

1984

Book Reviews

Recommended Citation

Book Reviews, 18 INT'L L. 741 (1984)

<https://scholar.smu.edu/til/vol18/iss3/21>

This Bibliography is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

BOOK REVIEWS

Guide to International Human Rights Practice

Edited by Hurst Hannum (International Human Rights Law Group). University of Pennsylvania Press, 1984. pp. 306. \$35.00

Human Rights in International Law: Legal and Policy Issues (Two Volumes)

Edited by Theodore Meron. Clarendon Press; 1984. pp. 566. \$84.00 (vol. 1, \$42.00; vol. 2, \$42.00).

The International Law of Human Rights is primarily—with some significant exceptions—a product of the past forty years. In that time the international community has proclaimed its commitment to “human rights and fundamental freedoms” in dozens of treaties, declarations, resolutions and other documents.¹ The international community has created what on paper appears to be a comprehensive normative and procedural structure for the promotion, encouragement and observance of human rights. As one leading professor suggests human rights has become “international” (i.e., the proper subject of international diplomacy, law and institutions) and “universal” (i.e., accepted by virtually all states and societies regardless of historical, cultural, ideological, economic, or other differences).²

With the structure of international human rights law substantially completed we are now in the era of implementation. The issue then is how can the governments of the world be induced to live up to their pledges of allegiance to human rights and fundamental freedoms. Can the current

¹United Nations Charter, Articles 1, 55 and 56. Many of these instruments are contained in “Human Rights Documents: Compilation of Documents Pertaining to Human Rights,” Committee on Foreign Affairs, U.S. House of Representatives (September 1983). A more comprehensive collection is “Human Rights: A Compilation of International Instruments,” U.N. Doc. ST/Hr/1/REV.5 (1982).

²Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights*, 1. (Columbia University Press, 1981). By 1984 slightly more than half of the members of the United Nations had ratified the International Covenants. Appendix E to the *Guide to International Human Rights Practice* contains lists of the governments who have ratified these and other major international human rights treaties (as of 1982).

structure of international human rights law and institutions really have a significant impact on eliminating human rights abuses? Which strategies should be employed to get the maximum benefits from the current structure for human rights victims? Which procedures should be the focus of our energies and which should not? Why should a practitioner bother to learn about international law of human rights? In which domestic cases will recourse to international law and institutions be worthwhile?

The books under review provide some answers to these questions, but their contribution is that they raise these questions for a broader audience—of students, teachers, and practitioners than provide definitive answers. Read together the books offer a comprehensive introduction to the international law of human rights and to the institutions and procedures which have been created to enforce it and thus make a significant contribution to the era of implementation. They are highly recommended for all students, teachers or practitioners of international human rights laws.

The Guide to International Human Rights Practice

The self-proclaimed goal of the *Guide* is to encourage and to assist in the process of implementing the international law of human rights by analyzing the existing enforcement procedures and by suggesting practical steps that practitioners might take to utilize them successfully.³ The *Guide* contains relatively little discussion of the substance of international human rights law. For this reason the *Guide* must be used in conjunction with other books, like the Meron volumes, which fill this gap.

The *Guide* is one of the first attempts to provide practitioners with practical information about how to use the international procedures for the enforcement of human rights. These procedures are diverse and are at various stages of maturity and effectiveness, as the *Guide* makes clear. The quality of the chapters is similarly diverse; however, in general the book offers a commendable introduction to the available international human rights procedures with many useful practical suggestions about how to use these procedures.

A practitioner new to the area will need additional information before actually attempting to use these procedures in most instances. In this regard, the appendices to the volume are very useful. These include: a bibliographic note; a checklist for choosing the most appropriate international forum; a composite model communication; addresses of international organizations to which communications may be sent; and a compendium of the states which have ratified the major international human rights treaties.

³*Guide*, p. xi. The *Guide* was published under the auspices of the International Human Rights Law Group, one of the leading public interest law firms active in the area of international human rights laws.

The *Guide* begins with a brief overview of international human rights law by Professor Richard Bilder. This overview, in addition to providing a capsule history of the international human rights movement, presents a laundry list of issues, problems and potential directions for the movement. Professor David Weissbrodt's chapter on the "Strategies for Selecting and Pursuing International Human Rights Matters" is perhaps the most provocative in the book. Practitioners will be particularly interested in Professor Weissbrodt's attempts to answer questions about strategy and tactics in pursuing human rights issues. He examines the strategies employed by the civil rights and public interest law movements in the United States and suggests that these experiences are relevant to an international human rights movement still in its infancy. Also included in the chapter is a discussion of strategies for implementing the right to food. This is one of the few times that the *Guide* focuses on economic or social rights, an area of international human rights law which should be of considerable interest to U.S. civil rights lawyers. The final introductory chapter is an outline and categorization of U.N. institutions and procedures by Theo C. Van Boven, the former Director of the United Nation's Division of Human Rights.

The heart of the book is the description and analysis of international procedures for bringing human rights complaints. These procedures include those of the I.L.O., UNESCO, the O.A.S., the Council of Europe, the O.A.U. and the United Nations. These chapters vary quite a bit in terms of their practical assistance though each chapter provides, at a minimum, a solid description of the existing procedures. The chapters on the Inter-American system and European Convention are particularly good in providing practical information for the practitioner. Practitioners in the United States will be most interested in the Inter-American system because of its potential application to alleged human rights violations in this country.

In general, the history of these procedures, with the significant exception of the European Convention and the I.L.O., has marked by the resistance of most governments to implement, in a meaningful way, the international human rights guarantees, which most governments have adhered to. The authors acknowledge the inadequacies of the existing institutions, but proceed on the assumption that if more practitioners invoke the procedures in an attempt to hold governments to their promises, human rights will be enhanced. Each of the procedures discussed relies upon the "mobilization of shame" against violators of human rights and given the sensitivity displayed by many governments to accusations of human rights violations, this assumption seems reasonable.

