humanitarian law are aimed at protecting the integrity of the human person, the two systems take very different approaches to accomplishing this same goal.

Normatively, human rights and humanitarian law diverge in their treatment of the rights and duties of the individual. International human rights law purports to grant universal rights to all individuals, guaranteed regardless of the individual's association to a recognized state or group. The state obligation to protect these rights applies *erga omnes*. Humanitarian law, however, was created to protect members of specific groups during armed conflicts. Therefore, the provisions of the 1907 Hague Convention, the 1949 Geneva Conventions, and the 1977 Additional Protocols protect the rights of identified subgroups, including combatants, prisoners of war, and unarmed civilians. One's connection to a specified group or state is essential to the application of humanitarian law. Provost argues that humanitarian law is based on a series of obligations imposed on individuals during armed conflicts. As the Nuremberg trials, the International Criminal Tribunals for former Yugoslavia and Rwanda, and the newly formed International Criminal Court have demonstrated, individuals may be held independently responsible for violations of international humanitarian law during armed conflicts. In contrast, human rights conventions and institutions designed to protect individuals in their relationships with the state, do not impose obligations on individuals. Therefore, violations of international human rights norms committed by agents of the state are usually treated as violations by the state. Provost explains that while these distinctions are generally applicable, exceptions do exist. For example, the African Charter on Human and People's Rights, unlike most human rights conventions, imposes specific obligations on individuals.

In Part II, Provost examines the role of reciprocity in each of these systems. While reciprocity is integral to humanitarian law, it is far less important for human rights norms. Human rights laws generally apply to relationships between a single state and individuals within its territory. Because human rights apply *erga omnes*, states may not neglect their human rights obligations simply because another state has done so. Humanitarian law applies primarily to situations arising from the interaction of two states. As a result, immediate reciprocity is integral to the system of humanitarian law. States' parties are expected to apply the Hague and the Geneva Conventions as long as the other parties to the conflict are also abiding by the Conventions. However, in its relations with another party to a conflict, a state need not comply with a provision that has been violated by that party. Provost explains that the importance of reciprocity in humanitarian law is closely related to the "bilaterizable character of many humanitarian obligations" (p. 236). Most human rights obligations, in contrast, are non-bilaterizable and correspond to systemic reciprocity. Therefore, human rights are more institutionalized and reliant upon universal and regional institutions for their enforcement.

Provost suggests that there has been movement in both humanitarian law and human rights from a system of immediate reciprocity to one of systemic reciprocity. However, he warns against completely abandoning the notion of

immediate reciprocity and argues that systemic reciprocity may not be sufficient to protect the interests of participants. Further, institutional weaknesses may lead parties to revert to immediate reciprocity. Humanitarian law, in particular, Provost argues should retain a system of immediate reciprocity.

Finally, in Part III, Provost addresses the importance of legal indeterminacy and factual characterization in human rights and humanitarian law. Humanitarian law only applies during limited types of armed conflicts: inter-state conflicts, national liberation armed conflicts, non-international armed conflicts, and internal armed conflicts. In addition, a conflict's level of intensity is essential for determining the applicability of the Hague and Geneva Conventions and the 1977 Additional Protocols. Provost explains that in order to avoid applying the humanitarian Conventions, states often argue that the conflicts in which they are involved fail to meet these criteria. In contrast, human rights laws must be enforced at *all* times. However, Provost acknowledges that certain rights, such as the freedom of speech, may be derogated during a state of emergency (e.g., a threat to the life of the nation).

In both legal systems, states are responsible for characterizing the situations that embroil their countries. This often results in states relying more on politics than on the letter of the law when characterizing these conflicts. In armed conflicts, each of the belligerents is entitled to characterize the situation, often resulting in conflicting accounts. Provost argues that this leads to international dialogues regarding the applicability of humanitarian law to specific situations. Because the participation of more than one actor is innate to characterizations in humanitarian law, the intervention of third states and international organizations in the characterization of a situation as an armed conflict is generally accepted. Provost suggests that third-party characterization can be particularly important in cases of national liberation movements, non-international, and internal armed conflicts. For example, it is unlikely that states will characterize internal uprisings as national liberation movements, because by doing so, they would be admitting to being a colonial, alien, or racist regime. The characterization of a state of emergency, on the other hand, is, by definition, a unilateral declaration by the nation threatened. Alternative characterizations by third states, therefore, seem out of place in human rights law. Provost explains that human rights are more institutionalized, and thus, the characterization of a state of emergency is often the result of formal legal review based on a factual inquiry by the state.

Provost suggests that consensus building may be a useful alternative to unilateral characterization in both human rights and humanitarian law. He proposes that under such an approach, "the totality of opinions as to the legal character of a situation would be taken into consideration" (p. 341). This mode of characterization is consistent with existing practices whereby actors base their opinions on previous characterizations. However, because third-party intervention is less acceptable in human rights, consensus-building will be less helpful in identifying states of emergency than armed conflicts.

International Human Rights and Humanitarian Law offers a detailed textual analysis of the statutes regulating international human rights and

humanitarian law. For readers unfamiliar with the international and regional statutes governing these legal systems, the book is probably best read with copies of these conventions at hand.

While Provost supports his analysis of humanitarian law with numerous historical references, he offers far fewer actual examples to support his portrayal of the international human rights conventions. Overall, the author's analysis concentrates heavily on statutory norms and avoids discussing many of the practical challenges facing these two legal systems. This omission leads the reader to an idealized understanding of these legal systems. Provost's conclusion that each legal system is best suited to the conditions for which it was created seems only natural when the primary evidence he uses to reach this conclusion are the conventions themselves.

Provost's detailed comparison will be particularly useful to scholars and students of international law. However, Provost's descriptive account falls short of providing a prescriptive framework that practitioners working in such a timely and topical area might desire. Nevertheless, practitioners and NGOs working to integrate principles of one of these legal systems into the other may also benefit from an enriched understanding of the similarities and differences Provost elucidates in *International Human Rights and Humanitarian Law.*

International Legal Perspectives: Old and New

International Law in Antiquity. By David J. Bederman. Cambridge, UK: Cambridge University Press, 2001. Pp. xiv, 322. Price: $70.00 (Hardcover). Reviewed by Christina M. Craige.

In *International Law in Antiquity,* David J. Bederman attempts to provide evidence of underlying patterns of thought and behavior that may inform an ancient conception of a law of nations. Those readers interested in the evolution of international law from the "cradle of civilization" to the European Union must look elsewhere; *International Law in Antiquity* pays undivided attention to the ancient world as a cohesive whole and leaves unexplored any roots it may have left to flower in later centuries. This highly focused view is one of the book's greatest strengths. The author's acceptance of the material on its own historical terms is admirable; the urge to impose a modern paradigm on the politics of antiquity is strictly repressed. Conversely, he rejects the idea of ancient law as primitive and disconnected. A professor at the Emory University School of Law, Bederman argues against what he calls "an article of faith in our discipline: that international law is a unique product of the modern, rational mind" (p. 1). To that end, the book analyzes three seminal time periods in antiquity. Bederman's aim is admirable, and his analysis is convincing. *International Law in Antiquity* ultimately proves its point.

The three geographic epochs on which Bederman focuses his attention are: (1) the ancient Near East of the Sumerian city-states, Egypt, Babylon,

Assyria, and the Hittites (1400-1150 BCE) and the later interactions between Israel and its Syrian neighbors (966-700 BCE); (2) the Greek city-states (500-338 BCE); and (3) expansionist Rome (358-168 BCE). In support of his thesis, the author considers three areas of ancient life in which the idea of a law of nations purportedly influenced state behavior: "making friends," "making faith," and "making war." Before delving into these topics however, the book touches upon the ideological foundations of an ancient rule of law.

The rule of law in the ancient world has often been accused of primitiveness on account of its religious grounding. Bederman disputes the *a priori* disregard of ancient law on that basis by examining the assumption of sole religious authority for law and by asking if such a religious cornerstone would "diminish the principles [the law] espoused, or compromise the effectiveness of its sanctions" (p. 50). Instead, Bederman finds three sources for ancient law that intertwined to inform impulses of state behavior. These are religion, ritual, and reason.

In developing the extent and interaction of these three principles, Bederman evokes the concepts of "good faith" and "breaking faith" (p. 51). Fables from each of the three time periods are related to show ancient appeals to divine, social, and rational conceptions of sanctions. The ancient preoccupation with religion and its ramifications waned with time, as the fables illustrate, to be supplanted by legal concern with custom and, arguably, reason. Ultimately, Bederman rightly concludes that ancient societies were cognizant of a cause and effect to their actions; negative consequences invariably followed from a broken oath, in the form of divine retribution or social ignominy.

Bederman closely analyzes the ways in which foreigners were treated by the ancient polities he inspects. These foreigners represented many types of people, from diplomats and envoys to metics and *proxenoi*. Since ancient societies prized highly the value of hospitality to strangers (which had its beginnings in religion), the convention was ultimately "formalized by social institutions having the legal power to compel obedience" (p. 89). This ritualizing of private hospitality, Bederman asserts, formed the cornerstone of ancient state diplomacy.

