

# Recent Publications

## Puerto Rico

*Puerto Rico: The Trials of the Oldest Colony in the World.* By José Trías Monge. New Haven: Yale University Press, 1997. Pp. v, 228. Price: \$35.00 (Hardcover). Reviewed by Christina Duffy Burnett.

Ask yourself why you are reading a review of a book about a colony called Puerto Rico in a journal on international law. Isn't Puerto Rico a self-governing Commonwealth? Isn't it part of the United States? If you decide to buy the book, ask yourself where in the bookstore you should look for it. In the international relations section? The U.S. history section? A turn-of-the-century Supreme Court case analyzing the status of Puerto Rico (and other territories "acquired" by the United States in 1901) may provide some guidance: Puerto Rico is "foreign in a domestic sense."<sup>1</sup> Perhaps the bookstore has a section on "not really foreign" countries or "more-or-less domestic" territories. Try using other phrases that have described Puerto Rico over the past century to refine your search: "Possession."<sup>2</sup> "A sort of an autonomous dependency" (p. 105).<sup>3</sup> "Unique."<sup>4</sup> You may have to go to the information desk.

The subtitle of José Trías Monge's book is on the mark; the term "colony" most accurately describes Puerto Rico. For one hundred years, the island has been an "unincorporated territory," which means that the United States has no intention of making it a state anytime soon, if ever.<sup>5</sup> It is subject to the plenary power of Congress under the Territorial Clause of the

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1. *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring). *Downes*, one of the "Insular Cases" of 1901, created the doctrine of "territorial incorporation" to justify keeping the then-newly acquired territories, without the intent of incorporating them into the Union as states. The other Insular Cases were *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Grossman v. United States*, 182 U.S. 221 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); and *De Lima v. Bidwell*, 182 U.S. 1 (1901). A series of cases between 1901 and 1922 dealt with similar issues; in 1922, the Supreme Court reaffirmed the principle of territorial incorporation set forth in *Downes*. See *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

2. See, for example, the question-begging title of James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899), which discussed whether (and how) the United States should keep the territories it had acquired at the end of the Spanish-American War. There are numerous references to Puerto Rico as a "possession" throughout the last century. See, e.g., *Downes*, 182 U.S. at 341-42; Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

3. Senator Robert A. Taft described Puerto Rico in these terms in his remarks during the 1943 debate on the Tydings Bill of that year (p. 105).

4. See, e.g., *Torres v. Puerto Rico*, 442 U.S. 465, 474 (1979).

5. See *Downes*, 182 U.S. at 339-42 (White, J., concurring). The U.S. Supreme Court has reaffirmed Puerto Rico's status as an "unincorporated territory." See *Harris v. Rosario*, 446 U.S. 651 (1980).

U.S. Constitution.<sup>6</sup> Residents of Puerto Rico have been U.S. citizens since 1917, but they have been denied representation in Congress except for a non-voting Resident Commissioner,<sup>7</sup> and they may not vote in presidential elections. Recently, the Eleventh Circuit held that consecutive trials in the local courts of Puerto Rico and the federal courts in Florida violated the prohibition against double jeopardy, because Puerto Rico's power to punish does not emanate from a separate sovereign.<sup>8</sup>

It might come as a surprise, then, to discover that Trías Monge's use of the term "colony" has caused an uproar in Puerto Rico. This is not because nobody there believes the term applies to the island—many have for a long time, and still do—but rather, because Trías Monge was among the architects of the Commonwealth status<sup>9</sup> his book maligns.<sup>10</sup> The Commonwealth Party leadership has long denied that this status is colonial. Many Puerto Ricans, through their support of the party, have agreed. If, then, Trías Monge thinks the Commonwealth of Puerto Rico is a colony, why did he participate in its creation? If this status has obviously colonial attributes, why do so many Puerto Ricans support it?<sup>11</sup> More importantly, if so many Puerto Ricans seem not to mind these colonial attributes, then why should it matter now, half a century later, if Puerto Rico is indeed a "colony"?

It matters a great deal, argues Trías Monge, and his book gives a potent account of the reasons. He provides a rich yet succinct history of the evolution of the status question as a persistent problem in Puerto Rican politics; he calls, urgently, for a resolution to this problem (although the parameters of his proposal remain, frustratingly, too vague); and he insists

6. U.S. CONST. art IV, § 3, cl. 2 ("The Congress shall have the Power to dispose of and make all needful rules and regulations respecting the Territories and other Property of the United States.").

7. The position is currently held by the Honorable Carlos Romero Barceló, former Governor of Puerto Rico. The position of Resident Commissioner is elective. The Resident Commissioner of Puerto Rico serves in the House of Representatives and, together with the Delegates from Guam, the U.S. Virgin Islands, American Samoa, and Washington, D.C., may serve and vote in Committee. The fifth populated U.S. territory, the Commonwealth of the Northern Mariana Islands (CNMI), has only a Resident Representative to the United States who lives in Washington, D.C., but is not a member of Congress. None of the territories has a representative in the Senate. For an explanation of representation of U.S. territories in Congress, see GENERAL ACCOUNTING OFFICE, NO. GAO/OGC-98-5, REPORT TO THE CHAIRMAN; and Abraham Holtzman, *Empire and Representation: The U.S. Congress*, XI:2 LEGIS. STUD. Q. 249 (1986).

8. *United States v. Sánchez*, 992 F.2d 1143, 1151-53 (11th Cir. 1993). *But see United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987) (holding Puerto Rico sovereign for purposes of double jeopardy doctrine); *cf. United States v. Wheeler*, 435 U.S. 313 (1978) (holding Indian tribes sovereign for purposes of double jeopardy and contrasting lack of sovereignty of territorial governments to "unique and limited" sovereignty of Indian tribes).

9. "Commonwealth" is the mistranslation of "*Estado Libre Asociado*," which literally translated would be "Free Associated State."

10. For a thoughtful discussion of the more and less negative connotations of the word "colony" in the context of U.S.-Puerto Rico relations, see Judge José A. Cabranes, U.S. Court of Appeals for the Second Circuit, Speech at the *Foreign in a Domestic Sense* Conference at Yale Law School (Mar. 27, 1998).

11. In a 1993 plebiscite, Puerto Ricans voted 49% in favor of "enhanced" Commonwealth status (p. 135).

that Congress must express a clear position on the status options acceptable to it, beyond its now tiresome assurances that it will “respect” the will of the Puerto Rican people. In one of many memorable lines in a book suffused with wit and wisdom, Trías Monge charges: “Let the Puerto Ricans choose, it is grandly said. Choose what?” (p. 3).

The most important achievement of the book is its challenge to the idea that Puerto Rico’s ambiguous status poses no problem because its people have, in the exercise of their right to self-determination, democratically chosen this status. As a major participant in the events that led to the creation of Commonwealth status, Trías Monge is in an excellent position to explain why, after a convention establishing the Constitution of the Commonwealth of Puerto Rico, a vote of 76.5% approving Commonwealth status, and its victory in two subsequent plebiscites,<sup>12</sup> Puerto Rico is still a colony, and status is still a problem.

The problem is this: The people of Puerto Rico approved Commonwealth status in 1952 under what appears to have been the widespread misunderstanding that it was merely a transitional status and that it represented a partial grant of sovereignty by Congress to Puerto Rico.<sup>13</sup> Congress consistently has stonewalled subsequent attempts by Puerto Rican political leaders and delegates in Washington to “enhance” this status.<sup>14</sup> The people of Puerto Rico chose not Commonwealth, but “enhanced” Commonwealth, in a 1967 plebiscite;<sup>15</sup> Congress failed to grant the requested enhancements. The people chose “enhanced” Commonwealth again in 1993, this time with a forty-nine percent vote; once more, these enhancements were rejected (although this time, with statements far less ambiguous than Trías Monge acknowledges).<sup>16</sup> Thus, as the author confirms, the people of Puerto Rico have not democratically chosen their current status. Instead, they have asked Congress for a status different from the current one ever since the very year they achieved it. As Trías Monge puts it: “So much for self-determination.” (p. 132).

The book begins with an account of Spanish rule on the island, which lasted four centuries, until the United States won the Spanish-American War

12. The second plebiscite took place in 1967, and Commonwealth, “purged of its colonial connotations,” won (p. 130). A version of Commonwealth won a third plebiscite, in 1993, but this time by a three-percent margin (p. 135).

13. For a discussion of this contested status and an assessment of the confusion and obfuscation surrounding its origins, see JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 160–200 (1985); and 4 JOSÉ TRÍAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO*, ch. 39 (1980–1983 & 1994).

14. See, for example, Trías Monge’s discussion of the Fernós-Murray Bill (pp. 126–29) and of various proposed bills between 1989 and 1991 (pp. 133–34). More importantly, a recent and extremely controversial bill, the Young Bill (introduced in the House by Representative Don Young of Alaska) rejected the Commonwealth Party’s proposed enhancements. See *infra* notes 33–35 and accompanying text.

15. See 4 TRÍAS MONGE, *supra* note 13, at 244–46.

16. See *infra* note 33–35 and accompanying text (discussing Young Bill); see also H.R. 3024, 104th Cong. (1996) (original version of Young Bill); Don Young, Chairman, House Committee on Resources, Press Release on “United States-Puerto Rico Political Status Act” (Mar. 6, 1996).

in 1898 and took as spoils of war the islands of Puerto Rico, Guam, and the Philippines.<sup>17</sup> Throughout the book, Trías Monge recalls the final shining moment in Puerto Rico's relationship with Spain: the Autonomic Charter of 1897, granted to Cuba and Puerto Rico by the Spanish government.<sup>18</sup> While, as Trías Monge rightly observes, the Autonomic Charter has been "unduly romanticized by many" (p. 15), it granted these islands autonomy<sup>19</sup> greater than that possessed by any Caribbean colony until after the Second World War, and arguably greater than that the United States has granted Puerto Rico to date—particularly because it included representation in the Spanish Parliament along with Spanish citizenship. The Autonomic Charter thus granted the islands increased autonomy without full independence or full incorporation into the metropolis, a central theme of Trías Monge's book and of the Commonwealth Party's platform.

With the Autonomic Charter as a backdrop and something of a baseline standard, Trías Monge embarks on the story of Puerto Rico's relationship with the United States. Its early stages are best summarized as a painful and embarrassing story of hypocrisy and paternalism, beginning with an infamous decree by General Nelson A. Miles proclaiming the arrival of the United States and the "blessings of enlightened civilization." In a chapter laced with exquisite sarcasm, Trías Monge observes that the first military governor "started acquainting Puerto Ricans with the blessings of enlightened civilization by suppressing Parliament, and the . . . Diputación Provincial and making extensive changes in the judicial system" (p. 31).

Chapters 3 through 9 present a tightly woven history of the next five decades in the U.S.-Puerto Rico relationship, focusing on the evolution of the island's political parties and the ways in which these shaped and were shaped by the ubiquitous status debate. These chapters recount a history marked by occasional watershed moments in Congressional legislation over Puerto Rico granting powers of self-government inch by excruciating inch; in the interstices of these fits of absent-minded imperialism, the political life of Puerto Rico took shape in the form of parties inevitably defined by their positions on the status question.

The first of these Congressional moments of activity, the Foraker Act of 1900,<sup>20</sup> created a civil government headed by a Governor appointed by the President of the United States; after much debate, most of it concerning the "fitness" of the inhabitants of the new "possessions" to govern themselves, the Act failed to grant U.S. citizenship to Puerto Ricans.<sup>21</sup>

17. Treaty of Peace, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754. The United States also took Cuba, but only temporarily. *See id.* art. I.

18. *See* 1 TRÍAS MONGE, *supra* note 13, chs. 7-8.

19. "Autonomy" is a vague term. I use it here because it has long been used in Puerto Rico to describe a variety of status options somewhere in between independence and full incorporation into the United States as a state, most notably by members of the Commonwealth Party to describe the status they seek. Trías Monge asserts the connection between the Autonomic Charter and "autonomist thinking" in Puerto Rico (p. 14).

20. Ch. 191, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. §§ 731-916 (1994)).

21. For a detailed account of the history of the U.S. citizenship of Puerto Ricans, see JOSÉ

Congress' next major move took place in 1917 with the passage of the Jones Act,<sup>22</sup> under which "American citizenship was conferred in a most inelegant way" (p. 72). With the renewal of the rhetoric of self-determination after the Second World War came the Elective Governor Act,<sup>23</sup> under which Luis Muñoz Marín, the founder of the *Partido Popular Democrático* or "Commonwealth Party" and primary inventor of the status of that name, became the island's first elected governor. Here Trías Monge's analysis turns to a detailed explanation of the events of 1950–52: the creation of Commonwealth status, the Constitutional convention, and the victory of Luis Muñoz Marín at the polls.

The next four chapters describe the genesis of Commonwealth status and its would-be trial by fire before the Decolonization Committee of the United Nations,<sup>24</sup> examine subsequent attempts to understand the true meaning of this status, and discuss other attempts at postcolonial arrangements in the Caribbean and in U.S. territories. Among the models that inspired Commonwealth status, Trías Monge identifies the Statute of Westminster, "which stated that no British law would apply to the dominions, except at their request or with their consent, and that the dominions could repeal any British law until then applicable to them" (p. 110). Trías Monge describes the United States' success, upon the creation of Commonwealth status and the approval of the Constitution of Puerto Rico, in removing Puerto Rico from the Decolonization Committee's list of non-self-governing territories. The removal was premised on the theory that Puerto Rico had entered into a "bilateral compact" with the United States which could not be altered without the consent of both parties, notwithstanding the embodiment of this "compact" in a federal statute.<sup>25</sup>

Chapters 10 and 11 rely primarily on Congressional hearings and administrative reports, while Chapter 12 cites U.N. resolutions and documents. Not until Chapter 13 does Trías Monge's analysis of origins of Commonwealth status cite American case law,<sup>26</sup> and then without discussion. Yet the events before the United Nations occurred the same summer that *Mora v. Mejías*,<sup>27</sup> the first federal court decision analyzing Puerto Rico's status, was decided. Although this case has long been characterized as noncommittal on the question of the contested "bilateral compact" theory, the Court of Appeals did reject the District Court's reasoning that Puerto Rico's new status meant the Fifth Amendment's due process guarantee no longer applied to Puerto Rico due to the island's status as a territory, but

A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS* (1979).

22. Ch. 145, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. § 737 (1994)).

23. 61 Stat. 770 (1947).