The *Guide* also discusses techniques, other than complaint procedures, for the enforcement of international human rights. One of the primary techniques incorporated in most human rights treaties is reporting requirements which require governments to report periodically to international

institutions about their progress in implementing international human rights obligations. Professor Fischer's chapter surveys the reporting procedure of four major human rights treaties and suggests strategies for non-governmental organizations (NGOs) to make this requirement a meaningful implementation technique, while acknowledging the weaknesses in the present system. The following chapter, written by Menno Kamminga and Nigel Rodley, members of Amnesty International's Legal Office, discusses in practical terms the participation by NGOs in the primary human rights bodies in the U.N. system—the Human Rights Commission and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities. This is followed by a very useful chapter by Jiri Toman on the development of international standards and guidelines for detained persons. This technique has potential application to many other areas, such as the rights of the disabled or mentally ill persons. Such standards or guidelines provide opportunities for those seeking to use international human rights law in litigation or in other forms of advocacy in the United States.⁴ Although international standards and guidelines are ordinarily not meant to be legally binding, at least outside the United Nations itself, this kind of standard setting may have a substantial impact on the domestic legislation of states and may contribute to the development of customary law.

The use of international human rights law in domestic litigation is the subject of Professor Lillich's chapter. The chapter is a good introduction to a subject which has spawned a cottage industry of law review articles and commentary in recent years.⁵ What is missing in the limited space devoted to this topic is a practical discussion of the litigation strategies which offer the best opportunities for establishing the kind of case law which will inspire domestic civil rights and civil liberties lawyers to vigorously assert international human rights claims in their cases. Hopefully, the chapter will entice civil rights lawyers to become familiar with the growing body of literature in this area, much of which is cited in the footnotes to this chapter, and to find creative ways to induce U.S. courts (state and federal), to use international human rights law to enrich our conception of civil rights and civil liberties. There are many opportunities in this area waiting to be mined.

The chapter on the rights of refugees by David Carliner is an interesting introduction to a rapidly changing area of law. Here too, the discussion is of necessity general and the practitioner will have to look elsewhere for practical litigation guides. The final chapter by Joseph Eldridge about strategies for influencing the human rights policies of the U.S. government is a realistic

⁴See, e.g., *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn 1980), *modified on different grounds*, 651 F2d 96 (2d Cir 1981); *Sterling v. Cupp*, 290 Ore 611, 625 P2d 123 (1981).

⁵See, e.g., Whisman, *Selected Bibliography: Articles and Cases on International Human Rights Law in Domestic Courts*, 18 INTERNATIONAL LAWYER, 83 (Winter 1984).

summary of the various pressure points in the government where human rights policies may be influenced by effective lobbying.

For practitioners with experience in the field of international human rights law there is little new information in the *Guide*, but it does make available to the interested practitioner an excellent one-volume road map to the available procedures and techniques for enforcing international human rights law. The existence of such a road map is vitally important if the practice of international human rights law is to be expanded beyond a handful of extremely able advocates and teachers, many of whom are the authors of the *Guide*. One can only hope that a paperback version is planned so that the *Guide* might receive wider distribution.

Human Rights Law In International Law: Legal and Policy Issues

The Meron volumes have a different purpose. "The object of this book is to provide teachers and students not only with a textbook dealing with the principal topics in the field of human rights, but also with teaching suggestions, syllabi, bibliographies and case studies." Less than twenty years ago there was no course in international human rights law in any American law school.⁶ As of June, 1983, there were at least forty-six law schools with courses in the area.⁷ This rapid increase is due to many factors, including the focus on international human rights in the American political consciousness in the past two decades and the major advances in the development of international human rights law and institutions in that period.⁸ Yet, as Professor Meron points out, the study of international human rights law has not yet entered the mainstream of university education. This book is an attempt to change that reality.

The Meron volumes have their origin in a 1981 conference on teaching international human rights law.⁹ The book consists of twelve chapters (including Professor Meron's introduction to the scheme of the book) addressing a series of topics which can be used to form the basis for a course in international human rights law. The choice of subjects is sensible and probably corresponds to the subjects most professors would include in such a course.

⁶Lillich, *The Teaching of International Human Rights Law in U.S. Law Schools*, 77 AM. J. INT'L L. 855 (1983).

⁷*Id.*

⁸This development was greatly assisted by the publication of two pioneering casebooks in the area. L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS: CASES AND MATERIALS* (1973); and R. LILlich & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* (1979).

⁹See Meron, *A Report on the N.Y.U. Conference on Teaching International Protection of Human Rights*, 13 N.Y.U.J. INTERNATIONAL LAW AND POLICY, 881 (1981).

Professor Henkin's chapter on "International Human Rights and Rights in the United States" and Jerome Shestack's chapter on the "Jurisprudence of Human Rights" provide the "setting" for the chapters that follow. The remaining chapters in the first volume by Professors Lillich, Humphrey and Trubeck discuss the substance of the civil, political and economic, or "social welfare," rights which are the corpus of the International Bill of Human Rights. Each of these chapters contains a comprehensive discussion of the norms in these areas with extremely useful citations to case law, *travaux préparatoires*, and scholarly articles.¹⁰

The chapter by Professor Trubeck is worthy of special comment. There are few materials available for the teaching of international "social welfare" rights. His chapter is a very useful teaching tool and is an extremely valuable addition to the literature. It is provocative in its approach and style, and contains more than enough substance to provide foundation for stimulating classroom discussion.

The five chapters which open the second volume cover a variety of subjects that might be added to the foundation chapters in the first volume to round out a course. Francis Wolf gives a comprehensive review of the procedures of the oldest international human rights institution—the I.L.O. This focus on the I.L.O. is certainly appropriate given its long record of effectiveness in enforcing its many human rights conventions.