Bederman cites the protection and respect accorded diplomats in the regions and time periods examined as evidence of a general recognition of a principle underlying inter-state relations. This diplomatic principle had two characteristics: that foreign envoys be treated as guests and that although "tolerable levels of personal coercion were permitted, the diplomats would otherwise be immune from sanctions in the host State" (p. 93). Such respect and immunity speaks to the concept of sovereign equality. Although the right to send and receive envoys was strictly limited by this point, particularly in the Roman time period, the recognized equality of a state distinct in government (if not, perhaps, in language and base religion in the case of the Greek city-states) supports Bederman's thesis of a generally held idea of some legal continuity.

Bederman explores an important duality in his treatment of the reception of strangers, which informs the relation between religious impulses and

impulses that stem from custom and reason. This duality is "the primary tension within the ancient state's perception of strangers: religious and ethnic particularism was balanced against the pragmatic institution of hospitality" (p. 120). The analysis of the treatment of non-diplomatic visitors focuses on the Greco-Roman time period, both because of the ambiguity of extant Near-Eastern sources and because a concern for the safety of foreign visitors particularly inhered in the Mediterranean state-systems. Ultimately, Bederman concludes that the formation of ritualized friendships among states successfully overcame ethnic and religious particularism and provided the groundwork necessary for states to make formal expressions of good faith: treaties.

In exploring the practices of "making faith," Bederman closely analyzes every major treaty in the time periods under examination. In one of the most fascinating sections of the book, Bederman delves into the treaty patterns of the Near East and how they influenced the later treaty practices of the Israelites (particularly the covenants between the Israelites and Yahweh). The treaty patterns of the Near East were differentiated on the basis of whether the treaty was formed between co-equal sovereigns or between parties in a relationship of master and vassal. What differentiated them from the practices of the western Mediterranean and later Near East was the conception that treaties were unilateral in nature. Thus, ideals of reciprocity and mutual enforceability were of great concern.

Bederman points out, however, that the diverse treaty practices of the Greeks, set them apart from the civilizations of the Near East. Although the basic treaty form of the Hittites was ultimately transmitted to the Greek states, and thence to Rome, the Greek system of treaty making is lauded by Bederman as unique in the ancient systems examined. Bederman posits that this distinctiveness may have stemmed from the different nature of political systems in the regions. Since the Greek system was more "dynamic," in that it had a greater number of independent actors than the more "static" systems of the Near East and Rome, methods of enforcement of treaties, for example, would necessarily differ. In fact, Bederman supposes that the treaty practices of Rome are much like a synthesis of the Greek and Near Eastern traditions.

Bederman too readily accepts the Greeks' lack of adherence to their own treaties, and it is in this respect that his argument is least satisfying. He praises the Greek propensity to draft into their treaties anti-deceit clauses, rules for interpretation, and refinements of treaty termination as eminently legal. Compared with their Greek analogues, Bederman considers Roman treaties hollow and formalistic. In doing so, he perhaps puts more emphasis on the ideal than on the actual. The Greeks were notorious, both within their own culture and without, as faithless in keeping treaties that were no longer beneficial. While breach of treaty was a concern throughout the ancient world—a concern that would likely have increased as the prospect of divine retribution waned—Bederman seems insufficiently troubled by its abundance in the Greek system. One might wonder about the good of complexity and rationality in faith that was routinely broken.

The last area of ancient life examined by Bederman is the condition of war, both how it was initiated and how it was conducted. In this area as well, one can see the transmutation of religious and ritualistic justifications into those supported by reason. Although, as Bederman asserts, considerations for commencing hostilities were primarily legal, the rituals surrounding such declarations were designed to preserve for the aggressor a moral high ground. The initiation of hostilities was a matter of sensitivity, particularly for the Greeks, who took great pains to avoid being cast as the aggressors in conflicts.

While in the pursuit of war, states generally respected the overriding principles of hospitality and restraint. Notable exceptions are the Israelite practice of mitzva (the treatment of which is one of the highlights of the book), and far-reaching conflicts, such as the Peloponnesian and Punic Wars. In this chapter, Bederman's thesis garners great support, and his analysis is elucidating.

Bederman's book ultimately succeeds because it focuses on what it can prove. There is no attempt made to show a cohesive body of laws that existed among nations in any of the three time periods. But for the reservations noted above, Bederman's work is concise, his structuring of arguments is clear, and his prose is eminently accessible. Students, academics, and laypersons alike will find much of interest in *International Law in Antiquity*. In eschewing modern parallels in his analysis, Bederman highlights the commonalities not only among the civilizations examined, but also in our modern conceptions of how states can be run, should be run, yet are not always run.

The Spirit of International Law. By David J. Bederman. Athens: University of Georgia Press, 2002. Pp. xvi, 225. Price: $40.00 (Hardcover). Reviewed by Martin Skladany.

In *The Spirit of International Law*, David J. Bederman examines the core of international law as a legal system instead of providing a doctrinal review of the rules of international law. He expresses concern in the preface that his emphasis on distilling "the essence of international law" through a mélange of intellectual history and contemporary review might seem strange or counterintuitive to some individuals (p. xi). Rest assured, this is the great strength of the book, making it intellectually fresh and relevant because of his extensive use of "canonical" documents of international law. Bederman accepts international law on its own terms. He emphasizes how practical and successful international law is in shaping international behavior, and he discusses the dialectics of international law, from the opposing intellectual justifications of international law to the tension between formalism and pragmatism, along with broad thematic issues dealing with the primary characteristics of international law.

While one of his previous books, *International Law Frameworks*, is organized along sub-fields within international law, such as human rights, the law of the sea, international environmental law, and the law of war, this work is structured along expansive thematic meditations on the central features of

the international legal system, devoting chapters to the values and paradoxes, coherence and sophistication, and rectitude and ambition of international law. The slightly unusual, yet conceptual, twist in the organization of the book is one of its greatest strengths. While both works share some common material, *The Spirit of International Law* is more theoretical in nature.

Bederman begins by maintaining that if international law is to be relevant to a diverse set of international actors it must be "secure in its historical and intellectual traditions, confident of its role in international affairs, and certain of the bases of authority and obligation for its rules" (p. 26).

After a few introductory chapters that make the book approachable for beginners, Bederman goes on to discuss the primitive character of international law and its contributions to the coherency of the international legal system. Bederman argues that values, while often an important source of conflict among states, do not hold sway over the international legal system as much as is commonly believed. Instead, the "identity of actors, the ways in which they make law, the sources of obligation, and the techniques for legal process" are more influential, and pressure the international legal system to accept or at least live with different ideologies (p. 138).

Bederman then argues that one of the unique attributes of international law as compared to other modern legal systems is that it is hard to conceptualize as a strictly positive legal system. International law is defined "as much by what is excluded from its remit and mandate as by what is embraced by the permissible scope of its regulations" (p. 139). Furthermore, international law would lose much of its practical meaning without its disconnection from international politics and domestic law, even though the distinctions are abating somewhat. For example, Bederman believes that a horizontal model of international law and domestic law is taking form, in which the two sit side-by-side and interact in the creation of new rules.

Bederman admits that pragmatism has superceded formalistic doctrines, yet he stresses that formalistic doctrine—both structural in nature (such as the distinction between international law of war and peace) and doctrinal (such as the doctrinal division between civil war and international conflicts)—does still play an important role in international law. Defenders of formalistic doctrine point to the value of regularity and certainty that it creates, while critics view formalistic doctrine often as championing antiquated and obsolete values. While discussing the advantages of pragmatic doctrine at length, Bederman is quick to point out that pragmatism has its dark side because it can disguise conflicts in values when "state actors doing the negotiating achieve their ends at the expense of other constituents of the system," such as when individual rights conflict with the interests of the state (p. 178). In the end, Bederman feels that we should all recognize the wisdom of Thomas Jefferson's assertion that "We are all pragmatists; we are all formalists" (p. 184).

Bederman also considers enforcement and compliance within the international legal system. Bederman underscores the remarkable fact that "in conditions that might legitimately be likened to a Hobbesian state of nature," international law has been successful in encouraging compliance by the main

international actors (p. 203). Yet many individuals ask too much of the international legal system, questioning its integrity after every failure. These same individuals often fail to acknowledge that they do not question their own domestic legal system after every incident of lawlessness. Bederman borrows Louis Henkin's observation that almost all nations observe almost all of their obligations almost all of the time. He states that the test for international law is how well it can mitigate conflict without the measures available to most legal systems, such as vertical enforcement, coercive measures, and reliable remedies.

Bederman discusses how international law is simultaneously both progressive and conservative. The international legal system is progressive in both substance and structure in that it attempts to address the concerns of "a fully constituted international society of nations, transnational enterprises, and individuals engaged in life across boundaries" (p. 219). It is cautious in that it mirrors the reality of state sovereignty, the significant transactional costs of cooperation, and the tension between the values and objectives of the states that comprise the system.