24. This review uses the term "would-be" because the United States made representations suggesting a change in the status of the island which subsequently turned out to be seriously misleading. See, e.g., TORRUELLA, *supra* note 13, at 160–200.

25. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731–916 (1994)).

26. Chapter 10 does cite 1–5 TRÍAS MONGE, *supra* note 13.

27. 206 F.2d 377 (1st Cir. 1953), *aff'g* *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953).

rather now applied as a result of the consent of the Puerto Rican people.<sup>28</sup> While the Court of Appeals reserved judgment on the inevitable further question—whether the Fourteenth Amendment now applied to the island instead of the Fifth<sup>29</sup>—the court's refusal to accept the District Court's reasoning concerning the constitutional implications of Puerto Rico's new "Commonwealth" status arguably sheds some light on the question of whether Congress entered into a compact relinquishing part of its sovereignty over the island. The omission of these cases from a discussion of the origins and meaning of Puerto Rico's status is puzzling.<sup>30</sup>

The final chapters turn to the present, offering a striking and powerful indictment of Puerto Rico's colonial dilemma. Providing a much-needed model of civility and constructive dialogue, Trías Monge fairly and impartially places the blame where blame is due: not only upon Congress, but also on all the political parties in Puerto Rico, which have engaged in a bitter and nasty debate, often misleading the people in the service of political aims. Trías Monge's description of the effects of continued colonial status makes an invaluable contribution to a discussion too often stymied by defensive claims that the United States has been a relatively benevolent master. While true (for whatever "benevolent" imperialism is worth), colonial status has deeply divided Puerto Rico, distorting and distracting its political life, and constantly reminding its people that, for whatever reason, they are not welcome as full and equal participants of the Union. In the Chapter 15, Trías Monge reiterates his call for a clear Congressional response, offering the vague contours of his own ideas for an "enhanced" Commonwealth status. Given the repeated rejections of such proposals in the past, the chapter raises again the question of the missing constitutional jurisprudence.

Trías Monge, of course, knows the constitutional jurisprudence cold; the omission of this material is obviously the result of a deliberate but curious decision. The book explains and challenges Puerto Rico's colonial status but scarcely mentions the federal constitutional framework that governs. The few exceptions include an eight-page discussion of the Insular Cases of 1901–05 in Chapter 4 (pp. 44–48); an occasional comment questioning the applicability of the Territorial Clause to Puerto Rico; and several implicit references to constitutional arguments by way of their summary rejection, primarily in Chapter 14. Yet the book is devoid of analysis concerning the post-1952 case law that discusses "Commonwealth" status. Instead, it looks to the Autonomic Charter, the Statute of Westminster, and a selection of models granting varying degrees of

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28. See *id.* at 382 (declining to decide what lower court had decided in dicta in *Mora*, 113 F. Supp. at 318–319).

29. Justice Rehnquist subsequently ruled out this possibility, albeit in dicta, in *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 606–07 (1976) (Rehnquist, J., dissenting on other grounds).

30. For a similar criticism, see Juan R. Torruella, *¿Hacia dónde vas Puerto Rico?*, 107 YALE L.J. 1503 (1998).

“autonomy” and “sovereignty” to territories in situations similar to Puerto Rico’s. Why?

In part, one suspects the answer lies in Trías Monge’s apparent judgment that U.S. constitutional jurisprudence is basically irrelevant to Puerto Rico’s status. The following statement suggests as much: “There are no limits to the arrangements that can be worked out between a former colonial power and its possessions. The Constitution of the United States is not such a quirky document that it deprives the nation of possibilities open to others to shed an ill-fitting colonial dress” (pp. 170–71). If this is right, then whatever light American constitutional jurisprudence can shed on the status of its territories is indeed irrelevant. If, in the end, the federal Constitution is not so “quirky” as to limit the Congress’ power to act with respect to the territories, then a review of this book obviously belongs in a journal on international law.

Trías Monge does explain, without delving into detail, the basic positions in the constitutional debate. In brief, one side (generally the supporters of Commonwealth status) has argued that when Puerto Rico became a Commonwealth, the island acquired a certain degree of sovereignty and the people of Puerto Rico entered into a “bilateral compact” with the United States, whose provisions may be modified only by mutual consent. The other side (generally the supporters of statehood and independence) has insisted that even had it wanted to do so, Congress could not have entered into such a compact, primarily because its plenary power under the Territorial Clause would not allow it to make a permanent, partial grant of sovereignty. The former believe that if Congress’ power is plenary, then Congress must have virtually unlimited power to enter into relationships with its territories. The latter believe that Congress’ “plenary” power is nonetheless limited by other provisions of the Constitution: Congressional action with respect to a territory would necessarily take the form of legislation; Congress’ authority to legislate with respect to the territories derives from a constitutional provision, the Territorial Clause; one Congress cannot by legislation bind a subsequent Congress’ constitutional power. A compact that can be legislated away by a subsequent Congress, goes the argument, is no compact at all.

Although he does not discuss the case law, Trías Monge dismisses the latter argument in Chapter 14. He rejects the “quaint notion that autonomist options based on the mutual consent idea are not open to the United States because supposedly one Congress cannot tie the hands of another” (p. 171). This statement, together with the author’s confidence that the Constitution cannot be so “quirky” as to forbid creative solutions to the status problem, effectively communicates Trías Monge’s disdain for what he considers unimaginative constitutional objections—he calls them “fanciful legal objections” and “dated legalisms” (pp. 167 and 171)—to the “enhancements” to Commonwealth status. He goes on: “The Insular Cases interpreted the United States Constitution to mean that the United States

could acquire and govern colonies. It would be simply astounding to hold that it cannot permanently divest itself of the power to govern them to the extent that the national interest should dictate" (p. 171).

Yet this claim casts doubt on Trías Monge's decision to put aside American constitutional jurisprudence, for it makes clear that his proposed status alternatives inevitably depend on the answer to a constitutional question: whether the Congress may *permanently* divest itself of *some* of its power to govern its territories. It is neither astounding nor quaint to say that a Congress cannot by legislation bind a subsequent Congress' constitutional power. This may not allow as imaginative a solution as one would like, but if it is correct, and Congress cannot permanently, partially divest itself of its sovereignty over Puerto Rico, the Statute of Westminster and the Autonomic Charter of 1897 will not make any difference.

Perhaps Trías Monge is right. Perhaps the Congress has the power to enter into any number of permanent arrangements involving partial grants of its sovereignty to other political bodies, which would in turn become neither states nor colonies but something in between. Perhaps, as he puts it in Chapter 14, "sovereignty, like the atom, can be split" (p. 170),<sup>31</sup> permanently. This position, however, is not obvious, and it requires more attention than Trías Monge gives it here. Trías Monge, a preeminent legal scholar who counts among his works a five-volume constitutional history of Puerto Rico,<sup>32</sup> has indeed paid closer attention to these questions. But this latest book purports to reduce the question of status to its essence. Without a discussion of the constitutional implications of his proposed Congressional act, the question remains whether a partial and permanent grant of sovereignty to an entity other than a state of the Union would not fundamentally alter the structure of the Union.

The choice to put aside the constitutional arguments raises yet another question: where is the Young Bill?<sup>33</sup> This bill, vigorously debated in Puerto Rico and bitterly opposed by the Commonwealth Party, recently passed in the U.S. House of Representatives by a single vote. Extensively debated in the press in Puerto Rico a year before the publication of Trías Monge's book, the bill attempts to provide a clear answer to Trías Monge's own question: "Choose what?" The answer, as originally written into the bill, was either statehood or independence; the bill omitted the Commonwealth option altogether, on the reasoning that the continuation of this status is constitutionally problematic.<sup>34</sup> The Commonwealth Party roared. Commonwealth status was added, sans enhancements. All of this happened in 1996 and early 1997. Why is there no mention of it in Trías Monge's book?<sup>35</sup>

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31. This is an infelicitous simile, since an atom, once split, is no longer an atom.

32. 1-5 TRÍAS MONGE, *supra* note 13.

33. United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. (1998).

34. Interview with Manase Mansur, Advisor on Insular and International Affairs, House Committee on Resources (Aug. 1998) (on file with author).

35. See H.R. 3024, 104th Cong. (1996). This was the original version of the Young Bill,



As a matter of international law, Congress has the “power,” according to the words in the Territorial Clause, to divest itself partially and permanently of its sovereignty. Certainly the words of the clause, standing alone, do not limit Congress’ power; it is easy to concede, as a logical exercise, that the lesser power follows from the greater. But the Territorial Clause does not stand alone. As a matter of domestic law, that power is defined and limited by other parts of the Constitution setting forth the structure of American federalism. If Congress divests itself partially and permanently of sovereignty over a territory, it creates an entity that does not exist anywhere in the Constitution—not in Articles I, II, or III, not in the Territorial Clause, not anywhere. It is the Constitution as a whole, not any inherent limitation in the text of the Territorial Clause itself, that limits Congress’ power to split its sovereignty.

Luis Muñoz Marín stood before Congress in 1952, prior to the adoption of the Commonwealth Constitution, and argued forcefully that the new “Commonwealth” status would not perpetuate inequality, as it would be “unthinkable that a free people, a people worthy of American citizenship, should go to the polls and vote for a status that they conceive as one of inequality” (p. 116). As Trías Monge tells it:

The gnawing feeling that these words were not fully heeded in the course of establishing the Commonwealth of Puerto Rico, that the resulting relationship still had not been adequately purged of all of its colonial connotations, clearly impelled Muñoz Marín to dedicate the rest of his years to efforts to add to the powers of the Puerto Rican people within a framework of association with the United States (p. 116).

That gnawing feeling must have come from Muñoz Marín’s recognition, deep down, that nimble sleight of hand would never slip Commonwealth status past very real constitutional objections. Using sleight of hand to slip this status past a people worthy of American citizenship proved easier; ironically, it undermined that very citizenship. Trías Monge’s nimble pen may have moved lightly over U.S. constitutional jurisprudence, but this should not diminish the accomplishment of his important, insightful, and engaging book. Heeding his call for civility, we must now embark on a dialogue worthy of American citizens.

## Environmental Issues

*Trade and the Environment : A Comparative Study of the EC and United States Law.* By Damien Geradin. Cambridge : Cambridge University Press, 1997. Pp. xxiii, 231. Price: \$64.95. (Hardcover). Reviewed by Jean Albert.

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which excluded the Commonwealth option altogether. The recently passed Young Bill is perceived by many as an attempt to force statehood on Puerto Rico, and the omission of Commonwealth from the original version as an insult to the Puerto Rican people’s power of self-determination. Perhaps this is why Trías Monge deems it unworthy of discussion.

This year, Cambridge University Press released the long-awaited publication of Damien Geradin's doctoral thesis. *Trade and the Environment: A Comparative Study of European Union and United States Law* is a remarkable work, as it examines thoroughly the solutions that the United States and the European Union, two federal type systems, have put forth to deal with conflicts arising between free trade and environmental protection. Assuming that harmonization is the key to solving tensions that may arise between these two goals, Geradin argues that the judiciary and the "federal legislature" are the main actors in the harmonizing process, and he undertakes a comparative analysis to confirm this assertion and to reveal similarities in reconciling free trade and environment protection objectives.

The book is divided in two parts. The first part, "Negative Harmonization," focuses on the role of the judiciary in limiting states' ability to enact legislation that restricts trade and examines case law of the European Court of Justice and the U.S. Supreme Court. Geradin notes particularly that the courts must reconcile the principle of free trade with the need to limit interstate commerce for environmental protection. The second part, "Positive Harmonization," relates to Geradin's vision of the "federal legislature" role in defining universally applicable environmental standards. Geradin asserts that both types of harmonization are necessary to guarantee that the "federal structure" responds efficiently to environmental concerns particularly as the balance between free trade and environmental protection is a delicate one. Since the risk of leveling down environmental protection standards is great in "federal systems," Geradin shows how these standards can be harmonized and upgraded without impeding free trade. Differences between state standards create competitive distortions that affect free trade whereas harmonized high standards place all competing actors on the same playing level.

Tensions between trade policy and environment protection have increased as environmental protection has become a major concern. Professor Geradin examines three types of tensions: waste, product standards, and process standards. Geradin deliberately chooses these three tensions to show that each area of environmental concern raises specific questions with regard to free trade. Waste constitutes a source of tension since it is considered a good under both federal systems and thus qualifies for the benefit of free-trade provisions, however, the free movement of waste may lead to environmental damage in receiving states. Consequently, states have enacted legislation to limit imports of waste. More generally, state limitation on free movement for environmental protection may concern products. Product standards are regulations attached to the characteristics of products whereas process standards concern the production methods used to make the goods. Geradin discusses the relevance of each as environmental issues in relation to the interstate movement of products.

Starting with state wasteload allocation, Geradin concedes that restrictions on waste movement can grow out of a desire to protect the environment but also proposes that such state action may disguise an intent to protect local waste-treatment industries. Process standards may also carry a hidden agenda. Geradin shows how the judicial bodies of both the United States and the European Union use the rule of reason to allow and limit state intervention in both systems in order to find a balance between the competing interests of free trade and environmental protection. The courts consider local concerns, the need for discriminatory measures and alternative solutions, the importance of the effect on interstate trade, and whether the legitimate objectives of the measure outweigh the negative impact on free trade. One aspect of applying the rule of reason is the court's interpretation of legislation and even constitutional provisions that protect the environment and recreates barriers between member states. Indeed, Article 30 of the Treaty of Rome and the Commerce clause are provisions protecting free trade that the courts applied in the light of environmental concerns. Jurisprudence preventing states from restricting freedom of trade constitutes the bulk of negative harmonization.

The second part of the analysis examines positive harmonization through the prism of state intervention. The federal structure intervenes to set new universally applicable rules. In the positive harmonization analysis Geradin highlights another tension: the separation of powers between states and the "federal entities." The system of attributed powers in the European Community prohibits it from acting unless it has been given express powers to do so. Similar questions relating to the basis for federal action exist in the United States. Geradin examines the impact of these limitations on environmental protection and the solutions that have been provided in both systems. States' residual spheres of competence over environmental matters constitutes both the foundation of state power and its limits in intervening to protect the environment. Geradin proceeds with this analysis after presenting a broad interpretation of the United States federal government's power to regulate interstate commerce and a simultaneous focus on the completion of the internal market in the European Union. Geradin asserts that positive rules of harmonization are necessary for reconciliation since they affirm new standards to be applied by every member state. They provide for legal certainty and they facilitate free trade by limiting trade distortions. On the other hand harmonization may limit the power of states to respond to legitimate local concerns. For example, differences in degrees of pollution of air or water in states entail differences in the standards each state is entitled to expect.