Jack Greenberg, one of the country's leading civil rights leaders and now a professor at Columbia Law School, follows with a chapter on "Race, Sex and Religious Discrimination in International Law," which should be of great interest to U.S. civil rights lawyers. This chapter contains a realistic appraisal of the strengths, weaknesses and ambiguities of the international norms prohibiting discrimination. It seems to break new ground and would form the basis for exciting classroom discussion.

Increasing attention has been paid of late to the relationship between international human rights law and international humanitarian law. Professor Dinstein's overview of international humanitarian law, therefore, provides ample material and ideas for a segment on this subject in a human rights class.

Professor Sohn's chapter on the implementation and supervision of human rights by the United Nations covers several important issues for class discussion and raises problems with the system that ought to be discussed in and out of the classroom. Most professors will probably want to supplement this chapter with additional materials on the United Nations system. Professor Sohn's chapter is complemented by Professor Weissbrodt's chapter on

¹⁰Unlike the *Guide*, the footnotes in the Meron volumes are at the bottom of each page and there is an index. These features make it a much easier book to use.

the contributions of NGOs to the protection of human rights. The discussion is practical and comprehensive and is well designed for classroom use.

The Meron volumes close with two valuable chapters on the two primary regional systems for the protection of human rights—the Inter-American and European systems. Each chapter is comprehensive and well-tailored for classroom use. It is unfortunate that the book does not contain materials about the African Charter on Human and People's Rights.¹¹ Although the Charter is not in force, a comparison between the proposed African system and the existing Inter-American and European system raises interesting and important issues for classroom discussion. In particular, a review of the African Charter raises the issue of different cultural perspectives about human rights—an issue which is barely touched in the book.

Each of the chapters in the Meron volumes contains syllabi, bibliographies and teaching suggestions, which vary quite a bit in utility to teachers and students, though generally speaking, they are quite useful and make this publication extremely valuable as a comprehensive manual for teachers in the area. It is the kind of book I would have found extremely useful had it been available when I started teaching in the area. The price of the book puts it beyond the reach of students, particularly given the need to supplement it with cases, treaties, and other primary materials. The publication of a 566-page book designed for students in two expensive hardcover volumes almost ensures that the book will not receive the audience it deserves.

Though the cost would be daunting even to practitioners, the *Guide* and the Meron volumes should be read and used together and would make good teaching and reference tools for teachers, students and practitioners. With both books, the landscape of international human rights law and institutions is well covered since each book contains important areas not covered by the other. The Meron volumes provide the comprehensive background to the substance of international human rights law which the *Guide* lacks. The *Guide* covers the procedural terrain of international human rights law from a practical standpoint which is not the focus nor the purpose of the Meron volumes. Unfortunately, each book is somewhat dated given the rapidly changing nature of the subject matter and the delays involved in multi-authored publications.

The two gnawing problems with both books, which is perhaps a reflection of the state of the international human rights movement, are that they do not address the issue of why the elaborate and growing structure of international human rights law and institutions has not had a significant effect in stopping human rights violations in the world, nor do they provide a comprehensive

¹¹African Charter on Human and People's Rights, adopted June 20, 1981, OAU Doc CAB/LEG/67/3, reprinted in INT'L LEGAL MATERIALS 58 (1982). See Gittleman, The African Charter on Human and People's Rights: A Legal analysis, 22 VA. J. INT'L LAW 667 (1982).

discussion of possible strategies for achieving better results. The books do make a significant and timely contribution to the "global struggle for human rights," and for this all those associated with these projects receive our appreciation.

Paul L. Hoffman
Legal Director, ACLU Foundation of
Southern California
Adjunct Professor of Law, South-
western University School of Law
Los Angeles, California

International Law of State Responsibility for Injuries to Aliens

Edited by R. Lillich. University Press of Virginia, 1983. Pp. xii, 407.

System of the Law of Nations: State Responsibility, Part I

By Ian Brownlie, Oxford University Press, 1983. Pp. xvi, 302.

After a long *hiatus* since the appearance of a major comprehensive work in the area of state responsibility, publication of the above volumes constitutes a significant event. Recently, certain aspects of the law of state responsibility have been engulfed in increasing controversy while the contours of new basic concepts can be observed as gradually taking shape. With ongoing codification efforts by the International Law Commission and the recent publication of the ALI's draft *Restatement* of the rules of state responsibility, the two studies thus represent timely and highly welcome contributions to the discussion of this important body of international law.

The first volume is a collection of eight essays authored by members of an American Society of International Law panel on state responsibility chaired by Professor Bishop. It is not, nor does it pretend to be, a comprehensive analysis of what has often been termed the hard core of the international law of state responsibility. Thus the reader will find little or only cursory discussion of such pertinent topics as, for example, the local remedies rule or the

Calvo clause. The goal of this volume is nevertheless highly ambitious. It is to provide a balanced perspective on the fundamental challenges to the traditional international law governing the treatment of aliens brought about by the process of decolonization, the quest for economic self-determination and a New International Economic Order (NIEO), and by the activities of multinational corporations. Its objective is thus, as the editor intimates, to advance the restatement and critical reformulation of the traditional rules, thereby countering the claim of an increasing number of states that the international law of state responsibility for injuries to aliens as a whole is no longer an internationally viable concept. Apart from two essays, namely on remedies and sanctions by Covey Oliver, and on attribution by Gordon Christenson, both of which address themes relevant to the general law of state responsibility, the book appears specifically geared to this undertaking. Measured against this yardstick, the book turns out to be a resounding success.