Bederman concludes by discussing international law's brilliance in being able to establish itself "in the most inhospitable of practical and intellectual environments" in the face of the cynicism that international relations cultivates (p. 225). He suggests that the challenge for international law is to continue to hold on to aspirations of international peace and justice, while serving a disparate group of interests and actors.

While the book is vast in its coverage of material, especially given its reasonable length (225 pages), it is not completely comprehensive. Bederman readily admits that exhaustively covering the subject matter of international law was not his overriding goal. Most notably absent is a discussion of the challenges of inclusion of international law into domestic legal systems. However, although this is a major topic in international law, the book is not noticeably weakened by its absence. Outside of the occasional verbosity, Bederman's writing style is enjoyably challenging. This book would be well-situated on the syllabus of any introductory international law course. It complement most texts in such courses, which tend to be more focused on the rules of law in the discipline's diverse sub-fields, by showing international law to be a system of ever-evolving, complex ideas and by examining international law from numerous planes of abstraction.

Globalization of Law and Capital

National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy. By Gaëtan Verhoosel. Portland, OR: Hart Publishing, 2002. Pp. xi, 124. Price: $72.00 (Hardcover). Reviewed by John David Lee.

Gaëtan Verhoosel's book examines National Treatment obligations at the WTO. His focus is on those challenged national regulations which use

"superficially origin-neutral measures" (p. 12). These measures, sometimes known as de facto, or "facially neutral," discrimination, disproportionately adversely affect the competitive conditions of *all* foreign products/services, relative to domestic products/services, but without *explicitly* distinguishing between the products/services on the basis of their nation of origin (p. 12). In contrast, de jure, or "facially discriminatory," discrimination explicitly targets foreign goods or services based on their national origin.

Verhoosel shows that the pertinent GATT and GATS National Treatment treaty provisions are largely contradictory, vague, and, most importantly, that GATT/WTO National Treatment case law simply lacks transparency. These adjudications, he argues, have created a comparably vague and contradictory case law. He thus suggests that the WTO adopt an alternative simplified approach to adjudicate such cases, by adopting his so-called "integrated necessity test" (p. 2).

Under his approach, "National Treatment should and can only be defined by referring to the necessity of domestic regulation" (p. 7). That is, "if a less restrictive measure achieving the same objective can be shown to lead to less or no adverse effects, the more restrictive regulation can be stricken down as discriminatory regulation" (p. 91). In order to qualify as discrimination, one must run a "counterfactual" (or postulate) against the possibility of less restrictive alternatives for attaining the same ends: "*[r]egulation is de facto discriminatory to the extent it is unnecessary*" (emphasis in original) (p. 78).

The book is based on Verhoosel's J.S.D. thesis at Columbia University Law School. It largely presupposes that the reader has a basic to moderate level of familiarity with the factual aspects of leading National Treatment GATT/WTO cases and procedures. Verhoosel is now employed with the Legal Affairs Division of the WTO, advising WTO dispute settlement panels, so we may see elements of Verhoosel's theory applied in future WTO jurisprudence. For these reasons, the book will appeal most to trade lawyers and GATT/WTO academics.

While Verhoosel's book is generally well written and thought provoking, it could have been stronger in important respects. First, it lacks sufficient definition and a detailed description of how the integrated necessity test would operate. Recall that he defines a regulation as "unnecessary" if a less restrictive measure achieving the same objective can be shown to lead to less or no adverse effects. This naturally raises the following questions: how will we know whether another measure "reasonably" attains the "same objective?" Whose opinions and interests should count most or be determinative—e.g., the WHO's opinions in health matters—towards ascertaining "adverse effects?" What should be the scientific standards or methods for justifying a "health" regulation, and how do we compare the existing regulations against other means of achieving the same ends through "less restrictive measures?" Unfortunately, Verhoosel does not rigorously grapple with these types of explicit theoretical benchmarks.

In fact, Verhoosel himself seems to waiver fundamentally about his test's core characteristics. At some points, he asserts that his test could be

viewed as "courageously" provocative (p. 68), "audaciously . . . innovative" (p. 2), and an antidote to the "fuzzy language" (p. 108) of existing GATT/WTO rulings on the matter. He implies that the test would create "one single, more stringent standard" than currently exists under GATT/WTO jurisprudence (p. 92). He seemingly contradicts himself, however, in other parts of the book. He claims: "necessity cannot be a uniform and stringent standard," requiring a "certain degree of flexibility in its implementation," and that the WTO's current necessity test rightly requires that panels consider "reasonable availability" and alternate measures' "technical and economic feasibility" (p. 110). He proposes adopting a so-called "'reasonableness' qualifier" which "leaves ample discretion to the adjudicator and allows deference to domestic choices in difficult and politically sensitive cases" (p. 110). He also rejects the notion "that an integrated necessity test would impinge more on regulatory autonomy then [sic] the current approach" (p. 93).

Verhoosel spends much of his time—perhaps the majority of the book—critiquing the reasoning and logic of existing GATT/WTO case law. But one can disagree with the reasoning underlying a particular case's ruling and still agree with the final outcome. In this regard, we are rarely directly told if certain regulations challenged in examined cases would have been ruled on in a different way under his integrated necessity test. He never states, for example, "in each of the GATT/WTO cases I have hitherto examined, an 'integrated necessity test' would have had the same/opposite final outcome in each of the following cases . . . ." Thus, once again, in this absence it is difficult to assess what the ultimate impact of his integrated necessity test would be if it were adopted.

Despite making the occasional brief reference to potential criticisms, Verhoosel gives insufficient attention to addressing or rebutting them. He concedes for example that his single, "more stringent standard" could be criticized because an integrated necessity test would undermine "the variety of 'connectors' found in GATT Article XX, all setting less stringent a standard than necessity." (p. 92). He also concedes that his theory is essentially a "logic-dictated implosion of the seemingly sophisticated cascade of judicial interpretations under Article XX" (p. 68). Nevertheless, he maintains: "When one compares the outcome of our proposal with the status quo, we fail to see the case against the integrated necessity test on 'legitimacy' grounds. GATT/WTO panels have been conducting necessity tests regarding de facto discriminatory measures under Article XX for decades. Why should there be a big fuzz [sic: "fuss"] all of a sudden?" (pp. 107-08).

Verhoosel should probably not be so sanguine. First, his test does not square comfortably with the actual text of the GATT. Consider the plain text of GATT Article XX(g), stipulating the environmental exception to GATT obligations. This Article has been invoked by politicians to reassure their domestic concerns that GATT obligations would not unduly undermine their sovereign right to create and enforce domestic environmental regulations. Unlike some of the other Article XX exceptions, XX(g) does not require that the provision be "necessary." It requires a lower standard of scrutiny: they

need only be "relating to" the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. Thus, many states, and certainly their environmentalist constituents, would surely make a "big fuss" if important regulations which otherwise would have met the Article XX(g) standard were explicitly struck down pursuant to an "integrated necessity test" doctrine.

It is also important to note that the overwhelming majority of Article XX jurisprudence during past decades dealt with facially *discriminatory* measures, not facially *neutral* ones. (These facially discriminatory cases make up the vast majority of the cases which Verhoosel considers in his book, despite the fact that he claims the focus is on "facially neutral" measures.) In fact, at the time of the GATT's early drafting and first decades of GATT jurisprudence, it was presumed that National Treatment obligations applied to de jure, not de facto, discrimination. Thus, as Robert E. Hudec has noted, by the time *de facto* measures were challenged at the GATT, the existing Article XX facially discriminatory jurisprudence was thought to be unduly strict for facially *neutral* discrimination. This is why the "aims-and-effects" test, which Verhoosel critiques throughout his book for being unduly prone to protectionism, was created in the early 1990s; GATT panels wanted to develop a less-stringent standard to apply to these more difficult *de facto* discrimination cases. In sum, applying Verhoosel's integrated necessity test standard may be an unduly strict level of scrutiny.

Indeed, Verhoosel never addresses the fact that when states agreed to create the WTO their understanding of the (albeit vague) provisions of the GATT was informed by the existing GATT cases expounding upon the treaty's provisions. This understanding *included the more deferential de facto discrimination scrutiny jurisprudence.* If Verhoosel's integrated necessity test is adopted, member states whose regulations may be struck down because of Verhoosel's test's presumptive higher level of scrutiny may resent this sudden and unexpected change. This could greatly undermine WTO legitimacy.

Finally, in regard to his confident assumption about little "fuss" over a stricter standard of review given decades of GATT/WTO rulings on National Treatment, the vast majority of the GATT/WTO cases Verhoosel cites in his book were pre-Seattle 1999. (Verhoosel rather curiously fails to mention the protest or its political implications.) Prior to 1999, there was little public knowledge or scrutiny of the GATT/WTO or its rulings. Now, however, we are in a completely different era of public awareness, opposition, and mobilization. While Verhoosel makes reference in passing to concerns about whether accepting his approach would worsen the "democratic deficit" problem affecting the legitimacy of the WTO (p. 107), he never rigorously grapples with to this fundamental issue. Thus, in contrast to politically conscious pro-GATT/WTO legal experts such as Hudec and Robert Howse, Verhoosel's analysis is often unduly formalistic.