In this second part, Geradin addresses the crucial "preemption" question. This lies at the heart of the positive harmonization issue. Whether states can adopt stricter standards than those adopted at the "federal level" or are prohibited from legislating once the "federal level" has intervened has long been and still is a subject of controversy. Geradin analyzes both the

United States and the European Union systems separately before comparing them and determining the role of the respective courts in solving the question. He points to the differences between the pre- and post- Single European Act era and explains how new uncertainties have arisen through the adoption of Article 100 A(4). By enabling states to adopt stricter standards than those harmonized under European Union legislation, the provision threatens the accomplishment of the single market. In the United States, harmonization rules indicate whether states can adopt stricter standards. The United States system more coherently avoids market fragmentation.

Although the title of the thesis does not suggest a narrow focus, the work in reality is doubly limited. It addresses only three areas of tension and it considers only two actors in the harmonization process. The thesis does not treat the question of the relationship between free trade and environmental protection through an exhaustive analyses of all environmental issues but only with those that are directly related to interstate commerce. Biodiversity and the protection of nature, soil, water, and air are not addressed directly; rather, they are approached indirectly through the prism of product standards and process standards (see, for example, pp. 45, 145, and 187). Geradin does not consider integrated protection of the environment such as the management of urban and rural environments—he only considers the relationship between free trade and the environment through the impact of movement of products even though the title of the book promises a broader perspective. Geradin should have included the expression “federal systems” in his title. Then the limitation would seem to make sense since United States federal legislation must fall under the commerce clause in order to be constitutional, so the rise of environmental concerns inevitably leads to more integrated action characterized by the intervention of the federal bodies. Also, Geradin does not discuss the role in detail of public and non-governmental organizations as participants in the lawmaking process. To him, the judicial and legislative bodies are the decisionmakers. He also fails to highlight the impact of international agreements related to the relationship between states and the federal bodies.

Nonetheless, Geradin’s findings have greater implications than the limited areas under analysis. The book describes the existing and developing fundamental notions, general principles, and exceptions that apply to free trade and the environment. However, Geradin also concludes that if the federal judiciary and legislature are constants in the relationship between environmental protection and free trade, the specificity of each environmental issue calls for contextual methods of analysis that result in varying solutions and differences in the degree to which judicial and legislative bodies are relevant in solving the conflicts with free trade. Geradin apparently believes that his findings result from the effect state regulation in each area has on interstate commerce when, in fact one could argue that the nature of the environmental concern and the financial interests

in different areas of trade are the causes of different treatment. Although he evokes pressure groups and industrial actors, he does not consider them to play a significant role in the difference of treatment between each area. Finally, his critique of the solutions he explores is extremely shallow (see the conclusion starting p. 199) and, combined with a sometimes confusing style (see, for example, pp. 12, 37, 69, and 141), it is difficult for the reader to go beyond the limits of the description. Finally, his analysis does not integrate international developments when an analysis of the implications of regional agreements such as NAFTA would have been appropriate.

*Rivers of Discord: International Water Disputes in the Middle East.* By Greg Shapland. New York: St. Martin's Press, 1997. Pp. xi, 183. Price: \$39.95 (Hardcover). Reviewed by Nathan Limpert.

Rapidly expanding populations and the drive toward economic development are placing ever greater demands on the world's natural resources. Nowhere is this more evident than in the case of water in the Middle East. In a region already replete with antagonism, disputes over water rights have the potential to escalate into major conflicts. In this concise and well-diagrammed study, Greg Shapland, head of the British delegation to the multilateral peace process Working Group on Water Resources, examines in turn the disputes over the waters of the Occupied Territories, the Nile, and the Tigris-Euphrates basin. Though he predicts that such conflicts will escalate as the demand for water grows, Shapland remains optimistic that water disputes will not derail the Arab-Israeli peace process or lead to open war elsewhere in the region.

Water disputes between Israel and its Arab neighbors date back to 1947 but became a major issue only upon the construction of Israel's "National Water Carrier" in 1964. By carrying water from Lake Tiberias in the north to the arid Negev in the south, nearly the entire length of Israel, the National Water Carrier seemed likely to make a major contribution to Israel's economic growth. Unwilling to countenance such a development, in 1964 the Arab League attempted to divert the headwaters of the Jordan, which lay in Syria. Over the next three years, Israel attacked construction sites in Syria on a regular basis, an important contributing factor to the tensions that led to the 1967 war.

Israel's occupation of the Gaza Strip, Golan Heights, and West Bank added a new dimension to the region's water disputes. In all of these territories, Israeli settlers consume five times as much water per capita as do Palestinians. Additionally, Palestinians are forbidden to dig new wells into the extensive aquifers that lie under the West Bank. Tensions over this issue have run high but were partially resolved by a 1995 agreement that recognized the water rights of Palestinians in the West Bank, provided for the allocation of additional water to the Palestinians, and created a Joint

Water Committee (JWC) to coordinate the management of water and waste in the West Bank. Shapland acknowledges that the Palestinians still regard the division of water resources in the area to be fundamentally unfair, but he cites the success of the 1995 agreement and the effectiveness of the JWC as evidence that water disputes are much less likely to obstruct the final-status negotiations than are most other issues.

Water rights in the Nile basin are largely governed by the 1959 agreement between Egypt and Sudan that authorized the construction of the Aswan High Dam and allocated more than two-thirds of the Nile's waters to Egypt, leaving the balance to Sudan. The agreement, which Shapland hails as a great success, also created a joint technical commission that has effectively resolved nearly all major water disputes between the two countries since 1959.

Unfortunately, the agreement between Egypt and Sudan does nothing to ensure the flow of waters that feed the main Nile *into* Sudan. Fiercely protective of its water supply, Egypt has exerted significant pressure upon the other Nile riparians, most notably Ethiopia. Former president Anwar Sadat publicly threatened war if Ethiopia attempted to develop the Blue Nile, and Egyptian-Ethiopian relations remain uneasy. While any Ethiopian development of the Nile basin is viewed with alarm by Egypt, Shapland argues that Egypt could continue to receive her annual quota of water despite such development. As an immense quantity of water evaporates from the surface of Lake Nasser each year, Shapland maintains that the reduction in these evaporation losses that would result from an Ethiopian development program could compensate Egypt for the Nile water used by Ethiopia. However, expanding populations in the Nile basin mean that competition for water in the region is bound to intensify, and Shapland views the future with some trepidation.

Shapland begins his discussion of the Tigris-Euphrates basin by emphasizing the dependence of Syria and Iraq and the abundance of Turkey. While Iraq and especially Syria rely heavily upon the Euphrates, Turkey not only has other substantial rivers but also receives rainfall that obviates the need for irrigation over much of the country. Despite this, a massive Turkish development project, known as the GAP plan, envisions the construction of twenty-two dams as well as the irrigation of a significant amount of land. In addition to the issue of water quantity, water quality is also a troublesome issue in the Tigris-Euphrates basin. Lower riparians are justifiably fearful that upstream use may raise water salinity to levels that would significantly reduce their crop production.

In order to present a common front against Turkey, Syria and Iraq have signed an agreement allocating fifty-eight percent of Euphrates water to Iraq and forty-two percent to Syria. Even though these two Arab states were able to prevent Turkey from receiving international financing for the GAP, Turkey has been able to move forward with the plan.

Despite Syrian and Iraqi fears, Shapland is optimistic that through more efficient irrigation techniques, water re-use, and the tapping of aquifers, Syria and Iraq will have enough water to fulfill their own development schemes (p. 137). In light of Shapland's own discussion, such optimism seems rather excessive. The overwhelming majority of the discussion is devoted to detailing the various problems presented by the GAP, while only a few brief paragraphs are spent on the development of the prospective resources that are to offset the GAP's costs.

Finally, Shapland identifies several common themes that characterize these disputes. While he discusses the importance of geographic position, variation in levels of development among riparians, and threats of military force, he emphasizes the unique quality of each river basin and the importance of existing political relations. Rather than developing a theory for allocating internationally shared resources, this work's value lies in its description of Middle Eastern water disputes in the context of the region's turbulent politics.

### Legal Issues in Foreign Countries

#### *From Occupation to Interim Accords: Israel and the Palestinian Territories.*

By Raja Shehadeh. London: Kluwer Law International, 1997. Pp. xi, 305. Price: \$130.00 (Hardcover). Reviewed by Aslı Bâli.

As Israel celebrates the fiftieth anniversary of its founding, the obverse of those celebrations is the Palestinian commemoration of fifty years of frustrated national aspirations of self-determination. This basic description of the connection between Israeli achievements and Palestinian losses has been relatively constant over the fifty-year history of the state of Israel, but the last five years have arguably marked a turning point in the Israeli-Palestinian relationship. After the failure of the 1991 American-sponsored Madrid Middle East Peace talks, Israelis entered into secret negotiations with the Palestine Liberation Organization (PLO) in Oslo, Norway, and the two parties emerged from their bilateral negotiations with an outline for an agreement.

Beginning with the signing of the Declaration of Principles between the Israeli government and the PLO on the White House lawn on September 13, 1993, the international community heralded a new era of peacemaking between the long time adversaries. Unfortunately, the initial elation of the Palestinians at the prospect of self-governance with limited territorial sovereignty has given way to renewed pessimism as to any form of autonomy within the framework of what have come to be known as the Oslo Accords. Raja Shehadeh's excellent legal analysis chronicles the sources of this pessimism with a thorough and incisive examination of the negotiations that produced the complex existing agreements.

Shehadeh's critical examination of the Oslo Accords places them in their proper context—that of the legal developments in the Palestinian territories during the twenty-six years of occupation preceding the agreements. This consideration of the legal repercussions of the Oslo Accords provides a basis for Shehadeh's well-documented explanation of the ways in which those agreements have consolidated and legitimated Israeli authority over the Palestinian territories rather than providing Palestinians with a basis for self-determination. Shehadeh himself is a Palestinian lawyer who practices in Ramallah, was a founding member of the leading Palestinian human rights organization Al Haq,<sup>1</sup> and served as an advisor to the Palestinian negotiating team that was in Washington during the Madrid peace talks. His familiarity with the legal negotiations with the Israeli government that preceded the Oslo Accords and the legal reality that has developed out of those Accords as he continues his legal practice in Ramallah provides Shehadeh with a unique qualification to engage in the analysis he undertakes in this book. Any scholar interested in the legal underpinnings of the Israeli-Palestinian peace process, and the causes of its unraveling, will be well-served by Shehadeh's contribution.

Three important short essays precede the substance of Shehadeh's analysis. The first two are forewords, one written by Ian Brownlie, one of the foremost international law experts in the English-speaking world, and the other by Edward Said, the most eloquent spokesperson for the Palestinian struggle in the Palestinian diaspora. The third essay is Shehadeh's own introduction to his analysis, in which he identifies his own position as a Palestinian lawyer who was a helpless witness to the loss first of Palestinian territory and then of Palestinian legal claims to sovereignty on that territory, which is the outcome of the Oslo Accords. Shehadeh's substantive analysis then proceeds in five major sections, followed by appendices that provide the full text of all the relevant legal documents considered.<sup>2</sup> The five sections are organized as follows: the Declaration of Principles (Oslo I); the Interim Agreements (Oslo II); the legal changes in the Occupied Territories prior to the Interim Agreement; the Israeli-Palestinian negotiations; and post-agreement legislation. Thus, Shehadeh's analysis proceeds systematically through the legal agreements that have been produced on the basis of the initial Oslo principles, and then returns to the context in which these agreements were created – that of Israeli occupation of the Palestinian territories and the legal infrastructure arising from that occupation. Next, he turns to an analysis of the legal positions of the two sides prior to and during the negotiations. Finally, he considers the implementing legislation passed by the Israeli government and by the Palestinian Interim Self-Government Authority (PISGA) in pursuance of their agreements.

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1. Al Haq is the West Bank affiliate of the Geneva-based International Commission of Jurists.

2. The versions that he provides are taken from the publications of the Israeli Ministry of Foreign Affairs.



In his analysis of the Declaration of Principles (Oslo I), which established the framework for subsequent Israeli-Palestinian negotiations, Shehadeh's legal discussion demonstrates that the substance of the principles were to advance three prime Israeli objectives: first, postpone consideration of the "permanent status" of the Palestinian territories (i.e., the question of sovereignty); second, establish that no legislative change can be made in the Palestinian territories without Israeli approval (thereby leaving the legislative machinery authorizing Israeli settlement expansions in place); and third, creation of an elected Palestinian Authority to bear responsibility for internal governance matters and the policing of the population of the territories. In exchange, the PLO's principal objective—recognition of the PLO as the only legitimate representative of the Palestinians—was also achieved. The risk involved in creating a Palestinian Authority sufficiently armed to have a policing capacity was to be offset by the economic dividend of the agreement that would accrue to a reluctant Israeli electorate. Shehadeh notes that this economic dividend was delivered not in the form of cooperation with Palestinians but through increased foreign investments in a newly "stable" and peaceful Israel.

When Shehadeh turns, in the next section, to an analysis of the Interim Agreements negotiated in Cairo in 1995 (Oslo II), he contrasts those agreements with Oslo I and finds that the Israeli government had already withdrawn from some of the original principles by restricting the territorial jurisdiction of the Palestinian Council (by dividing the Palestinian Territories into three zones and giving the Council exclusive jurisdiction only over one zone, comprising little more than 1% of the territory of the West Bank) and by failing to dissolve the Israeli Civil Administration in the West Bank. These changes provided the basis for Israel's later assertion of increasingly invasive security needs, including the "security" explanation for the creation of a network of bypass roads that created an unprecedented, new justification for expropriation of Palestinian property in the West Bank and annexation of additional Palestinian territory to Israel. In reviewing the three basic components of Oslo II—jurisdiction, security, and economic rights—Shehadeh also concludes that the PLO was unable to keep pace with administrative and legal changes proposed by the Israeli side that would deeply alter the lives of Palestinians living in the territories. The PLO emphasis on security issues and police powers undermined their negotiating position and blinded them to the long-term consequences of the juridical concessions they made at each phase of the negotiations.