The *leitmotif* for this critical review is laid out in an introductory essay by Richard Lillich in which the evolution of the treatment of aliens law and attempts at codification are traced briefly. Basic factors working against, and contentions in opposition, to this body of international law are reviewed in summary fashion. Lillich's discussion of the progressive blending of human rights with the treatment of aliens law is particularly topical. His warning is well taken that while adoption of a human rights-based approach to injuries to aliens is highly desirable, this should not be at the cost of abandoning the traditional rules of state responsibility. Scrapping the latter for the former implies trading well-secured customary legal positions for what would at best be a tenuous legal regime, at worst a far-off ideal. It is a warning that ought to be heeded by the authors of the ALI Draft Restatement of the Foreign Relations Law who in Sec. 711 (Injury to Nationals of Other States) emphasize the human rights perspective and give the traditional state responsibility law short shrift by relegating it to the reporter's notes.

Burns Weston provides an exacting analysis of Art.2 of the Charter of Economic Rights and Duties, the center piece of the NIEO. He concludes that failure of Article 2 to incorporate the so-called public purpose doctrine, i.e., the contention that foreign property, rights or interests can be taken legitimately only for public purposes, is not specifically objectionable as there is scant support for it in state practice. He takes, however, strong exception to the Article's apparent total repudiation of the prohibition against arbitrary discrimination and the principle of compensation which he considers part of existing customary law. His sensitivity to the claims of LDCs notwithstanding, he argues also persuasively against future acquiescence in the disavowal of the former principle and proposes to retain a standard of "appropriate compensation": To do otherwise, he argues,

would undermine legitimate expectations of stability in international economic relations and thus work against the long-term interests of the developing world.

His doubts as to the continued validity of the doctrine of acquired rights appear partially shared by Gillian White, at least insofar as entitlements to specific performance and to "full" compensation are concerned. Her essay on the law of state responsibility as it relates to wealth injuries involving creditor and contract claims raises issues which should be of interest in the context of the present international debt crisis. A review of the role of consent in renegotiating and rescheduling international debts is followed by an analysis of the permissibility of attaching fiscal and economic conditions to international loans that result in a denial of human rights in the debtor country. Finally, there is a valuable discussion of the scope of review in the denial of credit facilities by international lending organizations, an issue that may have reached the high-water mark of international controversy when the United States recently insisted on a denial by the World Bank of a small rural development loan to Nicaragua.

Professor Fatouros tackles another sensitive issue in North-South relations when he looks at the "Transnational Enterprise in the Law of State Responsibility" as both victim-claimant and "defendant" vis-a-vis the foreign host country. Traditional international law, it is true, only awkwardly accommodates the phenomenon of MNCs. It continues to treat such corporations as appendices of states authorizing the "national" state to exercise diplomatic protection or conversely, holding it internationally accountable for the conduct of the MNC where such conduct is attributable to that state. Given the multinational dimensions of business operations, Fatouros dismisses the application of the concept of nationality to MNCs as fundamentally inappropriate and instead urges "some form of [formal international] legal recognition of their existence" as major transnational actors. The steps he has in mind would obviously go beyond the *de facto* recognition as reflected in such attempts at direct international regulation of MNCs, as the OECD Guidelines or the Draft U.N. Code of Conduct. But the contours of this proposed change remain rather fuzzy.

The adequacy of the traditional nationality test also comes under attack in Christopher Ohly's analysis of claimant eligibility for diplomatic protection. His preference for a genuine link test which would focus on the existence of a substantial interest on the part of the protecting state, is based on a somewhat implausible assumption: that in a legal system in which third-party adjudication is a rarity, the complexity of the proposed test would not prove to be a bar to its effective application internationally. Certainly, with regard to corporate claims and claims by shareholders, which he would allow, he is unlikely to overcome justified doubts as to the feasibility of his proposed approach. Finally, in a survey of post-World War II state practice relating to

non-wealth injuries to aliens, George Yates proves that the doctrine of state responsibility for this type of claim has never seriously been called into doubt.

Professor Brownlie's book is the first in a sequence of projected monographs on the international legal system and part one of a comprehensive study of state responsibility. It draws heavily on the author's earlier writings in the field. The chapter on "Causes of Action in International Law" is essentially identical to an earlier *British Yearbook* article of the same title; and with Brownlie's *Principles of Public International Law* having become something of a standard source of reference on state responsibility in its own right, it is not surprising that some sections of the present study should resemble closely passages of the earlier work. Topics covered in this volume include responsibility for acts of organs and agents of states; for acts of private persons; and responsibility in case of civil war. There is an elaborate discussion of the topic of reparation. The issues of joint responsibility and of physical control of territory or persons as the basis of a state's responsibility are covered in two shorter chapters. Treatment of the so-called circumstances precluding international wrongfulness is reserved for part two of the study to be published in a separate volume.

Systematic as this treatment of the topic is, Brownlie's study is certainly no treatise in the ordinary sense. Rather than staying within the traditional format the author has made extensive use of primary source materials in aid of illustrating particular issues. The section on declaratory judgments, for example, is made up of one page of text written by the author and six pages of quotations from the joint dissenting opinion in the *Nuclear Tests* cases. This emphasis on access to original materials is also evident from the incorporation of three appendices which include the International Law Commission's draft articles on state responsibility and a forty-page tract, the ILC's entire commentary to draft articles 20-22 (on obligations of results and obligations of means). Moreover, one lengthy chapter consists almost entirely of a compilation of diplomatic correspondence involving protests or claims for reparation. This may strike one as somewhat excessive. Admittedly, the avowed purpose of this documentation is to "underline the universality and persistence of state practice" in the field of state responsibility. But it is a part that appears slightly out of balance with the rest of the book. Overall, however, the approach adopted by the author results in a very successful synthesis of abstract writing and vividly illustrative original materials.

To this reviewer, "Conceptual Foundations," the chapter which explores some of the major theoretical and conceptual problems associated with the concept of state responsibility, is a crucial one. The author introduces this section of his study by way of a disclaimer. In practice, he notes, the conceptual issues are often of a "tangential and advertitious significance."