A World Safe for Capitalism. By Cyrus Veeser. New York: Columbia University Press, 2002. Pp. xiv, 250. Price: $27.50 (Hardcover). Reviewed by Anand M. Kandaswamy.

The late nineteenth century, or the "Gilded Age," as Mark Twain christened it, was a unique period of American history. The upstart young republic that the United States had been was becoming a robust world power, one that was beginning to flex its muscles on the world stage. Citing imperialist influences like Alfred Mahan and Rudyard Kipling, American policy-makers sought to match the influence wielded by the great European powers. No sentiment better captured the prevailing mood than President Theodore Roosevelt's Corollary to the Monroe Doctrine, which gave the United States the right ". . . in flagrant cases of . . . wrongdoing or impotence, to the exercise of an international police power" (p. 31).

Although the Roosevelt Corollary is a vital part of American history, its specific development has never been studied in the detail that it deserved—until now. Veeser, an assistant professor of history at Bentley College, illustrates the development of the Corollary through a series of interrelated incidents that took place in the Dominican Republic over the course of a decade. The chief actor in these events was an American firm known as the San Domingo Improvement Company (SDIC). In a thorough examination of the company's control of Dominican finances, Veeser comes to the conclusion that the SDIC, through the pursuit of its own selfish interests, inadvertently laid the basis for a major reformulation of American foreign policy. Although the author marshals persuasive evidence to support the main thrust of his argument, some of his subsidiary claims are less convincing.

Veeser's narrative begins by detailing the career of Smith M. Weed, the president and founder of the SDIC. Weed was a roguish yet well-connected entrepreneur whose power rested not in his creative instincts, but in his cultivation of powerful figures, like President Grover Cleveland. Weed's personality was reflected in the SDIC's relatively effortless success in convincing American politicians that the interests of the U.S. government and the company were one and the same.

In 1892, the SDIC purchased the foreign debt of the Dominican Republic from a Dutch company named Westendorp. The Dutch concern had securitized the debt and sold it in the form of bonds to European investors. However, a market downturn and problems with the dictator of the Dominican Republic, Ulises Heureaux, prompted Westendorp to sell the debt to Weed's company. SDIC took over the operation of the Dominican Republic's customs houses from Westendorp. These customs houses exacted tariffs that were virtually the sole source of income for the Dominican government. After collecting their fees against the debt schedule that had been worked out, the SDIC officers remitted the usually inadequate remainder to the government.

Veeser's meticulous analysis of the situation makes it clear that the interrelationships between the various parties were quite complicated. Although Heureaux appeared to be at the mercy of the SDIC, he actually exercised some control over the American company. For example, the dictator

worked out an agreement with local merchants, whereby they were exempted from paying customhouse tariffs (SDIC's income source) if they made personal loans to his regime. Meanwhile the U.S. government was also using the SDIC as a subtle instrument through which it could wield power, without any attendant responsibility, over the Dominican Republic—an important feat in an era where the United States was fighting a war against Spain. But the U.S. government's lax oversight had harmful consequences for both the Dominican Republic and the SDIC.

As Veeser notes repeatedly in the book, the Dominican Republic's "deal" with the SDIC left it with very little money to finance the grand modernization schemes favored by Heureaux and the SDIC, which saw the development of a modern economy in the republic as a way to safeguard its revenue streams. Making use of cultural anthropology, Veeser speculates that the Dominicans were motivated by a desire to improve their country, and by their related antipathy towards their neighbors, the Haitians, whom they regarded as savages. Heureaux sought progress through a railroad that would lower shipping costs. More disastrously, he also sought to modify two long-established customs of Dominican life that he regarded as archaic. One custom was the network of *terrenos comuneros*, shared properties owned by large groups of people, which rendered individual private ownership of property difficult. The other was *crianza libre*, or a policy that allowed livestock owners to let their animals roam free and often destroy the crops of farmers, who greatly outnumbered the livestock owners.

Although these reforms might seem enlightened from our modern point of view, Veeser correctly asserts that Heureaux badly miscalculated when he tried to implement these reforms without popular support. The two customs had a fundamental place in the Dominicans' lifestyles. Veeser implies that the SDIC was even more reckless than Heureaux in allowing such radical reform to take place, because it was largely a political creation that did not have the vast monetary resources or personnel to properly support the changes. Indeed, as the narrative progresses, it becomes evident that this kind of behavior by the SDIC was not unique and that the firm was spectacularly unsuccessful in the goals it set for itself.

Heureaux's attempts at reform, as well as his misguided and inflationary attempt to pay debts with newly minted money (which was precipitated by the government's 1897 default on debt interest payments), led to his assassination in 1899. The end of Heureaux also led to the effective end of the SDIC's initial presence in the Dominican Republic. A series of unstable Dominican governments were unsure about how to deal with the company, which was highly unpopular among the common people. Eventually, the SDIC was expelled from the island nation in 1901. It was at this juncture that the international legal system played a crucial role. Refusing to accept its ejection, the SDIC hired a well-respected legal scholar and attorney, John Bassett Moore, to represent it at a three-judge arbitration panel that the Dominicans reluctantly accepted.

The description of the arbitration proceedings reads like a textbook example of legal realism. Veeser notes that arbitration proceedings of that

time almost always involved a great power asserting its authority against a weak nation. Demonstrating the blending of private and public interests, Moore was a lawyer for both the SDIC and the State Department. Furthermore, the issue that was supposed to have been the subject of the proceedings—the timing and amount of the Dominican Republic's payment to the SDIC—was ignored by Moore, who presented a 200 page brief that managed to argue that the Dominican Republic was not a real country, but that it still had the capacity to make payments to the SDIC! Moore was subverting the process and making an argument not to the three-judge arbitration panel, but to American policy-makers. Moore, in effect, wanted the United States to use its resources to enforce the SDIC's will. The three-judge panel, which consisted of two Americans (who knew the SDIC officers) and a conservative Dominican, complied with Moore's broad requests and laid the ground for the United States to act as the SDIC's debt collector.

But around this time the SDIC's luck began to run out. President Theodore Roosevelt and his cabinet had initially been sympathetic to the firm. However, after receiving the reports of an emissary sent to the Dominican Republic to investigate the SDIC, Roosevelt learned a great deal about its shenanigans. Moreover, American sugar planters in the Dominican Republic were irritated by the SDIC's attempts to tax their exports and imports. There does not seem to have been one single precipitating factor in Roosevelt's disillusionment with the SDIC, but he gradually became aware of the company's inadequacy.

This disillusionment led Roosevelt to formulate his famous Corollary in December 1904. Given the expansionistic character of Roosevelt's Republican Party and America's growing strength at the time, Roosevelt could not reasonably choose to abstain from the Dominican Republic's affairs. What he could do was enunciate a belief that interventions should not be for the benefit of American corporations, but rather for what he thought were idealistic and strategic reasons. The Roosevelt Corollary was setting the stage for the United States' emergence as a major actor in world affairs on the grounds that freed it from the overt constraints of a self-interested corporation. It also allowed the United States the opportunity to claim the high road by stating that the interventions were for the "benefit" of the smaller nations of the Western Hemisphere. The SDIC Affair's great contribution to this new policy was in inadvertently triggering a broader interpretation of the United States' policy towards other countries. As Veeser writes, "The Corollary can be seen for what it was: a calculated step away from an earlier policy of unexamined support for private interests in the Caribbean" (p. 141).

Although Veeser does an excellent job in presenting his main argument, two other claims are spelled out in the introduction, but never properly developed. Veeser mentions that the customs relationship established under the Roosevelt Corollary can be seen as a precursor to the Marshall Plan and the International Monetary Fund, but except for a few scattered comments, he never fully elaborates on this point. He also claims that the Dominicans actively influenced the events going on around them. Although it is true that they were directly responsible for Heureaux's fall, and thus indirectly, for the

demise of the SDIC, as the narrative closes we find them under the still domineering, if somewhat more benign, control of Roosevelt. As Veeser's narrative indicates, Roosevelt's decision-making seems to have only marginally considered the wishes of the Dominicans themselves. This assertion of Dominican independence is clearly overstated.

What is the relevance of Veeser's book in this day and age? Although it is a minor part of the book, the discussion of nineteenth century arbitration reveals certain characteristics of international law at the time that are fascinating to students of the law. More importantly, this work can be appreciated as the history of a crucial stage in American development. It demonstrates an instance where a key American doctrine was arrived at through indirect means. Although in subsequent years the United States did violate the spirit of the Roosevelt Corollary by intervening in another country's affairs to protect narrow commercial interests (in the 1954 coup against the Arbenz government of Guatemala on behalf of the United Fruit Company, for example), the Corollary proved to be a lasting doctrine in American foreign policy. The SDIC was neither the first nor the last private actor to wield great influence over American foreign policy, but in its legacy, it may very well have been the most important of them all.