In the following three chapters, Shehadeh outlines the context in which the juridical consequences of the Oslo Accords were facilitated and implemented. He describes the complex legal infrastructure the Israelis created to administer and control the occupied territories. He notes that while these laws were illegitimate under international law because they amounted to repeal and alteration of local law by an occupying power (a process barred by the Geneva Conventions), their integration into the Oslo

process has accorded them a legitimacy that was not otherwise available and undermined Palestinian legal rights accordingly. In particular, the legitimization of the juridical status of Israeli settlers and the territory they occupy in the West Bank and Gaza has undermined the Palestinian ability to resist continuing occupation and expansion of settlements. Next, in his analysis of the Israeli-Palestinian negotiations, Shehadeh demonstrates the absence of a clear Palestinian strategy and the costs associated with the failure of the PLO to ensure proper legal representation of Palestinian interests when negotiating with the Israeli government's lawyers. Finally, in his last substantive chapter, Shehadeh demonstrates that the implementation of the agreements again reveal a coherent legal strategy on the Israeli side, designed to consolidate maximum authority over the Palestinian territories within the Oslo framework, while the Palestinian side has been characterized by inconsistency, lack of strategy, and, under the limitations of the legislative authority of the Palestinian Council, paralysis. Based on his close legal analysis of the clauses of the agreements in Oslo I and II, the legal context prior to the agreements and the legislative changes in their implementation, and the negotiation of the agreements themselves, Shehadeh finally concludes that the Interim Accords represent a squandered Palestinian opportunity to realize some measure of autonomy and an Israeli legal victory in consolidating power over the Palestinian Territories.

For the patient, interested scholar, Shehadeh documents the betrayal of Palestinian interests in this peace process as a result of ineffective representation by the PLO and explicit negotiating and legal strategy by the Israeli government. The intellectually honest reader, prepared to go through the painstaking detail and technical rigor of Shehadeh's analysis, cannot help but arrive at the author's conclusions and share his sad pessimism regarding even limited Palestinian autonomy. Unfortunately, however, the legal analysis of the agreements is only a footnote to the political reality that has taken an even more depressing turn at the very moment of the publication of this book. In the end the degree to which an opportunity to articulate and vindicate Palestinian legal claims was lost in this process depends on the extent to which such an opportunity was ever available. Given the geopolitical realities of the international order within which such "legal" claims would be considered, and in light of decades of Security Council resolutions condemning the occupation of Palestinian territories that were ignored by the Israeli government and overlooked by the international community, it is unlikely that the legality of the Palestinian position would ever have provided sufficient leverage to fashion a just peace. While there is cause to join in Shehadeh's lament that the much celebrated peace process represents no more than another loss for Palestinians—this time of their legal rights under international law to resist *de facto* and *de jure* Israeli occupation—the real battle for Palestinian sovereignty and a fair settlement of the Israeli-Palestinian conflict was probably lost long before Oslo.

*Reluctant Neighbor: Turkey's Role in the Middle East*. Edited by Henri J. Barkey. Washington, D.C.: United States Institute of Peace Press, 1996. Pp. viii, 246. Price: \$17.95 (Paperback). Reviewed by Aslı Bâli.

Since the end of the Cold War, there has been much speculation in American foreign policy circles about the future relationship between the United States and Turkey and its strategic significance absent a Soviet threat. The conventional wisdom that has developed on the role of Turkey in a post-Cold War international order is that Turkey now is the gateway to the politically unstable Middle East and potentially important, oil-rich Central Asia. Particularly since the Gulf War, Turkey's significance as America's "other" ally in the Middle East has become increasingly central, exacerbating to some extent what had already been the country's troubled relationship with its Middle Eastern neighbors since the fall of the Ottoman Empire. Against this background, this collection of essays, edited by Henri Barkey, makes an interesting, if predictable, contribution to the literature on Turkey's evolving role in the region.

The essays in this book are mostly written by prominent members of the American foreign policy establishment, with a sprinkling of indigenous experts from Turkey, Iran, and Syria. The essays are the product of a 1994 conference entitled "A Reluctant Neighbor: Analyzing Turkey's Role in the Middle East," convened by the United States Institute of Peace—a congressional research institute that is concerned with peaceful resolutions to international conflict. The collection is divided into twelve chapters, each of which consists of an essay based on a paper presented at the conference, except for one new essay that was commissioned to complete the overview.<sup>1</sup> The essays represent three approaches to the question of Turkey's role in the Middle East: historical surveys, geographical pairings considering Turkey's bilateral relations with neighboring countries, and essays on Turkey's future prospects in the Middle East.

More than the rest of the collection, those essays that make projections regarding Turkey's future role in the "new" Middle East are written with a heavy dose of post-Cold War realism regarding Turkey's pivotal position as a stronghold in resisting anti-Western and "fundamentalist" trends in the region. Much of the reasoning regarding the importance of the country as an American ally clusters around this same realist insight: Turkey is an asset insofar as it is the only predominantly Muslim<sup>2</sup> state that is a dependable supporter of U.S. policy in the region, thereby serving as an important complement to the American-Israeli relationship. However, Turkey's original role as an American ally arose not from its position in the Middle East but from its proximity to the Soviet Union. During the first fifty years

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1. The "new" essay is the ninth chapter in the collection: Alan Makovsky's *Israeli-Turkish Relations: A Turkish 'Periphery Strategy'?*

2. Turkey is officially a secular state, but its population is 98% Muslim.

of Turkey's republican history, the country's foreign policy was driven primarily by anti-Communist ideology that was a prerequisite of its alliance with the United States. Beyond this orientation, Turkey's foreign policy was largely inward-looking<sup>3</sup> as the republic struggled with its internal identity crisis as a pro-Western, Middle Eastern nation caught between Western ambivalence (exemplified by the European Community's attitude of the towards Turkey) and Arab resentment (a legacy of Ottoman rule in the Middle East). The post-Cold War realignment of interests has prompted Turkey to focus more closely on the following three issues: regional military agreements, water disputes, and the regional dimensions of Kurdish separatism.

The first two chapters in the book give an overview of the Ottoman Empire's historical legacy, while also drawing attention to the conditioning of Turkey's foreign policy in this century by the westernizing orientation of the founders of the post-Ottoman republic. The third essay in the collection, written by Barkey, considers how Turkey's position at the juncture between the Middle East and the West has been affected by the developments of the 1990s, including the end of the Cold War, its participation in the Gulf War, and the advent of the Middle East peace process. Barkey concludes that the rejection of the Turkish bid for membership in the European Union might prompt a Turkish reorientation of interests towards the East, embracing both warmer relations with Middle Eastern neighbors and stronger ties with newly independent Turkic states in Central Asia. On the other hand, he notes that the regionalization of three major problems—water disputes between Turkey and lower riparians on the Tigris and Euphrates rivers, the territorial integrity of Iraq, and Kurdish separatism—all may draw Turkey into an increasingly unstable geopolitical situation with respect to the rest of the Middle East.

The next six essays in the collection consider Turkey's bilateral relations with Iraq, Iran, Syria, and Israel. The authors represent a wide spectrum, including a fellow at the National Defense University (Phebe Marr), a lecturer at Tehran University (Tschanguiz H. Pahlavan), and the chairman of the department of international relations at a prominent Turkish university. (Atila Eralp, from Ankara's Middle East Technical University). Nonetheless, the positions adopted by the authors are remarkably consistent, with an emphasis on the potential for conflict and cooperation in Turkey's bilateral relations with the respective countries considered. An emphasis on water politics in the Middle East, growing out of the conflict between Turkey, Syria, and Iraq as co-riparians in two river systems, as well as Kurdish separatism emerges as the common themes of the pieces. There is

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3. A notable exception to this inward-looking policy has been Turkey's relations with Greece. This issue is not discussed in the Barkey collection and thus lies beyond the scope of this review but it should be noted that Turkey's military intervention in Cyprus in 1974 is the single significant departure from the country's policy of disengagement. One other possible exception would be Turkey's limited participation in the Korean war, but that is more an outgrowth of its alliance with the U.S. and its role in NATO than an instance of national foreign policy.

also some attention paid to both the changes in Turkish foreign policy that has become more activist since the end of the Cold War and the possibility for economic cooperation in the region given Turkey's growing economy since the implementation of liberalizing reforms in the 1980s. Makovsky's essay on Turkish-Israeli relations considers a lingering source of tension between Turkey and its other Middle Eastern neighbors, since Turkey's military agreement with Israel, along with its continuing role in NATO (particularly in the Gulf crisis), is seen as a direct threat to the security interests of Arab states and Iran. Makovsky notes that while the growing rapprochement between Turkey and Israel in light of the Middle East peace process enhances Turkey's alliance with the United States, the anti-Syrian overtones of a Turkish-Israeli agreement coupled with Israel's reluctance to be drawn into Turkey's conflict with Kurdish separatists may destabilize Turkey's position in the region.

The final three essays in the collection consider the future of Turkey's role in the region, focusing on the prospects for continued Turkish secularism in light of the growing Islamist movements in the Middle East, and the perennial concerns with water politics and security issues. In addition to the possibility that Turkey will continue along its current path—that of increased ties with Israel, positive relations with Gulf states, prioritizing of support for American policy in the region, and exploration of economic cooperation and trade agreements with Middle Eastern states—at least one essay explores three other directions Turkey might take. In his essay *Alternative Turkish Roles in the Future Middle East*, Graham Fuller suggests that Turkey might also pursue the following paths: pan-Islamism, pan-Turkism, or a model of “greater Middle East democratic confederation” along the lines of a multiethnic, multinational union with some economic and political integration. With the possible exception of pan-Islamism, these possibilities seem quite remote, if for no other reason than because so deep a reordering of Turkey's regional interests does not seem feasible at present. In the case of the pan-Islamism option, the recent disbanding of the Islamist *Refah* party by the Turkish constitutional court suggests that such a possibility is more remote now than when Fuller originally wrote the essay. The conclusion of the essays projecting Turkey's future trajectory seems to be that Turkey will remain a significant regional ally for the U.S. and an important regional actor. Similarly, it appears that Turkey's main foreign policy concerns with respect to the Middle East will also remain consistent: water, security, secularism, and territorial integrity.

Turkey's land borders are shared with Iraq, Iran, Syria, Greece, Bulgaria, Georgia, and Armenia, and an Ottoman legacy and Turkey's own republican history have given rise to conflict with each of these states. Given its neighborhood, the title of this book neatly encapsulates Turkey's basic foreign policy as a “reluctant neighbor.” The collection of essays in this book is a useful resource for anyone seeking an overview of Turkey's relations with its Middle Eastern neighbors and its significance as an

American ally in the Middle East. Beyond this, the book provides few new insights into the dynamics that currently shape Turkey's role in the region and its internal politics. In particular, all of the book's authors adopt the basically pro-Western, secular republican perspective of Turkey's ruling elite with little close examination of sources of opposition to this perspective and the commitment to an American (and to a certain extent Israeli) alliance that goes with it. While some consideration is given to the emergence of the Islamist *Refah* party on the domestic political scene, the analysis is both limited and largely outdated, since the publication of the book has been followed by major changes in the Turkish political mainstream's response to Islamist opposition.<sup>4</sup> Thus, while the essays in the collection provide a useful survey of Turkey's geopolitical situation, the emphasis on a current events approach lends to the analysis being overtaken somewhat by subsequent events, while the overall framework adopted by the authors would have benefited from some more critical scrutiny of mainstream American and Turkish foreign policy perspectives.

*International Law and Australian Federalism*. Edited by Brian R. Opeskin and Donald R. Rothwell. Carlton South, Victoria: Melbourne University Press, 1997. Pp. v, 379. Price: Aus. \$59.95 (Paperback). Reviewed by Natalie S. Klein.

As Australians examine their governmental structure and the merits of republicanism, it is an appropriate time to compile a volume that focuses on Australian federalism, described as the unification of six British colonies into one Commonwealth, and their interaction with each other and with the new federal entity. *International Law and Australian Federalism* does not address Australian federalism uniquely but places it in the context of international law. While this book will be of particular interest to Australian lawyers, some aspects will be of more general interest as a case study of the role of international law in a federal state.

The first two chapters establish the foundation of the volume. Brian Opeskin first examines the difficulties that federal states pose in international law and the special treatment that is accorded to these states. In contrast, he reconsiders the relationship of customary international law to federal states only briefly with regard to state responsibility. This chapter will be of interest to international law scholars as it evaluates federal states in general and then uses Australian federalism to illustrate the arguments presented. Similarly, I.A. Shearer's chapter on the relationship of international law and domestic law begins by discussing the theories on this issue and then moves to an analysis of the Australian situation. This chapter does not address

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4. These changes have included the creation of a coalition government headed by the *Refah* party, the overturning of this government by the Turkish military and the subsequent banning of the party.

federalism or how the Australian states have treated either customary or conventional international law in any forum. Rather, it serves as an introduction to later chapters that examine the role of treaties in Australian law.

The next three selections look to different roles played by the different branches of government in the process of treaty implementation. Anne Twomey and Don Rothwell examine respectively in their chapters the roles of the executive and the legislature in the implementation of international law in Australia. Both authors provide a historical perspective on the emergence of Australia's international personality and consider in some detail the constitutional powers and restraints on the performance of Australia's international obligations in domestic law. Despite Twomey's throw-away line with respect to the lack of consultation in the treaty-making process that "Australians are not alone in these concerns," (p. 89) these chapters are most relevant to Australian lawyers. Following Rothwell's thorough exposition of the broad constitutional basis available to the federal government to implement its international obligations, Bill Campbell's chapter explains how the Australian government frequently attempts to evade these obligations in the national sphere. The tactic employed is a distinction between "what is necessary to ensure compliance with the obligations under a treaty and what is possible by way of compliance" (p. 141). This chapter clearly sets out the relevant factors for, and the process of, implementation of treaties in Australia.

The next two chapters examine domestication of international law by various courts. Geoffrey Lindell analyzes the role of judicial review in the conduct of international affairs. While the chapter focuses on Australian courts, Lindell also considers the American, British, and Irish courts' position on some issues. American readers may be startled by some of the portrayals of American cases and doctrines: for example, *Buttes Gas v. Hammer* is attributed as establishing the principle that courts of the forum will not adjudicate transactions of foreign states in the conduct of foreign affairs (p. 192). Following Lindell's chapter, which ultimately claims that domestic judges are not competent to address international law issues, Sir Anthony Mason thoroughly examines Australian case law concerning the judiciary's use of international law as a direct and indirect source of domestic law.

The following two essays, by Margaret Allars and Hilary Charlesworth, address the role of human rights in Australia from two different perspectives. Allars explores this role in Australian administrative law whereas Charlesworth examines the tension in Australian law and politics created by international human rights law and federalism. Charlesworth's piece is particularly refreshing as it returns the focus of the volume to the issue of federalism—a theme overlooked or quickly dismissed in previous chapters. Allars, for example, assimilates state and federal administrative law and then concentrates on the latter (p. 233). Charlesworth

critically analyzes the harmful effect of federalism on the implementation of human rights norms, highlighting the recalcitrance of the Australian states in this regard.