In another chapter, however, he registers his reservations about the ripeness for codification of a subject-matter like state responsibility, absent a sufficient understanding of the fundamental concepts involved. The relevance of this concern, i.e. for the primary significance of conceptual clarity, is highlighted when the author discusses so-called "liability for lawful acts" or, in the diction of the ILC, "international liability for injurious consequences arising out of acts not prohibited by international law". He is totally opposed to the very concept, and the Commission comes in for heavy criticism for pursuing a topic that is fundamentally misconceived and reflects general confusion about the principles of state responsibility. Brownlie is certainly right and not alone in contending that the search for rules based on a distinction between international lawful (i.e. not prohibited) and unlawful (prohibited) activities is totally useless. It is undeniable that the title chosen for the ILC topic might suggest that such a search is the Commission's real objective. There are, moreover, clear indications of corresponding confusion within the ILC. But these apparent misconceptions, deplorable as they are, cannot hide the fact that the Commission, perhaps in a somewhat stumbling fashion, is on to an objective that is entirely laudable. It is the identification of those principles and policies that justify the shifting of a transnational loss in situations in which the transnationally injurious conduct is not only lawful *per se*, i.e. not specifically prohibited by international law, but also untainted by international wrongfulness in the sense of falling short of the applicable international standard of due care. Conceptually, these situations cannot be accommodated within traditional categories of state responsibility. The ILC's efforts when properly directed towards this end, are not misguided; they ought to enjoy our strong support.

The rest of the chapter is commendable for its lucid exposition of such complex issues as the proper role of fault and clarification of such notions as "objective responsibility" and "strict liability" which have bedeviled many a writer before. The text of the volume throughout is thoroughly documented by extensive and up-to-date references to the literature and reflects a careful and detailed consideration of the recent work of the ILC, quite apart from an equally meticulous analysis of pertinent case law and state practice. The author's crisp style renders this a remarkably handy volume considering its wealth of information and its extensive provision of original materials. It is bound to be widely used as a concise and, in most respects, highly authoritative treatment of the law of state responsibility.

Gunther F. Handl
Professor of Law
Wayne State University Law School
Detroit, Michigan

Law in Radically Different Cultures

By John Barton, James Gibbs, Jr., Victor Li and John Merryman, St. Paul, Minnesota, West Publishing Co., 1983, Pp. 960, \$27.95.

It is rare to have a textbook/casebook reviewed in these pages, but once in a while a book on a unique subject matter or one of particular interest to practitioners draws our attention. This book falls into both categories.

Many comparative law texts focus on the laws of Western Europe, but the authors of this volume have broadened their perspective to include four cultures, which, as the book's title suggests, are radically different. The cultures are found in California/U.S.A., Egypt, Botswana and the People's Republic of China (P.R.C.). The book is the work of four scholars, three law professors and one anthropology professor. Each author supplies material pertaining to one of the legal cultures.

The text includes numerous excerpts from the writings of legal scholars, several suggested reading lists, citations to recent legislative enactments, and references to sources which are not readily available elsewhere. The importance of the work as a research tool should lead lawyers to add it to their collections.

The book is divided into five sections. Part I outlines the "Background" of each culture. Part II reviews "Inheritance, Succession and Descent" (property law). Part III covers the subject of "Embezzlement by Public Officials" (criminal law). Part IV introduces the concept of "Private Ordering" (contract law). Part V explores issues pertaining to "Population Planning."

The format of the book centers around the problem approach. The authors' emphasis on the "law in action" is very useful to the practitioner. Beginning with Part II, each section is introduced by a legal problem. The information presented in a section is organized in such a way as to illustrate how the problem would be solved in the various cultures. However, while each author addresses the issues raised by a problem, there is no uniformity with respect to the method of analysis that is employed. Accordingly, sometimes it is difficult to draw comparisons among the four cultures. Of course, it should be noted that this is the first edition of the text. With subsequent editions, more uniformity may be achieved by the authors.

Although each author includes excerpts from the writings of distinguished scholars in his presentations, questions may be raised regarding the material selected. For example, Professor Merryman's material on California/U.S.A. is easy for one trained in the common law to understand. However, the choice of California as a model in the area of property law gives rise to

complications. California is a community property state. Thus the legal solutions in California are not always in accord with the common law approach.

Of course Professor Merryman would contend that he is exploring the general tenets of Western law. Along those lines, it should be recognized that community property concepts are employed in the civil law systems of Western Europe. It is possible that, through the use of references to more generalized concepts of Western law, a wider range of comparison is developed. To that end, there are citations to French law in the text. Future editions of the book could expand those references to the laws of Western European countries. In that way it would be possible to explore more fully the links among French, Egyptian, and Chinese laws.

With respect to Egyptian law, Professor Barton, too, draws heavily on the works of scholars. The introductory material on Islamic law provides a much needed foundation for the development of a comparative analysis. However, there are several drawbacks. While Egypt is selected as the representative culture in the Islamic system, the excerpts presented are not limited to those of Egyptian scholars. There are selections by Indians, Pakistanis, and others influenced by Islam. The question could be raised as to whether the non-Egyptian writers are addressing issues relevant to Egyptian law. The author is silent on that point. A second drawback is that changes in the laws of Egypt since Sadat's death are so recent that they could not be included in the book. Most likely that shortcoming will be overcome in future editions.

Professor Gibb's material on Botswana is drawn from anthropological sources. Although that material provides a detailed review of the history of Botswana, it does not adequately explore the current laws of the country.

Professor Li offers excerpts by writers regarding the laws of the P.R.C. Sometimes the citations are too brief. While there is considerable information on the laws of traditional China and of the Republic of China, more discussion of the laws of the P.R.C. would be helpful. With respect to the P.R.C., difficulties develop, because new laws are being enacted daily in China. While most of the recent legislation is mentioned by Professor Li, the new statutes are not analyzed in depth. For example, the expansion of private property ownership and the growth of "free enterprise" are not fully examined. In addition, because of the publication date for the book, significant revisions of the criminal law with respect to capital punishment could not be included.