Globalization and Its Discontents. By Joseph E. Stiglitz. New York: W.W. Norton & Company, 2002. Pp. xxii, 282. Price: $24.95 (Hardcover). Reviewed by David Gamage.

Any book on globalization by Joseph Stiglitz would be impossible to ignore. Stiglitz is both a Nobel Prize winning economist and an experienced policy practitioner. He first gained prominence with his academic work on the economics of information, work that has helped explain the limitations of markets and the situations in which government intervention is warranted. In his policy roles, Stiglitz was chairman of President Bill Clinton's Council of Economic Advisors and later chief economist of the World Bank. While at the Bank, Stiglitz was a controversial figure for his well-publicized disagreements with officials in the U.S. Treasury Department and the International Monetary Fund (IMF) over the direction of development policy. Stiglitz eventually resigned from the Bank and has since published a series of articles denouncing the "Washington consensus" on development.

Given his credentials, you might expect Stiglitz to offer a provocative, thoughtful, and balanced treatise on globalization and development. Unfortunately, your expectations would only be partially fulfilled. Stiglitz is certainly provocative. He all but accuses his political opponents of being corrupt pawns of U.S. financial institutions. Balanced, however, Stiglitz is not. He repeatedly claims that the IMF is dominated by "market fundamentalism" and that IMF officials do not understand the intricacies of modern economic theory. Yet Stiglitz fails to mention that most real market fundamentalists, such as Milton Friedman, denounce the IMF and call for it to be abolished. Far from being dominated by market fundamentalism, the IMF has tried to

steer a middle course between leaving markets free to function on their own and trying to intervene in every aspect of the global market economy. Stiglitz presents a powerful critique of the IMF and its role in the global economy, but his discussion is marred by oversimplification and a refusal to address the many ideas that run contrary to his own proposals.

Throughout the book, Stiglitz condemns the IMF on three separate levels. First, he discusses several specific instances of IMF involvement in developing nations and argues that IMF policies were unhelpful or even counterproductive. Next, he argues that these specific failures arise from endemic biases in IMF policy and suggests several alternative approaches for IMF decision-making. Finally, he attacks the IMF as an institution and calls for a reform of the way it is governed and the role it plays in the world economy.

Stiglitz devotes a large portion of his book to detailing IMF "failures" in Russia and in East Asia during the Asian financial crisis. With respect to Russia, Stiglitz alleges that the IMF tried to move the country to a market economy too quickly and induced its government to privatize firms too soon. Stiglitz sees the problem as one of sequencing—he feels that regulatory norms and institutions need to be in place before policies like privatization can occur successfully. Without a doubt, Russia's transition to a market economy has been a disappointment. Although the IMF has certainly made mistakes in dealing with Russia, it is not at all clear that Stiglitz's strategy would have been more effective. Establishing the rule of law is no easy task and scholars vary widely on how best to achieve it. While Russia has suffered a massive loss in gross domestic product, there is also a new capitalist class acting as a buffer against the return of communism. Not only is Stiglitz unable to prove that his tactics would have yielded better results, his slower approach could have led to the election of a neo-communist like Gennady Zyuganov.

Stiglitz is more persuasive when appraising the IMF's actions in East Asia. He points out a number of mistakes the IMF made and advocates several alternative policies. Unfortunately, even here Stiglitz oversimplifies the issue. The IMF has admitted to many of the mistakes Stiglitz identifies. Moreover, there are as many scholars who fault the IMF for granting overly favorable terms to Asian nations as there are scholars who agree with Stiglitz's critique that the IMF went too far in enforcing austerity measures. Instead of engaging in a debate with these competing ideas, Stiglitz ignores them, or occasionally mentions them as asides, and writes as though the truth of his ideas is irrefutable. As Stiglitz admits, the IMF practices "battlefield medicine" and should not be expected to make choices perfectly. He offers many recommendations that could help to improve this battlefield medicine, but some of his criticisms boil down to little more than anger at the IMF for not following his advice in the first place.

Moving on, Stiglitz describes these alleged IMF failures in Russia and East Asia as arising from endemic problems with IMF decision-making. Stiglitz claims that the IMF employs a "one size fits all" approach based on its experiences with Latin America in the 1980s. Large parts of this critique are very persuasive. Stiglitz is at his best when explaining the problems with the

IMF's focus on maintaining exchange rates and raising interest rates. He likewise makes a strong case for greater attention to bankruptcy provisions and for cash infusions to stimulate economic growth. One can almost excuse his continued failure to discuss the wide variety of alternative reforms proposed by other scholars. Less excusable is Stiglitz's brief discussion of the political considerations that lead the IMF to call for austerity measures. Stiglitz seems to feel that most developing nations are well governed and would do fine if left on their own. A brief look around the globe paints a very different picture. Few governments, whether developed or developing, can resist the temptations to run deficits, subsidize powerful firms, and otherwise pander to special interests. These problems are particularly troubling when added to the corruption that exists in much of the developing world. The IMF sees part of its role as forcing countries to make tough political choices that they may not have made independently. While Stiglitz's preference for democracy is laudable, there is good reason for the IMF to withhold its financial support unless countries appear to be taking real steps to resolve their crises.

Ultimately, however, Stiglitz professes little hope that the IMF will learn from its mistakes. He claims that the IMF as an institution looks to the best interests of the U.S. financial sector rather than focusing on what is best for development. Going further, Stiglitz theorizes the emergence of a new colonial regime where the IMF plays a central role in forcing developing nations to follow U.S. policy goals. Once again, Stiglitz delivers an interesting, if one-sided, argument. Unfortunately, his solutions to these problems leave a great deal to be desired.

First, Stiglitz calls for developing nations to be given a larger voice in determining IMF policy. Yet he fails to mention the obvious problems inherent in giving nations power over their own bailouts. While arguing that the IMF mismanages its funds, he describes examples such as how the Russian government lied to the IMF and conned it into giving over $20 billion in loans. Nevertheless, Stiglitz wants to trust these governments with a greater say in how IMF dollars are disbursed. He seems oblivious to concerns that representatives of developing nations might game the system and use the greater political power he would grant them to obtain more money for their governments. At the very least, he should address these arguments.

Stiglitz also calls for greater transparency so that the IMF can be held accountable to political processes. But here again, there is no mention of the fact that the IMF deals with governments during crises and that these governments might be reluctant to share necessary information with the IMF if they could not be assured of secrecy. Nor does Stiglitz discuss how the IMF would maintain investor confidence were it to be forced to immediately reveal all the details of a crisis before it had constructed a solution. There is a general agreement that the IMF is too secretive and not sufficiently accountable, but creating greater transparency is a complicated issue involving numerous tradeoffs. Rather than discussing these tradeoffs, Stiglitz glosses over them.

Stiglitz is too important a figure and has too many powerful ideas to be ignored. Serious scholars of international economic policy should be able to

disregard the many areas where his book is deficient and focus on the novel insights he brings to the globalization debate. Regrettably, many of Stiglitz's readers lack the background knowledge to place his ideas into context. Uninformed readers may read this book as an indictment of globalization in the abstract or conclude that U.S. development policy primarily serves to exploit developing nations. By failing to present the broader context surrounding his ideas, Stiglitz's book will undoubtedly fuel the anti-globalization movement without doing much to inform the members of that movement or to help them understand the complex tradeoffs involved in setting development policy. His over-simplistic approach may ultimately discredit many productive development organizations and hence do great disservice to precisely the developing countries Stiglitz wants to help.

Nationalism/Self-Determination

Diversity and Self-Determination in International Law. By Karen Knop. Cambridge, U.K.: Cambridge University Press, 2002. Pp. xxii, 434. Price: $75.00 (Hardcover). Reviewed by Galit A. Sarfaty.

What do the people of East Timor and the Cherokee Nation have in common? Peoples from both regions have fought for freedom and equality before the law by appealing to the right of self-determination. In practice, however, they have articulated their self-determination in different forms, from secession for the East Timorese to internal autonomy within an existing state for the Cherokee. Such divergent realizations of self-determination derive from these actors' distinct historical circumstances and varying styles of participation. Marginalized groups have fluid and provisional legal identities that lead them continuously to interpret and reinterpret self-determination in the context of inequality and exclusion, rather than conceiving it as merely an exercise of political independence. Ironically, the interpretation of self-determination as a struggle for inclusion has traditionally excluded differing views framed in terms of culture and gender. It is this gap in the international legal understanding that University of Toronto law professor Karen Knop aims to address in *Diversity and Self-Determination in International Law.*

Knop's book is part of a new generation of literature that adopts a relational approach to self-determination, treating it as a dynamic, context-specific right instead of as a fixed, determinate legal principle. Following the work of such scholars as S. James Anaya, Benedict Kingsbury, and Iris Young, Knop departs from the conventional literature that focuses on the normative question of whether self-determination implies the right of secession. The traditional scholarship on self-determination operates within the dominant discourse of international law by prioritizing judgments, authoritative legal texts, and state practice. It ignores new meanings of self-determination that have arisen in the post-colonial era and excludes alternative critiques by non-state actors.