Brian Galligan and Ben Rimmer's chapter, entitled "The Political Dimensions of International Law in Australia," provides an interesting contrast to Charlesworth's essay. This piece considers the impact of globalization on federalism and draws a distinction between the role of the Commonwealth government vis-à-vis the international order and vis-à-vis the states. The tone of this essay is decidedly pro-federalism, emphasizing many concerns about the Commonwealth executive's "virtually unrestricted ability to incorporate international regulatory regimes into Australian domestic law" (p. 314). In light of these distinctive approaches, it is worth pausing to read the biographies of the contributors to explain the tension throughout the volume between those authors in favor of an active role for international law in Australia and those apprehensive about such interference.

In the final chapter, James Crawford provides an overview of the main themes of the volume, namely the impact of international law on the federal balance, federal-state consultation on treaty issues, judicial review of executive action based on international law and treaties, and parliamentary scrutiny of treaty action. Crawford acknowledges that the majority of the essays deal with different aspects of the role of treaties in Australia. Although a timely examination of this issue, this recurring overlap tends to shift attention away from the role of the states of Australia with respect to international law. Overall, this book addresses the effects of international law on all branches of government as well as on politics more generally and thus provides a useful and clearly written study of the impact of globalization on a federal state.

*Silencing the Guns in Haiti: The Promise of Deliberative Democracy.* By Irwin P. Stotzky. Chicago: University of Chicago Press, 1997. Pp. 293. Price: \$24.95 (Hardcover). Reviewed by Serge Martinez.

In *Silencing the Guns in Haiti: The Promise of Deliberative Democracy*, Professor Irwin Stotzky of the University of Miami School of Law examines Haiti's transition from dictatorship to democracy. He explores Haiti's past and present, analyzes its first steps toward democracy, and offers suggestions on both Haiti's ideal destination and the route it should take to get there. Stotzky's credentials on this subject are impressive, having served as attorney and adviser to former President Jean-Bertrand Aristide and as adviser to the administration of current President Rene Preval.

Part One discusses the obstacles, past and present, impeding Haiti's transition from dictatorship to democracy. Citing Haiti's history of



dictatorship and corruption, its devastated economy, a nonexistent infrastructure, the recent trade embargo, a woefully incompetent judicial system, and near worship of Aristide, of whom miracles were expected, Stotzky paints a bleak picture of Haiti's current situation and potential for democracy. Additionally, Stotzky cites a "deeply imbedded cross-class hatred" (p. 42) resulting from centuries of the elite minority's abuse of and profit from the poor majority. This abuse, justified by a belief that its lifestyle was more important than the welfare of the bulk of the Haitian people and a corresponding dehumanization of the larger poor population by the elites led to a pronounced callousness to the human rights of the poor, the guarantees of the Haitian constitution notwithstanding. This division has disenfranchised the poor for so long that the principles of elected government and rule of law are essentially new ideas in Haiti. This portion of the book makes clear both that many things need to change if democracy is to flourish and that change will be extremely difficult.

Part Two generally analyzes theories of democracy and particularly describes Stotzky's proposed brand of democracy for Haiti. Stotzky begins his discussion of democracy by describing the importance of laying a foundation for recognition and protection of human rights, which he calls "the most significant aspects of economic, political, and social life in a democratic society" (p. 56). This is especially true in the transition from dictatorship to democracy, given the length and difficulty of the process and the resulting "potential for human atrocities" (p. 56). Stotzky argues that a necessary first step for Haiti is the internalization of the concept of human rights, by which it will create and maintain a moral consciousness where historically there has been none.

To create that necessary moral consciousness, Stotzky proposes the creation of a "deliberative democracy"—democracy that consists of rational deliberation by *all* parties concerned. This collective deliberation leads to decisions that are the democratic proxy for unanimity—all affected parties have their say, then the majority carries the day. This theory places value not merely on the ends of the process but argues that deliberation and discussion are intrinsically valuable because they provide reasons to believe that the choices made by the majority are grounded in valid moral principles. This model of democracy provides no corrective mechanism should the majority make bad decisions—Stotzky argues that the moral force that comes from deliberation actually endorses as morally right whatever outcome the process gives, right or wrong. Stotzky contends that the majority is usually right and suggests that, over time, any wrong answers will probably be corrected.

Stotzky argues that participation in a deliberative democracy can "transform people's interests and preferences" (p. 67). Because deliberative democracy attenuates the power of self-interested parties, it forces everyone to work together, in a manner that is arguably altruistic, to seek out the best solution to a given problem. For this to work, however, *all* concerned

parties must participate in the deliberation. Haiti's implementation of this process means the radical change of including the poor majority in the decisionmaking process. Stotzky's ideas in this respect are not innovative—he admits they represent only an adoption of philosopher Carlos Nino's vision of democracy.

A problem with all democracy theory, including this vision is its fundamental incompatibility with the harsh realities of practice. Where Haiti is concerned, the structures and practices militating against true democracy are so severe and so widespread that any transition will face every conceivable obstacle. Moreover, innumerable unforeseen problems will accompany the implementation of democracy, and Stotzky concedes that his discussion must therefore remain “provisional and abstract”(p. 75).

Part Three focuses on one of the harshest realities facing Haitian democracy: the lengthy transition period that is a necessary precursor to democracy. It is not possible simply to make a carbon copy of one of the established democracies and transplant it to Haiti. First, it is necessary to develop the cultural attitudes, the institutional competence, and economic and political stability that will have to be in place to support a democracy. In Haiti, as in other developing countries, this is a tall order. Stotzky acknowledges the problems and describes them with the intimate knowledge of an insider.

Part Four examines the attempts by the Aristide and Preval governments to make the transition from dictatorship to democracy. To illustrate both how far Haiti has come and how far it has to go, Stotzky reports on the recent prosecution of a quasi-governmental official from pre-Aristide days for the killing of an Aristide supporter. Although the fact that the man was prosecuted at all was an encouraging and previously unheard-of attempt to create accountability for human rights violations in Haiti, the trial itself was a frequently hilarious spectacle that bore little relation to democratic notions of justice. Stotzky's descriptions of other institutions reveal similar shortcomings.

Stotzky makes it clear that there will be no easy fix—the cultural and economic pressures working against the new government are enormous. To make the transition to democracy, Haiti must overcome its own history as well as its current economic desolation. The judiciary, the economy, elections, and deeply imbedded cultural attitudes are all examples of institutional problems that illustrate Haiti's distance from the deliberative democracy envisioned by Stotzky, or even to Aristide's vision of a journey from “misery to poverty with dignity” (p. 1).

*Silencing the Guns in Haiti* is an extremely interesting insider's view of Haiti with an intriguing theory of democracy attached. The two are, unfortunately, never successfully married, and Professor Stotzky's work is less noteworthy as a discussion of democratic theory than as an incomparable study of Haiti by a well-equipped participant-observer.

*Legislative Drafting for Market Reform: Some Lessons from China*. Edited by Ann Seidman, Robert Seidman, and Janice Payne. New York: St. Martin's Press, 1997. Pp. xv, 236. Price: \$55.00 (Hardcover). Reviewed by Joshua Schwab.

Part diary and part theoretical tract, *Legislative Drafting for Market Reform* discusses methodologies of legislative reform through the experience of a United Nations Development Programme (UNDP) project in the early 1990s that aimed to aid the Chinese Bureau for Legislative Affairs in formulating bills suitable for developing a socialist market economy. The joint effort operated through a series of workshops and brainstorming sessions that attempted to identify recent procedural and substantive problems in the Chinese legislative process, and identify possible solutions.

The book is a collection of eleven essays that summarize the experiences or ideas of the foreign consultants involved in the project. The opening and concluding sections and the second essay are authored by two of the editors, Ann and Robert Seidman, and provide an overview of the entire project and its theoretical underpinnings. The Seidmans take a very optimistic view of the role of a foreign consultant, but they continually stress that, while China can learn from other countries, it does not have the proper cultural or legal infrastructure merely to duplicate another system, (an approach the Seidmans find inadvisable in any event). The authors emphasize that China's unique circumstances must be taken into consideration at all times. While the Seidmans make a conscious effort to avoid labeling the Chinese legislative system as backward or unsophisticated, the authors do appear to take the presumptuous position that only with UNDP training could the "legislative drafting log jam" (p. 12) be broken.

The rest of the book touches on some of the particular subjects that the consultants discussed with the Chinese. The third essay tells of John McEldowney's experience with a drafting team concentrating on budgetary issues. After a brief summary of the current Chinese economic system, McEldowney writes of the challenges he faced during the course of the project. Referring to himself in the third person as "the foreign consultant," the author tells of the Chinese desire for highly detailed explanations and the need to establish trust between the two parties. The author concludes his section with a discussion of the tensions between national and local goals in China that may preclude the effectiveness of a universal budget.

The next essay, by Peter Christensen, provides an account of various European legislative drafting formulae, especially those used by Denmark, that the author shared with the Chinese. Unlike many other essays, Christenson does not focus on his experiences abroad. This portion seems inconsistent with the Seidmans' disdain for a wholesale transfer of another legal regime because the author makes no effort to identify how these laws

may be adjusted for the Chinese situation. In contrast, the following piece by Edward Rubin provides an interesting commentary on the relationship between administrative law and culture. He opens with a discussion of the merits of American administrative law and argues that its success is largely linked to particular nuances of American culture; therefore, the system cannot be easily replicated in China. For example, American agencies are largely restrained by the threat of lawsuits, while the Chinese tend to avoid litigation that involves the government.

The subsequent two essays touch on the theme of education. William Clune addresses several problems facing Chinese education in a time of economic transition and what he perceives to be some of the misconceptions of his Chinese colleagues. Clune expresses concern that the advent of a market system will also bring a rise in materialism and threaten the diligence of Chinese students. He includes an intriguing anecdote about how advertising campaigns that accompany market economies may threaten the sexual morals, and hence the educational zeal, of the Chinese (p. 124). Like many of the other authors in the course of this work, Clune concludes with the statement that he may have learned more from his experience than did his Chinese counterparts (p. 128). While this cultural exchange is certainly a positive aspect of the UNDP experience, Clune also admits that, prior to his travels, "I knew relatively little about China and Chinese education . . . .," (p. 110), a statement that makes one question his role, and potentially the role of others, in the overall reform scheme. Charles Glenn follows Clune with a description of some of the theories behind educational reform efforts.

Sections eight and nine revolve around the complex issues of environmental law and regulation. Without lapsing into jargon, Thomas McHenry's essay identifies various threats to nature reserves and wild plants, stemming primarily from problems in funding, planning, and intragovernmental conflicts. Unlike the Seidmans, McHenry takes a less sanguine view of the U.N. project and labels it a "limited success" (p. 153). Dan Tarlock, in a discussion on groundwater, concurs with McHenry's assessment that it is not the technical ability of the Chinese, but rather their legal tradition, that impedes the introduction of environmental standards used in other countries. Both authors stress that China does not have adequate management to implement many of its existing environmental regulations. Tarlock argues that this result is largely from the Chinese "anti-law tradition" (p. 176) in which the law's main purpose is to punish social deviants rather than to guide and regulate the population. Tarlock's work implicitly argues that Western technology will only truly succeed in China if Western legal theories on science are simultaneously imported. However, this stance fails to explain the ineffectiveness of many of the West's own environmental regulations and seems inconsistent with the project's purported goal of adapting theories of law to fit China's needs.

The tenth essay, by Tamar Frankel, is a study of various pedagogical methods that can be employed in the UNDP and other similar projects.

While each individual section is informative in its own subject matter, the book as a whole lacks a cohesion link. The work cannot decide if its central theme should be the consultants' experiences in China, theories of how to aid in the implementation of reform, or the substance of suggested reforms. The works by Christensen and Glenn seem especially incongruous—in fact, neither contains the word “China.” While some of the authors suffer from an overly Anglocentric perspective, it would be misleading to label the entire project “neocolonial” based solely on a limited portion of the book. In the end, despite the lack of a consistent connection between the essays, the book is an adequate reminder of both the need to learn from other cultures and systems and the difficulties involved when theories cross borders.

### International Legal Theory

*Common Law and Colonised Peoples: Studies in Trinidad and Western Australia.* By Jeannine M. Purdy. Aldershot, England: Dartmouth, 1997. Pp. 309. Price: \$67.95 (Hardcover). Reviewed by Gustav Eriksson.

Upon first considering the geographical subjects of Ms. Purdy's *Common Law and Colonised Peoples: Studies in Trinidad and Western Australia*, this might very well strike the reader as an odd comparison. After all, the colonized population of Trinidad and Tobago is almost exclusively the product of immigration, voluntary or otherwise, while its Western Australian analogue is composed of indigenous peoples—the Aborigines. Also, with a few complexities aside, today the colonized peoples of Trinidad govern themselves directly while the Aborigines of Australia remain without an autonomous nation-state. Despite these oddities, Ms. Purdy's choice turns out to be extremely probative within her study's context: the impact of a British-based common law legal system in shaping colonized peoples' lives both in Trinidad and Western Australia.

One of her book's most powerful messages is that, despite the two subject populations' diverse characteristics and ostensibly different political situations, their everyday experience of the law is strikingly similar. Moreover, Purdy effectively illustrates that this common Western Australian Aboriginal and Afro- and Indo-Trinidadian legal experience is itself strikingly *different* from the way in which much of the legal academy experiences (or thinks about) the law. Purdy describes the experience of the common law among the legal academic world, as well as the broader white middle-class, as mainly one of discourse. The experience of darker-skinned Trinidadians and Aboriginal Western Australians, she explains, is a starkly different one, characterized by violence, police brutality, conviction through largely discretionary legal proceedings, and ultimately incarceration. For

both of these colonized peoples, the law functions chiefly as a force of action, power, and domination. By contrast, through law reviews, appellate court opinions, treatises, and other sterilized mediums, Purdy claims that the academy's perspective of the law has been completely separated from the law in action—that is, the law as violence.

Her characterization of "the academy" is at best a stereotype that incompletely describes both the composition and authorship of legal scholarship, especially as it has evolved in the past two decades. Nevertheless the protocol that she attacks still unquestionably enjoys a powerful resonance in the academy and is therefore entirely worthy of critique. Taken with this grain of salt, Purdy's critique is effective, for she continuously and convincingly illustrates the gulf between the colonized and the white middle-class experience of the law throughout her book.