The most thought-provoking material in the text is presented in the section on criminal law. There is a grid (p. 375) in the introductory portion of the section that sets the tone for the analysis. It suggests that cultures which emphasize retribution have a high rate of crime and a high incidence of recidivism. On the other hand, cultures which emphasize rehabilitation have a low rate of crime and a low incidence of recidivism. It could be asked

whether the United States falls into one category while the P.R.C. falls into the other.

The problem that introduces Part III concerns embezzlement by a public official. As is suggested in the book, the Western world does not usually take strong measures against embezzlers. However, in the P.R.C. embezzlement is a serious offense, which could lead to the imposition of capital punishment. Additional material in the section on embezzlement makes it possible to compare and contrast the prosecutorial systems in the four cultures. The expanded role of the prosecutor in Egypt is noteworthy. The *niyaba* (prosecution), which represents the state's interest and the public's interest, may be linked to the French institution of the public ministry. Its personnel assist in the prosecution of criminal cases and the litigation of civil cases. Moreover, they have the "privilege of intervention" in court proceedings. In the P.R.C. prosecutions are handled by the procuratorate, the most powerful organ of the legal system. The procuratorate draws on the Soviet model. Reading the material on embezzlement stimulates discussions of whether there is a connection among the public ministry, *niyaba* and procuratorate.

Such discussions increase the reader's understanding of different legal cultures. Moreover, for the creative lawyer, this book supplies information about foreign law that may be employed convincingly in domestic litigation.

Anita L. Glasco
Professor of Law
Southwestern University School of Law
Los Angeles, CA

Public International Law

Branimir M. Jankovic, Dobbs Ferry, New York: Transnational Publishers, Inc. (1984) pp. 444, \$45.00 hardcover, \$25.00 paper.

The publishers describe this text as a "contemporary work concerned with the international legal system as a whole" offering a complete analysis of the institutions of public international law. The publishers further state that the author "takes into account a 'wide range' of English, French, Russian, and German literature, as well as from a number of Third World nations." The reviewer found the text instead to be very much a Yugoslav exposition of international topics. One learns a substantial amount about Yugoslav or

"third world" attitudes toward international law and frankly, *Public International Law* could be considered a book specifically citing Yugoslav views on international legal matters set against a more general discussion. As to the publishers' second point, Jankovic provides a good description of the various international institutions under study, but not necessarily a thorough analysis. Upon review of the bibliography, sources cited after 1965 are scarce, suggesting that it was drawn from diverse areas through the 1960s but afterwards was substantially narrow in perspective.

Granting the author's promotion of Yugoslavia's role in the development of international law, I find this treatment of the familiar and unfamiliar to be useful to the general reader. We should nevertheless appreciate that this translation is drawn from Professor Jankovic's fifth Serbo-Croatian edition. The introduction (pp. 1-76), while both useful and interesting, is traditional. Jankovic begins by contending that international law is a legal discipline, just as every other branch of law (p. 8). He then observes that the effectiveness of "rules in international law is properly a question of their characteristics and cannot be a reason for denying their legal character" (p. 8). A few pages later, Jankovic asks "should international law be given priority (over internal law)"? Here he attempts to analyze the practice of various modern states, such as France, the United States, and Italy. The author answers his question with the wry observation that the most privileged positions are garnished by the strongest states. In this situation both *de facto* and legal, smaller and third world states are generally afraid of efforts to concede or grant primacy to any vague, broad, highly generalized and "hence undefined" international law (p. 13).

Part IV of the introduction delves into sources, from conception through material to formal. While Jankovic begins with "ideal" law, he moves quickly to his second doctrine, that of a contractual character which leaves up to states how they should regulate their relations in accordance with their will. Professor Jankovic leads this concept, as adopted by the Permanent Court of International Justice, into a discussion of the general interest of the international community. He stresses the social force argument with a number of formal legal sources. The thirty-five year struggle to gain recognition for nationalization of all means of production is presented from the prevailing international rule of inviolability of private property culminating with the 1952 Bolivian resolution in the U.N. General Assembly. Section V of this introduction presents an interesting discussion of codification. The specialized agencies' role in codification is also singled out due to their sifting out "technical issues from political considerations."

Jankovic moves on through a narrow view of the rise of the bourgeoisie and the rise of capitalism. Similarly, the classic sources as viewed from *Mitteleuropa* are recognized, but little more. The German jurist, Joseph

Kohler, and his theories of special and acquired rights receive more attention than do those of Grotius or Pufendorf. One suspects this may be because it represents an unattractive (to Jankovic) 1914–1920 German theory. An interesting although somewhat confusing discussion of centralization (due to typographical errors or omissions—p. 48) nevertheless manages to present the major points of more recent developments of international law as primarily molded by the legal system within the United Nations.

Still within his introduction Jankovic initiates a discussion of the trend toward integration of the international community: He views this trend largely as the product of modern technology, which is causing the world to shrink at an alarmingly rapid rate. If such pressures exist, which could create reality out of “interdependence,” than under the force of change a new approach must be found for a “qualitative new development in international affairs.” With this lead-in, Professor Jankovic argues in favor of the concept of an objective interest in international law. He attempts to construct this within the parameters of the sociological school and legal or Vauchere positivism.

In short, Jankovic takes us through this exercise to demonstrate how imperative it is that there be a shift “from relations between states to relations within the organized international community.” Political goals would thus be achieved on a jurisprudential basis (or at least on a basis of a body of rights and obligations) which are fixed on “progressive” principles. Leaving aside the stilted exposition, it is difficult to take exception to such theory.