In departing from this approach, Knop highlights the diverse interpretations of this right that result from marginalized groups' participation in international legal arenas. Knop analyzes self-determination not just as a norm but as a means of countering exclusions and inequalities in international law. The articulation of identity through self-determination is an attempt to challenge a single grand narrative of international law, reflected in the current trend of coherence analysis among legal scholars such as Thomas Franck and Rosalyn Higgins. Knop explains that self-determination has served a counter-hegemonic function by broadening participation in its interpretation.

Knop problematizes the meaning of the "self" in self-determination by presenting case studies of groups traditionally marginalized in international law—e.g., indigenous peoples and women. She argues that these groups have expanded their participation by asserting varying interpretations of this self-determination right and contesting dominant ideologies. The degree to which their voices are recognized depends largely on the amount of discursive space afforded by international institutions. Knop begins with a close reading of several International Court of Justice cases, particularly the influential 1975 Western Sahara advisory opinion regarding Morocco and Mauritania's objections to the self-determination of the Western Sahara territory. The judges' differing perspectives uncover the continuing struggle to define international law away from colonialist interpretations. As this case indicates, efforts to present a universal definition of self-determination across cultures are often in tension with an accommodation of diverse perspectives. Among the excluded perspectives on self-determination to be examined, Knop adds another important layer that has been widely ignored: institutional self-understandings. Accounts of how an institution understands itself shed considerable light on how and whether outsider groups' interpretations gain legitimacy. Depending on whether institutions like the United Nations interpret their mandates as standard-setting or mediative, they may focus more on adhering to legal norms rather than incorporating the perspectives of outsider groups. For example, Knop compares indigenous peoples' participation in the articulation of their rights in the 1989 International Labor Organization Convention No. 169 and the 1993 United Nations Draft Declaration on the Rights of Indigenous Peoples. The gains for indigenous peoples in the texts and in their increasing recognition by states reflect the international institutions' growing receptiveness to outside input as well as indigenous peoples' understanding of the institutional process.

Knop's discussion of the participation of colonies, ethnic nations, indigenous peoples, and women in the interpretation of self-determination reveals the cultural and gender biases embedded in the law. Yet in her persuasive attempt to recognize marginalized groups' self-representations, Knop glosses over intra-group distinctions and the often conflicting aims of individual versus collective self-determination. For example, Knop only briefly recognizes that women's right to vote and participate equally in post-World War I plebiscites on self-determination did not translate into social equality for individual women. She also mentions but does not fully elaborate

on the potential conflict between individual indigenous women and the groups to which they belong.

The U.N. Human Rights Committee case of *Lovelace v. Canada* exemplifies the struggle of indigenous women to balance individual equality with loyalty to their tribes. After marrying a non-Indian man, Lovelace had lost her Indian status under Canada's Indian Act, which did not operate similarly with respect to Indian men. The Human Rights Committee's decision in favor of Lovelace avoided the potential tension between the equal rights of women and the right of self-determination for an indigenous group in its application of traditional membership rules. In her description of the *Lovelace* case, Knop fails to analyze how these sometimes incompatible visions of self-identification between individuals and groups interact to produce the unified views presented in international legal fora. In accordance with Knop's stated goal of uncovering diverse perspectives in international law, she should have focused more attention on the conflation of individual and community that occurs in the articulation of minority group rights.

Knop's deconstruction of self-determination also does not address the interdependent political/legal and social/cultural/economic dimensions. Cultural self-determination must precede its political and economic counterparts, according to Vine Deloria, Jr., a leading Native American scholar. Thus, there is an important link between a group's cultural self-awareness, economic development, and political recognition by external parties. Indeed, Knop acknowledges that her book focuses on the dominant discourse of political self-determination and leaves out feminist and Third World critiques based on the interdependence of economic and political self-determination. She does not realize, however, that this omission prevents her from understanding the temporal shifts in the meaning of self-determination within and between groups. In order to truly explain the relationship between identity, participation, and the recognition of a people's equality, one must supplement exclusively legal definitions with more holistic understandings.

Despite the minor shortcomings in Knop's account, a major contribution of this book is its exploration of the social life of international law and the legal life of cultural forms. By examining the social relations of power inherent in the interpretation of self-determination, Knop presents law as a discursive construct and the legal subject as indeterminate, contested, and changing. She urges readers to recognize the constitutive features of self-determination as a nexus of meaningful practices by a diversity of actors, including non-state, marginalized groups, and institutions. The model of interpretation that Knop presents can be applied to many concepts in international law, including democracy, freedom, and property. Demands for a gendered and intercultural recognition on local, national, and supranational scales require a multi-layered analysis of international law—one that presents law as a dialogue between dominant and subordinated visions. Including traditionally excluded perspectives will challenge the determinate quality of the law and adapt its meaning to a changing and diverse international society.

Who We Are: A History of Popular Nationalism. By Robert H. Wiebe. Princeton: Princeton University Press, 2001. Pp. xvii, 282. Price: $24.95 (Hardcover). Reviewed by Alexandros Zervos.

Robert Wiebe's *Who We Are: A History of Popular Nationalism* aims to provide a more balanced view of nationalism than currently available from an allegedly biased academic community. Wiebe's thesis is based on a new exploration of nationalism's development in Europe and the world, and the differentiation of state excesses from nationalist passions. Wiebe's argument that "nationalism is the desire among people who believe they share a common ancestry and a common destiny to live under their own government on land sacred to their history" (p. 5), is a much more positive definition than many of his academic colleagues would advance. After introducing his broader theoretical framework, Wiebe answers basic where, when, and why questions and then devotes chapters to exploring nationalism in Europe, the United States, and other areas of the world, including Africa and Asia.

Wiebe begins his book by positing that nationalism is actually a complex creature whose reputation has been unfairly tainted by a "Faustian bargain, trading . . . soul for . . . fulfillment as a state"(p. 10). He cunningly commences his case for understanding nationalism by preemptively removing important alternatives from consideration. In particular, "universalism," dismissed as "another form of provincialism" whose "vastness . . . offers us no way of situating or identifying ourselves" (pp. 9-10), is conveniently brushed to the wayside and never heard of again. These preliminary tactics are presumably meant to eliminate consideration of nationalism's most formidable theoretical competitors. But despite providing some interesting insights into the origins of nationalist sentiment, Wiebe's theoretical arguments are not convincing even in their own right, and his choice of case examples reveals obvious biases, some of which cast doubt on the positions they are meant to support.

Wiebe develops his arguments by examining the European communities where nationalism was born and developed. His analysis includes reasonably insightful observations about the interaction of nationalism with democracy and socialism, which developed at about the same time in modern Europe, co-existing and competing in turn. He also traces nationalism to the demographic pressures that altered European society during the 19th century, positing that it was actually a response to a societal model that no longer worked. Most innovatively, Wiebe establishes a link between migration and the gradual development of nationalist ideas as peoples' loyalties expanded to include cultural as well as blood relations. This appreciation of the role that immigrants can play in construction and maintenance of nationalism in their old homelands seems under appreciated in other academic work.

Wiebe's broadest intellectual argument is an effort to disengage nationalism from "crimes of the state" (p. 8) that hover "like crows over the nests that nationalists make" (p. 6). By doing this, he hopes to prove his thesis that nationalism was a popular and useful response to changing societal conditions. But he also admits that the ultimate aim of nationalists everywhere

is to create a state that almost by definition displays the unpleasant characteristics nationalism is maligned for. Wiebe identifies this as the "Icarus Effect" (p. 7), but Wiebe disappointingly does not explain how to stop the movement from flying too near the sun. Arbitrarily redefining nationalism to embody only its appealing aspects is not a theoretical breakthrough. Even Wiebe's interesting intellectual arguments about the changing nature of European society and the breakdown of previous social norms do not suggest that nationalism was or is the best response to the phenomenon, and many of Wiebe's case studies conveniently pass over some of the worst slaughters associated with this response to "basic human needs" (p. 11).

Wiebe's major case studies include a special focus on Ireland and Israel. These support his arguments about immigration's role in developing nationalist sentiments. But even in the first few chapters, the paucity of Balkan references rings a false note. In modern European history, this area has served as the chief example of destructive nationalism. It is the "madwoman in the attic" of anyone who tries to defend nationalism, and Wiebe's analysis cannot claim universal application without addressing the challenge this region poses to his model.