This dichotomy of experience, moreover, serves not only as the main substantive conclusion of her comparative study but as the central factor governing the organization and method of the book as well. Discarding the traditional formal approach she assigns to western academic legal discourse, she seeks to interject something of the substance of her book (law as something physically experienced) by focusing on sources of information, as well as means of conveying it, that are underprivileged as a result of the formal western approach. As a result, the bulk of the empirical work undergirding the book consists of direct observation, informal interview, and other methods of direct interaction with the subject populations. In addition, the text itself mixes traditional analysis with excerpts of song, poetry, social commentary, and applicable quotations from members of the colonized population. What results is a piece of work that simultaneously delivers a powerful message and conveys the richness of the cultures that she examines.

The goal of Purdy's study is to illustrate the ways in which one of the primary legacies of the British colonial enterprise—the system of common law—has effected and continues to effect an ongoing transformation of the non-white populations of Trinidad and Western Australia into the "criminal other." The largely discretionary aspects of the common law system, ranging from selective police enforcement of minor laws, methods of taking suspects into custody, the setting of bail and its amount, prosecutorial discretion, the leniency of the judge, and the assignment of jail time to those who cannot pay fines, are exposed to be primary factors in portraying and indeed transforming ethnic populations in this way.

As Purdy probably anticipates, her substantive message may well be discounted by many western academics because her method is not strictly formal statistical analysis. In my view, however, the minimum statistics and hard empirical work that she does include provide striking and (in most areas) adequate support for her allegations. Moreover, the most telling moments in her study derive from anecdotal narrative in which observed

subjects are literally molded into "the criminal" via the discretionary elements of the common law listed above.

Although her style is innovative and her thesis compelling, there are nevertheless some problems in the book. For instance, the author, who is from Western Australia, has provided a much richer portrayal of Trinidad as compared to her homeland (Compare Chapter 5 with 6). Perhaps this reflects the reality of intensive research in what was for her an entirely new place and the subsequent comparison to an area with which she may be overly familiar. Thus, for a reader who has had much more experience with Trinidad, or a reader who is unfamiliar with both of the geographical subject areas, the book becomes slightly unbalanced. Another shortcoming is that, although the author vehemently stresses the need to dispose of the formal western methods of academia, her work is at times overwhelmed by her own formal ideologies, mainly Marxism, feminism, and scientific realism (pp. 174 and 251.) The author does, however acknowledge these perspectives from the beginning. The influence of formal ideology is most poignant in the more formally analytical sections of the text, and, with some exceptions, drops out from the more unique narrative portions. Nonetheless, this ideological inconsistency is slightly disconcerting and detracts from the power of the text.

Overall, Jeannine Purdy's *Common Law and Colonised Peoples* is both probative and extremely enjoyable to read. The author has something extremely important to say, both about the effect of law on colonized populations and the examination of law itself. Through her innovative method and compelling style, she articulates both well.

*Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation.* By Donald Rothchild. Washington, D.C.: Brookings Institution Press, 1997. Pp. xiii, 343. Price: \$19.95 (Paperback), \$49.95 (Hardcover). Reviewed by Glenn McGrory.

In resource-scarce, often neglected African nations, ethnicity is a potent mobilizing force that can catapult groups into fierce bloodshed or protracted struggles. Yet, there is nothing inevitable about ethnic conflict in Africa. Pragmatic regimes balance ethnic group interests, most directly through elite power-sharing arrangements and public resource allocation. Even where power sharing falters and conflict looms, third party intermediaries can use coercive and non-coercive incentives to promote cooperation. With this constructive outlook, Donald Rothchild, a professor of political science at the University of California, Davis and scholar of African affairs, develops a framework for understanding ethnic conflict in postcolonial Africa and proposes common sense recommendations for third party mediation and management.

Part One is an anatomy of ethnic politics in the postcolonial period. Drawing numerous examples from across the continent, Rothschild develops a useful analytical model of state-ethnic group relations. In the context of economic scarcity and state "softness" typical in Africa, ethnic groups compete for economic, political, and social resources. He characterizes these as "negotiable" claims that are amenable to balancing and cooperative group politics (p. 31). In contrast, non-negotiable demands—including security, equality, status, identity, recognition, and territory—often have polarizing effects (p. 33).

The results of this interplay of competing group interests are determined by group perceptions and state policies. When ethnic groups and the elites who manipulate them make moderate, pragmatic demands upon the state, positive-sum outcomes result. Conversely, where group perceptions are "essentialist" or tend toward viewing politics as a zero-sum game, ethnic group competition often becomes mutually destructive.

State responses to ethnic group competition are likewise critical. Liberal political regimes, or what Rothschild labels "polyarchies" (p. 11), promote intergroup cooperation through transparent, responsive state institutions and "coalitional" politics. Few African states have enjoyed more than brief experiments with such openness. More commonly, African regimes have been characterized by elite power sharing. Ranging from authoritarian to moderately democratic, such regimes limit direct public participation but coopt and accommodate ethnic elites. Capable of short term conflict management, elite power sharing regimes are nonetheless weak, transitional forms of governance often linked to an individual leader's capacity and that lack long-term public legitimacy.

While polyarchies and elite power sharing regimes adopt cooperative strategies for coping with ethnic plurality, authoritarian (or "hegemonic") regimes, which are often dominated by one ethnic group, are uncompromising and exclusivist. Instead of ethnic balancing and coalition building, these regimes deal with ethnic conflict through coercive strategies, including cultural assimilation and ethnic group isolation or displacement. Not surprisingly, the repressive strategies of hegemonic regimes contribute to "zero-sum" mentalities, non-negotiable demands, and essentialist perceptions among competing ethnic groups. In such situations, international actors can intervene to avoid the escalation of conflict and onset of violence.

In Part Two of his book, Rothschild examines the ways in which international mediators can alter ethnic group perceptions, limit conflict, and help establish regularized conflict management systems in African states. Through detailed analyses of successful international mediation efforts in Angola, Zimbabwe, South Africa, and the Sudan, Rothschild outlines a range of pressures and incentives that mediators can employ to manage conflict. Non-coercive incentives reward disputants for cooperative behavior. These include fiscal incentives such as aid packages, "insurance" incentives (in which the mediator guarantees one disputant that the other



party will adhere to a brokered deal) and regime or group recognition incentives (in which the mediator provides some form of legitimacy to the disputant.) The coercive tools mediators can utilize include diplomatic pressure, sanctions, and the use of force. Combining these incentives and pressures, international mediators can alter ethnic group perceptions, defuse conflict, and promote more cooperative strategies in African states.

Ethnic balancing, third party mediation, conflict management—but to what end? Early in his work, Rothschild characterizes them as “promoting constructive conflict relations” and, more fundamentally, creating an “enabling political environment in which economic development can occur” (p. 18). It is with distributive goals in mind that one might question the elite-emphasis of Rothschild’s prescriptions for conflict management. He is correct to identify elites as the “ethnic entrepreneurs” (p. 31) who can mobilize groups to support or reject the state. Whether a long-term policy of buying-off elites will result in economic development, or even greater stability, is questionable, however. Elite power sharing and even polyarchical strategies that reinforce the power of elites to manipulate ethnic group behavior may forestall conflict, but with disastrous long-term results. Mobutu Sese Seko, for example, was renowned for his effective use of patronage. The result was a relatively stable but kleptocratic regime that impoverished and brutalized its citizens before its eventual collapse.

Rothschild’s tendency to use static, “snapshot” examples of successful ethnic conflict management—like the 1972 Addis Ababa accords that (temporarily) ended civil war in southern Sudan (p. 214)—is instructive. State responsiveness to elites and ethnic balancing can delay or terminate ethnic conflict, but long-term nation building requires a greater distribution of resources, and, to some extent, weakening of ethnic group identification in favor of some sense of joint nationality. Rothschild rightly dismisses authoritarian efforts to assimilate weaker ethnic groups or to create a supra-ethnic ideology (Afro-Marxist failures in Ethiopia and Mozambique are examples (pp. 63–64)). He also recognizes that “fully democratic regimes seem uniquely well designed to manage conflict, for they combine vibrant and active civil associations with a dynamic and secure state.” (p. 71). However, he gives the prospect of democracy as a form of nation building and conflict management limited consideration. Developing his analytical categories from a dismal postcolonial record, Rothschild excludes democracy from his principal regime types (p. 26), opting instead for the less majoritarian “polyarchy,” of which democracy is an extremely liberal form.

*Managing Ethnic Conflict in Africa* offers a thorough assessment of ethnic group politics in Africa and outlines a sensible set of incentives and pressures that third party mediators can utilize to promote ethnic harmony. While pragmatic, Rothschild’s strategy for managing ethnic conflict may be shortsighted. Managing ethnic conflict ultimately means delegitimizing

ethnic politics. For this, third party mediators might add democracy-building initiatives to their tools for conflict management.

*The Concept of International Obligations Erga Omnes*. By Maurizio Ragazzi. Oxford: Clarendon Press, 1997. Pp. xl, 264. Price: \$95.00 (Hardcover). Reviewed by Christopher R.J. Rickerd.

This is a book about a dictum. In the second phase of the *Barcelona Traction* litigation, the International Court of Justice (ICJ) delivered a judgment in 1970 that included the following discussion of obligations *erga omnes* (towards all):

33. . . . [T]he obligations of a state towards the international community as a whole . . . [are] [b]y their very nature . . . the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination . . . (quoted at p. 1)

Ragazzi's monograph is based on his D.Phil. dissertation at Oxford. His project is to unpack a concept described by his supervisor, Ian Brownlie, as "very mysterious indeed" (p. xi). Ragazzi circumscribes his task; by excluding analysis of rights and remedies attached to obligations *erga omnes*, and he does not consider their bearing on international crimes. What he does accomplish is a skillful inquiry into the four exemplary obligations imposed by the ICJ and possible extensions of the character *erga omnes* to other areas of international law. He also explores the concept's relationship to *jus cogens* (peremptory norms of international law). Ragazzi is admirably cautious; he stresses the narrow definition given by the ICJ to obligations *erga omnes* and notes that the ICJ's language in *Barcelona Traction* did not imply *actio popularis* (the idea that any state can take legal action to vindicate an obligation *erga omnes*) (p. 211).

Obligations *erga omnes* are universal, binding all states without exception. Whereas a norm of *jus cogens* must be accepted by the international community as a whole, and customary international law is vulnerable to abstention by persistent objectors (for example, France and China in the 1970s on atmospheric nuclear testing) or derogation by treaty, obligations *erga omnes* are moral absolutes. Exemptions are impossible for prohibitions of intrinsically evil acts. Article 53 of the Vienna Convention on the Law of Treaties spells out the prerequisites for norms of *jus cogens*, but a much less formal standard, namely the ICJ's dictum, exists for identifying obligations *erga omnes*. Fortunately, the court gave four examples, each of which Ragazzi addresses in turn.

*Acts of Aggression.* Ragazzi discusses the ICJ's 1947 *Corfu Channel*, which adjudicated a dispute between the United Kingdom and Albania over the latter's mine-filled territorial waters. The court's invocation of "elementary considerations of humanity" (p. 84) to support an absolute obligation to give notice of minefields, derived from the 1907 Hague Convention, foreshadows the concept of obligations *erga omnes*. The ICJ's 1986 decision in the *Nicaragua* case also referred to the necessity to warn about minefields. Ragazzi looks to three dissenting opinions (but not the majority view, which held the United States to be in breach of a customary rule of international law) noting that the dissents clarify the ramifications of violating an obligation *erga omnes*. Doubt exists as to whether a violation of the norm of *jus cogens* against aggression can be excused on the ground that self-defense precluded the wrongfulness. Yet the absolute character of an obligation *erga omnes* means, as the dissents of Judges Schwebel and Jennings emphasized, that claiming self-defense would not excuse a breach.

*Genocide.* The *Barcelona Traction* dictum cited the ICJ's 1951 advisory opinion on the 1948 UN Genocide Convention. It concluded that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (p. 100). The inherent obligation is one based on "the most elementary principles of morality" (p. 100) and is thus universally applicable to all states. Underlying moral considerations obviate the need for consent or formal ratification. A 1996 ICJ judgment on preliminary objections in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* reaffirmed the *erga omnes* character of the prohibition on genocide, this time using the vocabulary of the *Barcelona Traction* dictum.

*Slavery.* After tracing the development of this concept in the international law of the nineteenth century, Ragazzi identifies protection from slavery as the only one of the four obligations *erga omnes* that acquired this character after being an accepted practice. In 1819, United States Chief Justice Marshall in *The Antelope* case used what is today called the principle of the persistent objector to deny that the slave trade was contrary to international law, despite its violation of the "law of nature" (p. 115). Yet in 1848, an arbitral decision made under a convention between the United States and Great Britain departed from an 1835 ruling and held that the slave trade was illegal. Thus, precedent had been superseded by intervening developments in international and United States law, which now prohibited this traffic. Today, the 1926 International Convention to Suppress Slave Trade and Slavery, supplemented in 1956, underpins the obligation *erga omnes* against slavery.

*Racial Discrimination.* In 1960, Ethiopia and Liberia challenged South Africa's mandate for South West Africa based on its practice of apartheid there. The ICJ held that the countries lacked standing to bring the case

despite their allegations that the international custom of nondiscrimination carried with it an obligation *erga omnes*. Judge Tanaka dissented and, over the objections of the President, Sir Percy Spender, who had cast the deciding vote on the standing issue, reached the merits. He characterized the prohibition against racial discrimination as creating an obligation *erga omnes* because of the underlying moral and social values it represents. Subsequently, International Conventions on the Elimination of Racial Discrimination (1965) and on the Suppression and Punishment of the Crime of Apartheid (1973) reinforced the obligation. In 1971, moreover, in its advisory opinion on Namibia (formerly South West Africa), the ICJ censured South Africa's continued presence by holding that nonrecognition of South Africa's illegal occupation was enforceable *erga omnes* regardless of a state's membership in the United Nations.

Following this discussion, Ragazzi also provides an assessment of three candidates for the status of obligation *erga omnes*: human rights law, development law, and environmental law. These are all potentially within the ambit of "the basic rights of the human person" mentioned in *Barcelona Traction*, but he notes that inclusion of these categories would stretch the ICJ's dictum. If the general obligation to respect human rights were to become an obligation *erga omnes*, the four specific obligations listed in the dictum would be supplemented by a general (and vague) fifth obligation. Development law presupposes positive obligations, whereas the ICJ's four examples are prohibitions. Finally, environmental law can be premised on obligations attaching to optional rather than universal rights (such as claiming an exclusive economic zone under the Law of the Sea). Ragazzi is not being pessimistic in scrutinizing these potential obligations *erga omnes*. Rather, he is, consistent with the tenor of his book, carefully assessing the light shed by a brief dictum on the present and future status of international obligations *erga omnes*.

*Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future.* By T.N. Srinivasan. Boulder, CO: Westview Press, 1998. Pp. viii, 140. Price: \$35.00 (Hardcover). Reviewed by Christopher Schell.

In the turbulent wake of World War II, the victorious nations created international institutions, like the United Nations, to salve the wounds of war. The architects of these institutions also envisioned an International Trade Organization (ITO) to promote world commerce through reduction of trade barriers. Subsequent negotiations did lower tariffs in the General Agreement on Tariffs and Trade (GATT), but the ITO, faced with U.S. congressional disapproval, never came into existence. The latest chapter of GATT negotiations, completed in the Uruguay Round in 1994, rectified the

lack of a permanent institution by forming the World Trade Organization (WTO).

The WTO stands on two pillars: it seeks to foster continued trade liberalization and consensual decisionmaking as each member has equal voting power. Developed countries hungry for new markets have generally heralded trade freedom. Less developed countries (LDCs), conscious of past exploitation, have questioned trade liberalization and developed countries' motives. The Uruguay Round poses two important questions for LDCs: how will the WTO affect the interaction between LDCs and developed countries? Will trade liberalization benefit LDCs as well as developed countries?

T.N. Srinivasan, the Samuel C. Park Professor of Economics at Yale University, analyzes these questions in his new book, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future*. This work arose from the World Bank's invitation to assess the economic climate for LDCs after the Uruguay Round. Srinivasan places the Uruguay Round into the context of prior GATT talks and the historical interaction between developed countries and LDCs on trade issues. He discusses the successes and failures of the Uruguay Round and then addresses the effect the WTO will have on LDCs. Srinivasan concludes that developed countries will benefit from the Uruguay Round, but for "developing countries, particularly the poorer ones, a much more cautious and nuanced assessment is appropriate" (p. 99).

Throughout the book, Srinivasan assumes prior knowledge of GATT history, as his short eleven page synopsis does not mention many of the individual rounds. Responding to the first question, Srinivasan argues that in the Uruguay Round, many LDCs adopted a different theoretical outlook concerning trade than in prior rounds. Previously, many LDCs argued against lowering trade barriers and viewed the GATT primarily as aiding developed countries. Despite signing GATT, LDCs often pursued an import substitution economic model. By the Uruguay Round, some LDCs turned to the export model that had proved successful in East Asia. Srinivasan contends that this conceptual change combined with LDCs' greater involvement in the WTO's negotiation may mean that the WTO will increase LDCs' participation in global trade issues. However, Srinivasan only poses the possibility that the Uruguay Round may herald a new era of positive interaction between LDCs and developed countries. His lack of further analysis constitutes a major drawback of the piece.

Regarding the effects of the Uruguay Round on LDCs, however, Srinivasan comprehensively argues that there are eight reasons to believe that the WTO may not correct all of GATT's problems and that LDCs may not benefit from the Uruguay Round as much as will developed countries:

First, any member of the WTO can withdraw without stating any reason by giving six months' notice. By their ability to withdraw and thus seriously damage the viability of the WTO, powerful trading countries may be able explicitly or implicitly to intimidate LDCs during trade disputes

within the WTO dispute resolution mechanism. For example, Srinivasan cites a U.S. proposal to review WTO decisions that harm the United States to determine whether the United States should remain in the WTO.

Second, many LDCs previously demanded and received the ability to keep their own trade barriers as they pursued an import substitution strategy. Now, LDCs increasingly use exports to fuel growth. A rise in protectionism in developed countries would harm LDCs ability to export. Srinivasan argues that LDCs must insist on barrier-free trade even when developed countries want to restore tariffs.

Third, studies show that quantitative income gains of the Uruguay Round for LDCs are modest and unevenly distributed. Though some developing countries should show income gains, sub-Saharan Africa will lose income as a result of the Uruguay Round.

Fourth, the extension of the multilateral agreements into new areas like services, investment, and intellectual property may harm LDCs, since developed countries possess more competitive industries in those areas. Developed country industries might capture a disproportionate amount of the benefits of that liberalization.

Fifth, many regional trade agreements, like the North American Free Trade Agreement, were also negotiated during the Uruguay Round. Those regional agreements might push developed countries into more trade within their respective regions. Srinivasan contends that regional agreements may inhibit multilateral agreements as interests benefited by the regional agreement would fight to exclude competitors from LDCs.

Sixth, developed countries might refuse market access to LDCs that do not have high enough environmental or labor standards. Srinivasan argues that linking trade issues to non-trade issues may harm LDCs because they might not be able to afford the higher standards and would lose access to export markets.

Seventh, domestic constraints within LDCs might prevent them from capitalizing on the Uruguay Round agreements. Many LDCs lack the necessary infrastructure like sufficient power, transportation, and communication networks to take advantage of freer trade as well as developed countries.

Finally, some argue for requiring cross-institutional conditionality between the WTO and the World Bank and the IMF. Under such a scheme, the WTO must sanction LDCs for not fulfilling obligations to the other institutions. Although the WTO has equal voting, the World Bank and the IMF have a weighted system favoring developed countries. Developed countries might increase their power over LDCs in the WTO through their greater influence in the other institutions.

Srinivasan also alludes to another factor, stating that trade barrier reductions often represent a victory of diffuse consumer interests over protectionist producer interests. While consumers often suffer at the hands of local producers unconstrained by foreign competition, they tend not to

wield political power sufficient to counter producers. The Uruguay Round might counterbalance producers by forcing them to compete in the world market. Economist Mancur Olson has argued that, in general, interest groups lobby against needed structural adjustments that would hurt their vested interests. By preventing adaptability, those lobbies hinder a country's economic success. Olson cites the high post-war growth in Germany and Japan when World War II swept away economically harmful lobbies. Could trade liberalization undermine parochial producers and spur LDCs' economies? Srinivasan leaves the question open.

While Srinivasan assumes familiarity with trade economics, he delivers to the lay reader a cogent and insightful overview of the Uruguay Round and its effects on LDCs.

*Ethics and Authority in International Law.* By Alfred P. Rubin. New York: Cambridge University Press, 1997. Pp. xxvi, 228. Price: \$59.95 (Hardcover). Reviewed by Ralph Wilde.

Rubin examines the claim that, in certain circumstances, authority in international law (that is, the right to exercise jurisdiction) exists by virtue of ethics alone, irrespective of any positivist basis. Taking a skeptical stance toward such moral, ethicist, or naturalist approaches, and expressing sympathy towards positivist or descriptive approaches, Professor Rubin offers a forceful analysis of the impact of both visions on the development of international law, particularly in the areas of criminal liability and universal jurisdiction. He questions the extent to which the exercise of authority can have an ethical base, and how, if it is possible, it can be explained and justified. Ultimately, Rubin rejects ethics: Since humanitarian concerns must be articulated via a process controlled by the distribution of human discretion in order to become law, Rubin cannot countenance such impulses as an independent ground for authority. He bases his arguments on existing jurisprudence but argues that they are original in the sense that they displace the conventional wisdom, which he sees as tending to support the ethicist position.

Rubin, himself a former U.S. government official, takes a realist approach. He grounds his jurisprudential discussion in "*who* decides, rather than *what* is the rule of substance" (p. 28), and he is wary of the prejudices of those who claim to have discovered the law. He focuses much more on the intentions of officials who exercise authority than on the theorists, who he views as more intent on forcing the law in a particular direction rather than in explaining its processes. Rubin examines doctrine primarily in terms of how it has been applied to reality. From this inquiry, he argues that "positivism, obsessed with authority and contemptuous of moral balancing, dominates the thinking of statesmen" (p. 9). Consequently, Rubin believes that the precedent of events like the Nuremberg Trials, with their one-sided

application of humanitarian law, did not anticipate a viable international criminal court; rather, they illustrate the conceptual fallacy on which such projects are based.

Rubin begins in Chapter 1 with a lively and thorough examination of the two schools, naturalism and positivism, that he considers necessary for a discussion of the nature of authority in international law. He defines naturalism as the approach that argues that "rules of behaviour derive ultimately from sources outside the will of mankind" (p. 7); that is to say, from nature. Several models of this nature are described, from physical nature to value-based morality or ethics, and divine law; the differences and problems between Aristotelian and Ciceronian philosophy are also identified. He defines positivism as the assertion that moral values exist in the law only because of the exercise of human discretion that is the source of that law. In a gesture towards even handedness, Rubin argues, that in the search for authority, ethicists ignore the discretion imported into the law by the body that discovers it, and positivists disregard the moral sources of norms, focusing excessively on who articulates them. He attempts to avoid the "trap" of most scholarship, which he sees as either "naturalist elaboration of principles that are asserted as merely self-evident but with no necessary connection to wisdom or truth, or positivist works merely descriptive or empirical" (p. 54).

Chapter 2 presents Rubin's view of the international legal order into which the United States entered on independence. He describes this order as characterized by a theoretical adherence to naturalist models but argues that it relied in practice on positive approaches. The theoretical models of Pufendorf, Wolff, Vattel, Vitoria, and Coke are described, along with what Rubin sees as positivist challenges by Suarez, Gentili, and Zouche. He insists that many theorists ignored the value systems with which statesmen were engaged and proceeds to examine this area, looking at the influential writings of those such as Sir Leoline Jenkins, the English international affairs juriconsult of the late seventeenth century. Rubin argues that the questions before decisionmakers centered on their jurisdiction to adjudicate rather than on any overriding obligation to cooperate and that this behavior did not evince a belief in a just distribution of authority. However, he finds that contemporary jurisprudence tended to deny these historical facts, apart from suggestions to those effect made by minor scholars such as Bynkershoek and Wooddeson.

In Chapter 3, Rubin examines how the post-independence era was characterized in the international arena by a coming together of naturalist theories and positivist practices. He evaluates the legislative history of the Articles of Confederation and the Constitutional Convention. Through the examples of piracy, the slave trade, and conflicts of law, Rubin suggests how notions of universal jurisdiction became more attractive but nonetheless remained so problematic as to be unsupportable. With piracy, Rubin sees insuperable difficulties in interpreting its *meaning*, and argues that



consequently the concept cannot give rise to universal jurisdiction because it is not workable. With the slave trade, Rubin discusses the relevant case law, focusing particularly on the dicta of Justice Scott in *Le Louis* because of its refusal to exercise universal jurisdiction. Rubin sees this position as derived from the idea that “[n]o state can, since the Peace of Westphalia, claim to be in a position to make the law binding on all” (p. 125). He also suggests that conflict of laws arose because the rise of international commerce meant that property and contract rights granted in one legal process needed to be legal in another.

Rubin then attempts, in Chapters 4 and 5, to synthesize the two approaches, paradoxically, in a present-day positivist model. Rubin’s overwhelming experience that proposals that moved away from positivism “could not work in practice” (p. 144) is clear, as is his belief that *ipso facto* they were unsupportable. He considers the suggestion that in an interdependent, post-modern world a “universal law” is required, but dismisses this claim via a pessimistic analysis of the extent to which national prerogatives would prevent it, and of the hypocritical selectivity that would prevail. He also places the value of self-determination above other universal values that might require the reduction of state prerogatives. Perhaps most importantly, Rubin cannot accept the degree to which this would involve the exercise of authority by international jurists subject to minimal accountability. Rubin asserts that ethical approaches in international law must be developed through submission to the “selection process” (p. 169) of the international order rather than being imposed unilaterally without consent. The treaty mechanisms of the Council of Europe human rights regime would be an example of the former; the Security Council-created International Criminal Tribunal for the Former Yugoslavia an example of the latter. For Rubin, the bottom line is “the value of respect for the moral opinions of others, even when we believe them to be morally wrong, as fellow participants in the comity of nations” (p. 206).

The book is a well argued articulation of a positivist understanding of authority in international law. Its particular focus on universal criminal jurisdiction is timely in light of the expanding scope of international humanitarian law and the *ad hoc* and permanent criminal tribunal projects. Observations are always informed and insightful; the style is witty with engaging turns of phrase.

*International Law*, 4th ed. By Malcolm N. Shaw. New York: Cambridge University Press, 1997. Pp. xlvi, 939. Price: \$49.95 (Softcover).  
Reviewed by Ralph Wilde.

This work, the fourth edition of a book that has become the set text in many public international law courses in the U.K., provides a clear, systematic examination of all the major contemporary issues in international

law, written in an engaging and readable style. Shaw's work offers commentary and description on the process of international lawmaking, rather than a cases and materials format. While the book is primarily written from an English law viewpoint, it contains important sections devoted to the perspectives of other jurisdictions, notably the United States (see, for example, p. 327), and comparative law covering civil and other common law countries. Shaw also frequently analogizes to municipal law to good effect, successfully comparing and contrasting it with international law in many situations (for example, the connection between territory and municipal land law concepts, p. 334). The work includes sufficient detail to reflect the complexity of issues without overwhelming the newcomer, and Shaw skillfully highlights and answers the questions that a reader encountering the subject for the first time might raise, such as the special status of Taiwan and the PLO (pp. 166 and 174). The work is also useful for the international lawyer in that it revisits first principles and cites resources from which innovative interpretations of each topic can be formulated.

The scope of the book is as ambitious as international law itself. Shaw grapples with the full breadth of the subject from the jurisprudential discussions of the early chapters to institutional technicalities like the human rights instruments. The chapters on background and theory are exceptionally useful in placing the subject in its historical and jurisprudential context. The wide scope of approaches, from Kant to Koskiennemi, is a necessary consequence of the conceptual diversity that the discipline embraces. The text discusses case law both to demonstrate the development of the law and to give a flavor of the issues that occur when that law is applied in tribunals. Institutional issues are also covered thoroughly. These sections include constitution and composition, range of functions, sanctions available, resources issues, relationships with other institutions, success and failure, and future proposals. For example, although one chapter examines the subjects of international law, Professor Shaw acknowledges the increasing significance of individuals and international organizations in this field by covering them in separate chapters.