The introduction continues with an exposition of Soviet theory, including a short criticism of Vyshinski's role in international law. Differing views of neutrality are introduced in the fashion one has come to expect from the author, with carefully drawn anti-bloc positions. Professor Jankovic clearly does not like our division of the world into blocs. He argues that bloc discipline has had a deleterious effect in many international organizations, particularly in the United Nations. The author concludes that the non-aligned countries are the ones “most objectively able and free to make decisions relating to the common interests of international peace and international security.”

Nearly eighty pages into the text, Jankovic now turns to chapter one, and the topic of states. He describes the international personality of the federal state and the question of the so-called federal clause in Yugoslavia. The discussion again may be out of proportion. He moves on to discuss recognition and the role of international organizations. The *de jure/de facto* examples of Israel and the Arabs are very much outdated.

Part I continues with a substantial review of rivers. This focus on water-

ways, particularly the Danube (pp. 135–138) jars the reader into appreciations of how academics like Jankovic interpret the world from their own perspective.

Chapter Two moves to International Organizations, guided by the author's concerns about the principle of an European balance of power. Professor Jankovic may describe the Security Council and General Assembly in terms of universality, but his description of the U.N. Secretary-General (pp. 198–9) provides no such comparisons and is far too sketchy. The material on specialized agencies continues in skeletal form, with no mention of any recent major controversies involving FAO, ILO, UNESCO, or of any of the varied budget crises of the past thirty years.

Chapter Three deals with man as a subject of international law. Professor Jankovic takes the reader through an evolution from state interests to the interests of individuals. He contrasts the views of post-war theorists, contending that relations between states are regulated by international law. He identifies Soviet positions in this arena, contrasting them with the Yugoslav majority view that the individual will inevitably assume a more important place in relations regulated by public international law. Professor Jankovic's development of the section in Human Rights (pp. 215–218) becomes more personal when he poignantly attacks the superpowers after identifying himself as a member of the five-nation drafting committee assigned in 1968 to draft a text for the Proclamation of Teheran.

Part II deals with the "legal regulation of international relations." Chapter One repeats the form of the preceding chapter. This reviewer found the section to be a precise sketch of players, beginning with chief of state and continuing through diplomatic agents and ambassadors. The section on international officials initiates from an historic perspective, and concludes with a summary of privileges and immunities. It would have been more constructive to see a discussion of the conflicting roles of the IBRD and UNDP "ambassadors" of that specific period of time, addressing the question of which group of I.O. resident representatives were more senior in the country of assignment.

Jankovic continues with a review of international acts and treaties, comments on the third world view of the possibility of accession and concludes with comments on the ratification process. Subjects of *pacta sunt servanda*, non-retroactivity of treaties, and *rebus sic stantibus* are dealt with in less than forty pages. With this kind of headline presentation, the material is relatively simple to follow.

Chapter Three deals with peaceful settlement of disputes. There is a good discussion of negotiations, inquiry, mediation, conciliation, etc. The seven-page discussion of arbitration highlights that 170 arbitration cases were heard between 1974 and 1980, contrasted with the non-use of the International Court of Justice. At the end of part II, the author addresses U.S.-

Soviet differences in the Military Staff Committee of the United Nations. The differing theories of equal contribution (Soviet) and "comparable contributions" (U.S.) are presented with an almost perceived antagonism for what is as opposed to what should be in our world.

Chapter Four on International Conflicts defines retorsions, reprisals and war, and examines the appropriate rules and sources. A few pages later the author combines political and historical concerns of his country by dealing with the German recognition of the national liberation army of Yugoslavia as belligerents in the 1940s. These combinations, drawn from his country's unique experience and role, exist throughout this book, which appears to the reviewer to have been the evolution of lecture notes. Nevertheless the book is helpful because it provides the western reader a Yugoslav perspective of international law.

Joel M. Fisher
Vice President
Wells International
Los Angeles, CA

The Extraterritorial Control of Competition Under International Law with Special Regard to U.S. Antitrust Law (2 vols.)

By Erik Nerep (Stockholm, Norstedt's, 1983).

The problems of applying antitrust and other laws extraterritorially—i.e., to conduct outside of the territory of the regulating state—are extensive and have led to serious international conflicts involving many countries. Ironically, however, American lawyers are generally aware only of the writings of American and British authors on this subject, and the United States and British perspectives represent opposite ends of the spectrum of views on this issue.

This book by a Swedish legal scholar is thus particularly welcome, especially because it is comprehensive, accurate, and insightful. The work can be divided into two main parts. The first is a detailed analysis of case law, primarily U.S. and European Community case law, relating to the extraterritorial application of antitrust and securities laws. The second part is an in-depth study of legal writing on the subject of extraterritoriality,

Summer 1984

including chapters dealing with virtually all, if not all, of the main approaches to the subject.

The book's main strengths are also two—namely, its comprehensiveness and its analytical method. The book is highly comprehensive. The author reviews legal literature on extraterritoriality not only in English, but in German, French, and the Scandinavian languages as well. His study is thus unusually rich and varied in perspective. This is particularly valuable for American readers for whom much of this material is not easily accessible, if it is accessible at all.

The second particularly useful feature of the work is the analytical method which the author applies to the case law in the area. This method is to isolate the major issues in cases involving extraterritoriality and to analyze the way these issues are dealt with in each of the many cases studied. The issues are: (1) characterization of the action—i.e., civil, criminal, or administrative; (2) localization of the conduct; (3) definition of the jurisdictional criteria; (4) identification of distinctive elements in international in contrast to domestic cases, (5) distinctions between the treatment of alien and domestic corporations, and (6) remedies actually afforded. The careful application of this method provides an excellent source of insight into the case law. This may in itself be worth the price of the book, for it provides access to the cases and suggests relationships between them.