Wiebe's reluctance to explore certain areas in detail does not extend to his home country, and it is in Chapter 4, "The Case of the United States," that the source of *Who We Are: A History of Popular Nationalism*'s flawed theoretical optimism becomes clear. Although hinted at even in his theoretical framework (with its emphasis on migration and suspicion of "state power"), his U.S. bias is fully confirmed by the decision to devote large portions of the text to a case study exploring the nuances of the American experiment. Given Wiebe's academic background, this is not surprising, as Sam Bass Warner writes in his introduction that "the life and health of the American experiment with democracy . . . was Wiebe's lifetime scholarly question" (pp. vii-viii). Chapter 4 crystallizes the latent suspicion that Wiebe is trying to extend idealized "City on the Hill" conceptions of what being nationalist means to the entire world. In reality, many nationalisms reflect not the U.S. experience (fractured though it is) but rather the memorable formula from Ernest Gellner's classic, *Nationalism*: "Ruritania for the Ruritanians! Let all the Ruritanians be joined in the sacred fatherland! And let no one other than Ruritanians—bar perhaps a small number of well-behaved visitors who know their place as guests, and who do not occupy key decision-making positions—take up much space in the sacred land of Ruritania."

By the time Wiebe addresses non-Western societies (Chapters 6 and 7), it is not a surprise that theory is almost completely abandoned in a frenetic, potted-history-in-a-paragraph race around the world. Wiebe appears to believe that reciting mantras about Western racism will excuse him from any criticism of neglecting or sidelining experiences in developing countries. Through this technique, he avoids fully juxtaposing his theories with the reality of post-colonial societies. It may be that some developing countries do not yet have enough of a track record to allow full-scale analysis. But the reader cannot escape the worry that Wiebe treats these areas with a light touch because they do not fit his thesis as neatly as do Ireland, Israel, and the United States.

Wiebe patronizes the developing world while ignoring the fact that it is here that "imagined communities" and their ersatz-equivalents have done the most damage and caused the most human suffering. The intellectuals who fled into exile from nationalist excess—critics dismissed as "victims . . . who have felt the lash of . . . discrimination" (p. xi)—understood this in a way that Wiebe, comfortably writing from the middle of his splendidly isolated continent, cannot.

In his final chapter, Wiebe vaguely writes of "encouragement of diversity" (p. 217) and suggests that nationalism's true promise would be represented by this conception, somehow divorced from the dirty hands of state bureaucracies. He pines for a collection of small, self-governing communities that live in harmony, practicing their own norms and deciding all issues by way of a New England town meeting (or its African equivalent). In this, he reflects the illusory dream of so many immigrants to the United States. But, as most victims of nationalist violence would attest, these "ideal" communities are far from benign creations. Cosmopolitan universalism may appear impractical and provincial but is infinitely more appealing than the fractured world of which Robert Wiebe apparently dreams.

Global Currents

The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming. By David G. Victor. Princeton: Princeton University Press, 2001. Pp. xiv, 178. Price: $22.95 (Hardcover). Reviewed by Justyna Gudzowska.

Despite the attendant international uproar, President George W. Bush's decision to walk away from the Kyoto Protocol may have been the right step in the fight against global warming. According to David G. Victor, a senior fellow at the Council of Foreign Relations, the Kyoto Protocol is a noble effort to reduce greenhouse gas emissions but one which is fundamentally flawed since the main mechanism relied on for its implementation, emissions trading, is unworkable under international law. *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming* omits the usual debates about whether global warming poses a significant threat to mankind. Instead, Victor reexamines the architecture of the Kyoto Protocol and concludes, as the title suggests, that the collapse of the Kyoto Protocol is inevitable. In its place, he offers another approach: a hybrid system of taxes, less ambitious national emissions targets, and flexible internationally coordinated measures to limit gases other than carbon dioxide.

The Kyoto Protocol is the result of frenzied negotiations between 10,000 attendees including 100 delegates from the United States headed by vice President Al Gore, ministers from all over the world, and non-governmental organizations (NGOs) and industry lobby groups. The protocol is unprecedented in that it actually sets out legally binding targets (for the time frame 2008-12). However, in order for large emitters such as the United

States, Japan, and Australia to agree on the objectives, a compromise had to be reached. The compromise came in the form of three mechanisms: formal emissions trading, joint implementation (JI), and the clean development mechanism (CDM)—together comprising what Victor refers to as "full-blown emissions trading" (p. 4).

Without such a compromise, countries would have to meet their targets exclusively within their borders—an utter impossibility for many industrialized nations. For instance, the United States is required to reduce greenhouse gas emissions by 7% relative to 1990 levels. Yet already by 1999, U.S. emissions had risen 12% above 1990 levels. Meeting its Kyoto obligations would mean that the United States would have to undertake a massive effort to restructure the economy and cut emissions by about 30%—an effort that could cost about $1000 per household. An emissions trading system, on the other hand, would "allow firms to shop the world for the least costly ways to reduce emissions" and reduce the cost of Kyoto compliance in the United States from $1000 to $100 per household. Instead of reducing emissions to the required levels, industrialized countries could purchase parts of other industrialized nations' Kyoto allocations through a formal emissions trading system, earn credits by implementing emissions reducing projects within the borders of other industrialized nations (JI), or implement projects within developing countries exempt from the Kyoto Protocol (CDM).

> Thus a consensus is emerging worldwide that trading is the key to realizing the Kyoto Protocol. For the western industrialized nations, emissions trading makes the protocol's targets and timetables appear cost effective and feasible. For developing countries, full-blown emission trading offers the best chance to benefit from a worldwide effort to slow global warming. Trading is the keystone of the architecture adopted in Kyoto (p. 7).

At first blush, emissions trading sounds like a simple Ricardian win-win solution to a highly complex problem. Unfortunately, Victor proceeds to show us how this solution is an unworkable fantasy due to two sets of insurmountable obstacles: permit allocation, and monitoring and enforcement. To start a system of emissions trading would require creating permits worth about $2 trillion—an immense single invention of property rights. Furthermore, how are the newly created assets divided between the participants? The standard solution of "grandfathering" the permits to existing emitters based on their current level of emissions is highly unpopular with developing countries, whose emissions are on the rise. A separate system could be devised to accommodate developing countries but then one must be careful not to exacerbate the existing "hot air" problem, which arose due to very generous targets assigned to Eastern European countries, especially Russia and the Ukraine. The Protocol requires that Russia and the Ukraine not exceed their 1990 level of emissions. Because the economies of Russia and Ukraine have withered since 1990, their actual emissions are already a substantial amount below the target emissions and they can sell their allowances without even making an effort to reduce emissions. This could result in the transfer of billions of dollars to Russian oligarchs from

industrialized countries who could in turn meet their targets by buying Russian allowances, and absolutely no reduction in greenhouse gas emissions—thus the term "hot air" trading.

The final problem, that of monitoring and enforcement, is endemic to all international treaty-based systems. The incentive to cheat will be high, making the data reported by the various countries potentially unreliable. An independent verification system would be necessary to ensure that countries are not cheating. The author posits that the problem would be alleviated if the Protocol concerned itself only with carbon dioxide emissions from fossil fuels, which accounts for 70% of global warming, as opposed to emissions from all six greenhouse gases. Carbon dioxide emissions are easy to monitor since "emissions factors have been studied intensively and are well known" (p. 57). More importantly, if countries do decide to cheat or ignore their obligations, there is no mechanism to punish them and hence no strong built-in incentive for them to abide by the terms of the treaty. Consequently, compliance is dependent on the honor of the participants—a dubious proposition.

After outlining the various reasons why the Protocol is destined to fail, Victor looks into possible alternatives and suggests a hybrid approach. This approach relies not only on emissions trading but also on taxes. The inclusion of emissions taxes adds flexibility to the system in that a country could choose not to engage in trading and meet its obligations, not through targets but through a market-based tax system. The main difference between the Kyoto approach to emissions trading and Victor's approach is a cap on the permit price, which would result in "greater surety about the cost of compliance" (p. 102). This greater surety would, in turn, alleviate the allocation problem for four reasons. Because of a maximum price surety, costs of compliance would be more foreseeable, and countries would thus be more likely to ratify the Protocol. Surety would also facilitate the launching of an international regulatory system and make it "easier for governments to negotiate an allocation that corresponds with their marginal cost of abatement," which would mean that at the outset of trading the system would be near equilibrium and huge outflows to Russia and the Ukraine would be unnecessary (p. 104). Finally, if the cap is set at a relatively low price, expanding membership would be easy, as more permits can be printed and sold to new entrants.

To alleviate the problems associated with compliance and monitoring Victor proposes that the system be restricted to the easier-to-monitor emissions of carbon dioxide from fossil fuels (for the other five less easily monitored greenhouse gases, the author proposes a flexible system of internationally coordinated policies and measures), and in membership to "like-minded" participants who care deeply about global warming and thus will not cheat or exit the system. Additionally, the author's system would be one in which the buyers are liable for the default of the sellers, making the buyers the enforcers of the trading mechanism.