Insofar as the work contains a jurisprudential approach, Shaw seeks always to ground the discipline's approaches in their historical and political context. Thus, when he describes De Visscher's approach to territory as an attempt to "render the theoretical classifications more consonant with the practical realities," (p. 345) he could really be talking about the enterprise of his own book. Shaw identifies the kinds of international phenomena and problems that the international legal process attempts to address. Furthermore, he traces both the historical development of each area of the law, identifying the particular political and philosophical factors that precipitate change. The author describes the law as it is and makes suggestions about how it should be. Above all, he directly addresses *the* issue that those coming from a background in municipal law have to resolve, namely the overwhelming importance of power and politics. Shaw's

perspective explores how international law is, nevertheless, "law," distinct from morality, politics, and courtesy. He is willing to put himself on the line and distinguish the two in particular cases such as those concepts that he considers "not necessarily legal principles as such but rather purely political or moral expressions" regarding title to territory (p. 354). When discussing concepts, Shaw constantly points out, with examples, that more often than not the issues in any given case do not fall into neat categories (p. 344). He refers to the policy factors that are influential in these circumstances, such as "the need for stability in the international system," and explains why different weight is given to them in different cases.

One of the many strengths of the book is its willingness to reflect the diversity of opinion that prevails in scholarship on any given issue while remaining firmly engaged in the business of describing the law to the extent that this is possible. From a starting point of English, and to a lesser degree, U.S. approaches, coverage embraces scholarship in France, other European countries, Africa, Asia, other Commonwealth countries (notably Australia and India), and the Soviet Union. Important references are made in the main body of the text, coupled with comprehensive citations of seminal scholarship on both major topics and discrete subjects in footnotes. On highly controversial issues, Shaw invariably avoids taking a position, but, in most cases, he thoroughly examines the opposing paradigms and then sets out the prevalent "received wisdom," the position that most scholars take (for example, on the importance of *opinio juris* at p. 76). In doing so Shaw does not encourage black-letter analysis, but rather brings some sense to what would otherwise be chaos to a newcomer, even as he encourages readers to go to the cases and scholarship and think for themselves. When Shaw does take a position on a controversial topic, he normally emphasizes that there is more than one view in this area, such as in his discussion of the Falklands issue (p. 361).

Such an ambitious work is not without its limitations, many of which stem from the editing challenges inherent in describing so many connected concepts. There is occasionally repetition, such as the double description of estoppel (pp. 350–51). Sometimes terms are undefined until late in the text, without even a footnote reference to the subsequent definition (for example, the reference to baselines at p. 363). Shaw does not always conclude chapters with an attempt to draw the information together, making some sections, notably the institutional chapters, dry, somewhat systematic descriptions of various machinery lacking concluding analysis. Another problem, by no means unique to this work, is the technique of listing cases and instruments at the start of the book with references to the relevant section in the text but without their citations. The citations are instead in the footnotes. To include them in the list would therefore be a repetition, but this would greatly enhance the usefulness of such books to researchers and practitioners, who may consult the list just as much to find a reference to the citation as to locate the book's description of the case.

The fourth edition of Shaw's text is even more comprehensive than previous editions. Topics have been updated and expanded in the light of new cases, scholarship, and political developments: for example entirely new chapters have been introduced on the United Nations and human rights. It remains one of the most accessible works in its field and is surely destined to continue creating an enthusiastic response in newcomers and providing a valuable resource to all those already interested in the subject.

*Reconceiving the Refugee in International Law.* Edited by James C. Hathaway. Cambridge, MA: Kluwer Law International, 1997. Pp. xxix, 171. Price: \$78.00 (Softcover). Reviewed by Ralph Wilde.

This important work is a powerful response to the current crisis in international refugee protection. Through a skilful examination of concepts and practicalities, it attempts to reconceptualize the current international legal framework so that it can have a more meaningful impact on the refugee problem. In the introductory chapter, James Hathaway sets out the "Rights-Regarding Model of Temporary Protection" that provides the overall framework for the book. Each chapter considers a different aspect of the concept: Hathaway and Manuel Angel Castillo consider temporary protection, and Maciej Domanski looks at what it is to be a refugee; Robert Gorman and Gaim Kibreab address "Development Aid and Development Assistance"; Asha Hans and Astri Suhrke focus on "Responsibility Sharing"; and Amitav Acharya and David Dewitt look at "Fiscal Burden Sharing." Bill Frelick concludes with a critical appraisal of each contribution.

The book's genesis and approach reflect the challenges and ambition of its thesis. It is the product of a lengthy series of consultations, involving all those concerned with refugee protection, from governments to international organisations. As the title suggests, it is a work in progress, providing suggestions as to what can be *thought about* in this field rather than a fully-worked out explanation of what the thinking should be. Each chapter concludes with a series of questions and points for further discussion. This inchoate approach does not mean, however, that the thesis advanced is not sophisticated and, at times, brilliant. Instead, it reflects the reality that reform of such an important legal regime will be a process, not a single event, and one that will probably take many years. It is, to use the phrase that is repeated like a mantra throughout the work, a "*principled and pragmatic enterprise*," for reform that is "realistic within contemporary political constraints, yet . . . inspired by norms of justice" (p. 83).

Hathaway sees two main conceptual flaws with the current state of refugee law. First, it gives full responsibility for the protection of refugees to the receiving state, irrespective of its ability to respond adequately to this challenge. Second, in many developed states, asylum has historically been

equated with permanent immigration, and, as a result, there is increasing resistance by such states to offer refugees protection within their boundaries. Thus, refugee law has come to have a "marginal role in defining the international response to involuntary migration" (p. xviii). The majority of the world's refugees are located in developing countries that cannot support them; as legal obligations are only triggered when refugees enter territory, developed countries adopt *non-entrée* policies. Whereas the refugee law regime was originally instituted by states to safeguard their interests with reference to migration policy, this self-interest no longer converges with the law. It is necessary, therefore, to return to first principles and conceive a regime that genuinely addresses the needs of the two actors to which this area of international law applies, states and refugees. This reformulation starts from the notion that there should be a right to seek protection outside the state of origin when there is no realistic prospect of removing the risk of serious human rights abuse there.

Castillo and Hathaway posit temporary protection as a concept that is both legally authentic and practically viable. Since refugee status is "explicitly conditioned on the continuation of a risk for refugees in the country of origin," (p. 2) it is by definition temporary in nature. This was originally the price demanded by states for their cooperation in a refugee protection regime. Today, the link between asylum and immigration needs to be broken so as to increase the willingness of states to accept refugees and therefore safeguard the concept of asylum. Protection would be focused on repatriation, with permanent resettlement as an exceptional or, after a five year period, residual option. In addition, the host state location should not be determined by accident of fate in anything other than the very short term. Instead, an inclusive process should decide where refugees should reside, having regard to factors such as location, resources, security, culture, and tradition.

Domanski explains the sociological and psychological effects of being a refugee and why it is that a branch of human rights law concerns itself with the particular situation that such individuals face. It looks at this situation in refugee camps, and examines issues like the desocialization and dematuration that occurs upon becoming a refugee, changing attitudes to time and space, and grief and anxiety. A refugee (who is, ironically, unnamed) is quoted as saying, "A feeling that never leaves you when you are a refugee is a feeling of being 'nothing', of your overwhelming 'nothingness'" (p. 31). That it was felt necessary to include such a chapter is a sad indictment of the extent to which rhetoric on bogus asylum seekers has deflected attention from the needs of genuine refugees.

Gorman and Kibreab discuss the interrelationship between refugees and development in the countries of origin, flight, and asylum. They insist that refugees "can as easily be agents for . . . as burdens on development" (p. 37), and advocate a bottom-up model. Development activities should be geared towards making repatriation viable, both in terms of how

communities develop while in exile and the conditions that they face on return. The shortcomings of current "cooperation" between agencies like UNHCR and UNDP, with their different mandates and roles, is highlighted. Three kinds of assistance are conceived, (initial) humanitarian infrastructure and refugee programs. Refugee Development Councils and Local Development Councils would also be set up, composed of refugees and host communities, to implement the assistance provided and prepare for repatriation.

Hans and Suhrke outline the history of sharing responsibility for hosting refugees and propose a regionally-oriented model for the future. Refugees are initially distributed in a spontaneous and anarchic fashion that leads to biases in responsibility-holding. There has only ever been limited, *ad hoc* burden sharing, since "legal obligations and humanitarian conditions alone rarely suffice to persuade states to admit refugees" (p. 104). The authors therefore adopt a *realpolitik* focus on why states do not shoulder their responsibilities, arguing that this occurs because they do not see their interests affected by refugee crises in far-off countries. Hans and Suhrke suggest that it is possible to conceive, from the perspective of regional security and development interests, a more compelling regionalized model for responsibility sharing. Acharya and Dewitt engage in an impressive examination of the politics behind the changes in fiscal responsibilities for refugees. They argue for a "distributive-development" framework, taking a broad, conceptual approach rather than discussing specifics, and laying emphasis on the security implications of refugee flows that demand preventive and remedial responses.

Throughout, issues are discussed in a well-informed and insightful manner, illustrating the depth of authors' understanding and knowledge. Observations are extremely coherent and persuasive, and always squarely within the bounds of reality. A self-consciously pragmatic approach responds to the concerns of both right (for example, development strategies might lead to poor states "generating refugees in order to benefit" (p. 75)) and left (for example, regionalized burden models amount to a globalized form of apartheid). It is a compelling and nuanced reform proposal to what is currently a morally bankrupt legal system, and one that deserves the attention of all those concerned with refugees and human rights.

*Religious Liberty and International Law in Europe.* By Malcolm D. Evans.  
New York: Cambridge University Press, 1997. Pp. xxxi, 394. Price:  
\$79.95 (Hardcover). Reviewed by Ralph Wilde.

This work is really three books on religion and Europe: first, a survey of the historical and philosophical importance of religious freedom; second, a review of the institutional arrangements that promote religious freedom; and third, a discussion of the treaties and case law that have developed in

international law. Malcolm Evans approaches the subject in a chronological fashion, with all three discussions running throughout the entire work—as periods change, the prominence of each issue shifts. For example, the early chapters place much more emphasis on history and politics. In contrast, the chapters on the League of Nations and U.N. regimes concern the debates, proposals, and amendments of their legislative histories.

Evans illustrates how the concept of religious toleration, now subsumed within the idea of human rights, began in ancient times and developed in a manner that influenced the subsequent concept of human rights. In many ways, this process tracks the development of public international law generally, and international human rights law specifically. Thus, the usual suspects and events make an appearance, from Grotius and the Treaty of Westphalia to Eleanor Roosevelt and the ECHR. However, the book is not merely a trek through familiar developments with religious elements flagged along the way. The focus on religion, as both an influence on and part of the subject matter of the development of international law, sheds new light on the nature of the entire international legal order. The work brings to prominence the extent to which religion, although ultimately displaced by Enlightenment-based philosophy, was nevertheless instrumental in the early development of international law. Such insights are, however, peripheral to the main enterprise of the book, which is to trace the evolution of the concept of religion as it has been reflected in international human rights law, from hortatory preambles to detailed case law.

The first chapter investigates how religious developments in the pre-modern age, and the Judeo-Christian tradition that dominated them, shaped the secularized modern age. For example, Evans illustrates how the “just war” concept, which became secularized through natural law thinking, had its roots in premodern religious principles. An examination of religious toleration in the ancient world reveals that it was “not born of philosophical conviction but based on political expediency” (p. 16). He then explores the development of modern public international law as a system within which religious tolerance could be effected. The importance of thinkers like Victoria and Gentili (who rejected differences in religion as a basis for wars between states, and argued for tolerance of religious differences within states) is highlighted. The second chapter concerns the modern age, from the Westphalian settlement in Europe to the Treaty of Versailles. Agreements now begin to include religious protection, particularly focusing on resistance to interference with religious minorities. As each legal development progresses, Evans identifies the religious elements, such as the clauses in treaties, and the particular concept of religious freedom that they embody. As the chapter concludes, one can see how religion in international relations ceased to be a means of determining the physical boundaries of the state.

The negotiations around the League of Nations, discussed in Chapter 3, hint at the future role of human rights in that the obligations of public international law were seen as requiring oversight. There were concerted

efforts to incorporate guarantees for religious freedom which, although ultimately unsuccessful, paved the way for the minorities treaties that would follow. These are discussed in Chapter 4, and in Chapter 5, Evans outlines the extension of their provisions in other instruments; Evans examines the minorities regime in detail. It is interesting to see how primitive and short-lived League-era initiatives anticipated the kind of activities that would be integral to subsequent U.N. human rights bodies. The reporting obligations imposed on Albania in its Declaration on joining the League, for example, echo the reporting requirements imposed on states subject to the scrutiny of the U.N. Human Rights Committee. Chapter 6 investigates how these embryonic human rights obligations worked in practice.

In the latter half of the book, Evans conducts an exhaustive examination of religious liberty and the modern human rights institutions. This begins with an overview of the development of the U.N., where freedom of religion was separated from the framework of minority rights. Evans then discusses the Universal Declaration of Human Rights, article 18 of the International Covenant on Civil and Political Rights, and the 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion and Belief. It is only in Chapters 10–13 that he focuses exclusively on Europe. Here, Evans provides a major work in its own right, with his comprehensive discussion of the legislative history and case law of article 9 and article 2 of the First Protocol to the ECHR.

In the human rights discussions, certain controversial concerns resurface throughout all of the debates. These include the right to change one's religion, or abandon it (apostasy); the "just war" concept and conscientious objection; the definitions of "religion" and "faith"; the scope of *manifestation* of religion; the status of non-traditional faiths; and proselytizing and missionary activities. It is here that the strictly chronological format weakens the force of the thesis. Concerns are mentioned each and every time they crop up, leaving it to the reader to recall previous references and retain any analysis in the event that the issue will be reiterated later in the book. Readers may have preferred discussions on a topic by topic basis, to acquire a better sense of how various developments have dealt with the same issue. The reader is left with many unanswered questions, as it is not the purpose of the book to discuss how such concerns can be resolved but merely to convey their importance. The key dilemma running through the book is whether faith is compatible with toleration and human rights. If by definition the ultimate predicate for international human rights is secularism, to what extent can religion be fully promoted within a human rights law framework? Professor Evans discusses this tension, but ultimately sidesteps it by concerning his discussion with religious *liberty*, thus perhaps acknowledging the impossibility of reconciling the ultimate political consequences of faith with those of human rights law.

Notwithstanding these ideological dilemmas, there is a smooth blend of description and analysis throughout the book. For example, the exhaustive



discussions of legislative history are peppered with comment and concluded with succinct and perceptive analysis of the policy and political factors that can be identified in the process. This book will be of interest to a broad range of people, from international jurists to human rights law practitioners, historians, and religious scholars.