The American Law Institute's Draft Restatement of Foreign Relations Law, *Timberlane* and its progeny, and the adoption of blocking statutes by many foreign countries are some of the factors which are forcing U.S. lawyers to reexamine the U.S. approach to the problem of extraterritoriality. Dr. Nerep's book is particularly useful in this regard, for he provides in-depth analysis of these issues from a variety of perspectives.

David J. Gerber
Associate Professor
Chicago-Kent College of Law
Illinois Institute of Technology

Dictionary of Legal, Commercial and Political Terms, German-English, Vol. II.

Clara-Erika Dietl, assisted by Egon Lorenz, Anneliese Moss, Wiebke Buxbaum, David T. Donaldson. Munich, Germany: C.H. Beck'sche Verlagsbuchhandlung (Oskar Beck). Sold in the United States by Matthew Bender Co., 1983. Pp. 782. \$100.

This is the long-awaited volume II complementing the first dictionary (English-German), which appeared in 1979 and was reviewed by us in 15 *International Lawyer* 172 (1981). The present volume is the result of more than twenty years of compiling legal, commercial, and political terms, and comparative analysis. As does the first, this volume covers three linguistic and legal systems—German, English, and American—revealing, where necessary, subtle yet important distinctions between English and American terminology, and thus elucidating those points which also reflect sophisticated differences between the two common law systems. Besides the comprehensive compilation of legal, commercial and political terms this volume also contains a list of the important international and European organizations and institutions as well as international agreements and conventions. A particular strong point is its extensive inclusion of titles of German codes and statutes with very usable English translations. This is in contrast to many other dictionaries that list no usable translations, but instead list only the titles of some similar laws in the English or American system.

The dictionary is thorough and concise, providing a comprehensive compilation of highly technical German terms and legal concepts and the precise English and American counterparts. Where no precise equivalent exists due to differences in the legal systems or trade usages, the dictionary—often citing excerpts from German statutes, in addition to English translations—offers brief but accurate explanations in the text, supplemented by footnotes which contain cross references to the relevant sections in the respective codes or statutes. For example, the term *Treu und Glauben* (literally loyalty and belief), which is of central importance primarily in German contract law, is very well defined and explained as an interpretative method and as an equitable corrective device closely related to the English language concept of "good faith." Also the German concept of frustration of contracts (*Wegfall der Geschäftsgrundlage*), which also governs contractual relations is helpfully described by analogizing it to the doctrine of *clausula rebus sic stantibus*, a term used in public international law concerning the effect of a fundamental change in circumstances on legal relationships. In another

example, a short explanation was necessary and was provided to supplement the definition of the German principle of co-determination (*Mitbestimmung*) (participation of labor representatives in management).

Anyone engaged in business transactions between the three countries has certainly realized that it is no small challenge to translate terms which are almost equivalent to the counterpart in the other language, but which carry slightly different connotations. The dictionary copes skillfully with this problem.

For example, the concept of *öffentlicher Glaube* (literally public belief) adheres to certain official documents, such as the certificate of inheritance and the land title register, and carries an irrebuttable presumption of accuracy in favor of bona fide purchasers. One feature that will be especially appreciated by English-speaking users is the generous use of full length sentences in both German and English to illustrate many of the peculiarly German concepts.

One has to bear in mind, however, that a legal dictionary can only point out those substantive differences in the legal systems which pertain to the process of translating and there is no room to dwell on technicalities prevalent in the respective legal orders. Thus the reader must always be cautious of transferring any assumptions about his own legal system to that of other countries. The concept of secured transactions as governed by the Uniform Commercial Code, e.g., is functionally comparable to the German security device of the equitable lien (*Sicherungseigentum*), which sometimes is labeled as "security property" because the debtor transfers his title of ownership to the secured party. However, the technical parameters in the two legal systems are completely different. Whereas it is vital that the secured party under Article 9 of the Uniform Commercial Code perfect his security interest by filing a financial statement, no such recording is required in Germany for this "equitable lien"; "secret liens" are allowed and may prove detrimental to the unwary debtor.

In so vast and pioneering a work, there are bound to be a few oversights, and the author seems to have anticipated this by leaving a couple of blank pages at the end of the volume. One apparent omission is the term, *überragende Marktstellung*, as used in the 1973 amendments to the German anti-trust legislation (*Gesetz gegen Wettbewerbsbeschränkungen*). The term refers to a position of market power distinct from market share, based on such factors as financial strength, access to supply and sales markets and the like. It is a classic example of a German word having no precise English equivalent. Various writers have translated it as "paramount",¹ "superior",²

¹OECD Guide to Restrictive Practices Legislation, Dr. Eberhard Gunther, German Policy Toward the Market Conduct of Powerful Enterprises, Indiana Univ. Institute of German Studies (1977), Stockman & Strach, 5B World Law of Competition § 6.06 [2].

²RIESENKAMPFF/GRES, LAW AGAINST RESTRAINTS OF COMPETITION, (1977, 1980).

“commanding”,³ and “dominant market power.”⁴ We still await an authoritative translation.

The dictionary is well structured and contains excellent and accurate cross-indexing which alerts the reader to related concepts. As we pointed out with respect to volume I, it is unfortunate that the dictionary does not contain a table of contents which would save the reader time in locating the footnotes (found in a separate chapter behind the text at pages 739 et seq.) and the extensive list of German abbreviations (beginning at page 775). We would also recommend that short English translations of the German statutes and regulations be provided directly in the table of abbreviations.

This dictionary of legal, commercial and political terms, designed primarily for German attorneys, is a very thorough and concise work which will also prove a very welcome tool for American and English practitioners, scholars and social scientists.

Dr. Heinz J. Dielmann
Frankfurt, Federal Republic of Germany

Dudley H. Chapman
Washington, D.C.

³CCH, *Doing Business in Germany* ¶23,509(g).

⁴Dr. Dietrich Hoffman & Staub, in *1A Competition Law in Western Europe and the USA*, German Law/Commentary (loose leaf).