The Collapse of the Kyoto Protocol is a provocative piece that is also a short and easy read. As is often the case with polemics of this sort, the critique in this instance is more persuasive than the alternate proposal. Victor fails to

demonstrate how his proposed alternative would avoid many of the deficiencies of the Protocol. A capped permit price does not dispose of the problem of asset invention. Even with enforcement through buyer's liability, a system in which defaults were frequent would eventually cave in as the number of viable sellers dwindled. Restricting the participants to countries where global warming is a priority might significantly reduce monitoring and enforcement problems, but it would also likely result in a small membership of relatively clean countries, whose reductions would have little or no global effect. Victor suggests that the membership would slowly be enlarged as more countries started thinking seriously about global warming. Yet it will likely take a very long time for countries such as Russia and the Ukraine to start taking global warming seriously, and it is unclear just how urgent the global warming problem is. Victor's proposal is, therefore, only a partial solution to the Protocol's problems. This begs the question whether the remaining problems would also lead to the collapse of the new hybrid system. It may be that any system short of an incredibly intrusive international regime supported by an international enforcement mechanism is ultimately destined to fail.

An Introduction to the International Criminal Court. By William Schabas. Cambridge, U.K.: Cambridge University Press, 2001. Pp. ix, 406. Price: $90.00 (Hardcover). Reviewed by Celia Whitaker.

In a year of news dominated by the war on terror and a push for war with Iraq, some Americans may have begun to think that the quest for international justice begins and ends in Washington. But a different quest is taking place far from Washington, and indeed, it is taking place against the active opposition of the Bush administration. This search aims to investigate and punish the world's most atrocious crimes—genocide, war crimes, and crimes against humanity. In July 2002, this effort took a major step forward with the entry into force of the Rome Statute of the International Criminal Court (ICC). But as William Schabas demonstrates in *An Introduction to the International Criminal Court*, many questions about the court's power and procedures remain unresolved after Rome—and will only be answered as the court actually begins its work. Schabas is Director of the Irish Centre for Human Rights at the National University of Ireland, Galway, and evidently an ardent supporter of the ICC. For anyone interested in understanding this groundbreaking development in international law and the political controversies it has engendered, his book makes a timely, engaging, informative, and provocative read.

Schabas is primarily interested in the ICC's place in history. He argues that the court falls naturally in the twentieth-century continuum of international human rights and criminal law. In his view, the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence—the ICC's foundational texts, which are appended in full to the book—merely codify the "development and enlargement" of international law throughout the twentieth century (p. 22).

The book therefore begins with a concise review of this development and enlargement. The story starts at the Hague Conventions of 1899 and 1907, stagnates during the interwar years, and acquires new momentum with the Nuremberg and Tokyo war crimes trials, and the 1948 Geneva Conventions and Convention for the Prevention and Punishment of Genocide. That was also the year the United Nations first called for the creation of an international criminal court; the Cold War froze the idea, and it took another half-century before this vision could be realized. In the meantime, however, international law continued to progress, mainly through the evolution of customary law and of commonly held norms, rather than formal treaty regimes. The final breakthrough came with the establishment, in the 1990s, of the *ad hoc* war crimes tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

This discussion of the ICC's history is uncontroversial. But the brief history lesson lays the ground for Schabas's advocacy for the ICC. He exhaustively reviews the Rome Statute, always seeking precedents to support the text. He first parses the statute's definitions of the four "core crimes" in the ICC's jurisdiction—genocide, crimes against humanity, war crimes, and aggression—making frequent comparisons to history. He then applies the same framework to his discussion of the court's temporal and geographic jurisdiction, its procedures, and the role of the Prosecutor.

Schabas's enthusiasm for the court, his fluid writing, and his thorough research make his arguments difficult to resist. Yet his thesis of historical continuity falls short in a few places where the ICC has clearly made procedural and substantive ICC innovations. For example, Article 13 of the Rome Statute gives the court inherent jurisdiction over the "core crimes" (i.e., there is no requirement of prior approval from a state or the United Nations to prosecute a case); Article 8 extends war crimes to those committed during peacetime, despite lingering "doubts" among many scholars and practitioners (p. 42). In cases such as these, Schabas concedes the formal break with precedent but insists that the changes still reflect the evolution of customary law and norms. But this is a conveniently slippery argument: customary law is "not always easy to identify with clarity," so dissenters will have difficulty countering Schabas's claims with specificity (p. 23).

Even the establishment of a Prosecutor with the power to independently initiate prosecutions does not shake the author's confidence. Although the idea has close analogies in domestic judicial systems, it was still hugely controversial during the Rome negotiations. But referring again to evolving norms and customs, Schabas argues that the *proprio motu* prosecutor "was an idea whose time had come" (p. 97). Here, however, he has support in the recent past: he praises the "extremely positive model" set by Richard Goldstone and Louise Arbour, the prosecutors of the *ad hoc* tribunals at the time of the Rome negotiations (p. 97). Their "integrity, neutrality and good judgment . . . answered those who warned of . . . a reckless and irresponsible 'Dr. Strangelove prosecutor'" (pp. 12-13).

The most intriguing example of the court battling to break new ground concerns its jurisdiction over crimes of aggression. The whole concept was so controversial that the Rome delegates failed even to agree on the scope and definition of the crime, leaving that task to future negotiators. Ironically, there is precedent for such jurisdiction, because the Nuremberg and Tokyo tribunals prosecuted "crimes against peace," an older term for aggression. But since 1945, responsibility for determining cases of aggression has resided in the U.N. Security Council, as provided for in Article 39 of the U.N. Charter. Thus, wholly or partly transferring such responsibility to the ICC raises highly sensitive questions about the Security Council's relationship to the court.

The Council's five permanent members would presumably advocate predicating ICC prosecutions on a Security Council finding of aggression. Schabas, however, convincingly argues that this type of prerequisite would be dangerous: it would constitute an "incredible encroachment upon the [court's] independence"; it would practically exempt the big five from prosecution for aggression; and "no Court can leave determination of such a central factual issue to what is essentially a political body" (p. 27). In any event, ICC prosecutions of crimes of aggression will have to await a definition through formal amendment to the Statute—a "complex and extremely cumbersome procedure" that cannot take place before 2009, seven years after the statute entered into force (p. 161).

Schabas attended the United Nations Diplomatic Conference that produced the Rome Statute in 1998, and he gives the reader a thrilling insider's view of the intense diplomatic maneuverings during that hot summer month. The planners had strategically chosen to leave the most contentious issues out of the main debates. Thus, by the final week, the Security Council's role, the crimes over which the court would have inherent jurisdiction, and whether it could prosecute citizens of non-party states still remained open questions.

Schabas's narrative pulls the reader along as the suspense mounted during the final week. The climax comes with an eleventh-hour final proposal from Philippe Kirsch, legal adviser to the Canadian delegation and chair of the Conference's Committee of the Whole, who had been assigned personal responsibility for the most important unresolved issues. Kirsch played his cards "[l]ike a skilled blackjack player" (p. 17). The United States tried to rally opposition and succeeded in forcing a vote on the statute, which many had hoped would be ratified by consensus. The statute was of course adopted, but the U.S. politicking led to public declarations against the statute from three states—the United States, Israel, and China—and numerous abstentions.

This episode is just one of several places where Schabas makes clear his frustration—and that of many ICC supporters, in Europe and elsewhere—at the United States. He characterizes the successful U.S. proposal for a detailed code of crimes—what would become the Elements of Crimes—as "rather less harmful than many other Washington-based initiatives" (p. 29). Even this relatively benign U.S. addition to the ICC, Schabas predicts, will hinder the administration of justice. Combined with the "prolix definitions" of crimes in the Statute itself, the Elements will "further fetter . . . judicial interpretation"

(p. 29). Modifying the law to keep pace with evolving criminal behavior is an inherently more "cumbersome" process in the international context than in national jurisdictions (p. 160). With the ICC in particular, Schabas worries that the precise codification of crimes will hold judges back as they try to keep apace of the "imagination and inventiveness of war criminals" (p. 42).

Most prophetic, however, is Schabas's discussion of extradition. The Rome Statute attempts to get around many states' obligations not to extradite their own nationals. It does so with "exceptional" creativity, distinguishing "extradition" (delivery of a person from one state to another) from "surrender" (delivery of a person from a state to the court) (p. 110). Yet Schabas is certain that this rhetorical dance will not satisfy Washington: he cites the "embarrassingly tardy" U.S. compliance with a request for the transfer of a Rwandan suspect to the ICTR as a dangerous omen for future U.S. cooperation with the ICC.

Unfortunately for the Court, history has already realized Schabas's fears—and even surpassed them. *An Introduction to the International Criminal Court* was published in August 2001. Since then, the current administration has waged war against the *ad hoc* tribunals and the ICC. It nullified the U.S. signature of the Rome Statute in May 2002 and used bully tactics in the Security Council to win a one-year agreement giving U.N. peacekeepers limited immunity from ICC prosecution. American diplomats then fanned out across the globe, seeking bilateral agreements for permanent U.S. exemption from ICC prosecution on a country-by-country basis. All of this makes Schabas's alarm seem eerily prescient.

Anyone seeking to understand these legal and diplomatic battles, and to follow the ICC as it takes its first steps, will greatly benefit from Schabas's work. His expressed goal is to condense the voluminous literature on the ICC into a concise, readable format. In this endeavor, he has admirably succeeded.