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Book Reviews

BOOK REVIEWS

The Evolution of the Right of Self-determination: A Study of United Nations Practice. By A. Rigo Sureda. Leiden, Netherlands: Sijthoff International Publishing, 1973. Pp. 397.*

Rarely does a Ph.D. dissertation make a good book, but this volume is an unquestioned exception to the general rule. *The Evolution of the Right to Self-determination* is one of the most exact and even law books I have had the pleasure of reading.

This reviewer is more than casually interested in the right of self-determination since he has served for several years as counsel for the People of Micronesia, whose effort to obtain independence from (or free association with) the United States and trusteeship status represents a significant current expression of the right of self-determination. Unfortunately, the book does not consider this Trust Territory of the Pacific, thereby overlooking an actual case which calls forth all the classic issues pertaining to the right of self-determination, such as: who controls and supervises a plebiscite, what questions are submitted, what pre-plebiscite "educating" occurs, what negotiations precede the plebiscite, what alternatives must be offered, whether the Trustee can in any way profit, whether some groups or territories can go one way and some split off and go another, etc., etc. The case is unique because this is the only "security" Trusteeship under the jurisdiction of the Security Council, rather than the General Assembly, and the only one posing the issue of the degree (if any) to which self-determination may be restricted in the interests of the "security" of some or all other nations.

Apart from this omission, the balance discusses every relevant case, and there are over 100, from the Aaland Islands, through Goa and Palestine to Zambia.

But this is more than a case-by-case analysis, more than a record of successes and failures. From a coherent historical perspective, the author examines the movements of the different pieces of the world gameboard, revealing the conflict between harsh political realities, on

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one hand, and the democratic ideal of renouncing all forms of territorial grabs in favor of plebiscites and self-determination on the other. Thus, in World War I, Germany first proposed self-determination to break up the British empire. The Allies refused the principle and divided Alsace-Lorraine, the Austrian Tyrol and Kiao-Chau. Only in the "mandates" was a self-determination embodied. And incidentally, the world lost a prime chance to fix the rule that no territory could be acquired by military victory.

Sureda finally faces this dilemma in his closing chapter, "The Exercise of the Right of Self-determination and the Law of Use of Force," recognizing that:

> During the last decade the Security Council and the General Assembly have passed resolutions on the right of self-determination which seem to leave deliberately obscure the relation of this right with the prohibition to use the force contained in Article 2(4) and with the provisions on self-defense of Article 51.

This is accurate enough by way of capsulizing what has happened, but Sureda understates the impact of those resolutions by saying that they "raise a host of questions." In fact, they raise the bloody conflicts of Indonesia, Goa, Portuguese territories, Israel-occupied territories and more.

It is not proper here to detail the extremely careful analysis of the various incidents of self-determination. These can best be examined as presented in the book. But, a word needs to be said about how the author faithfully covers all of the major questions that one might raise as to self-determination: competence of organs of the United Nations; the difference between "non-self-determined" territories and others; who are the people entitled?; what is the "subject"?; are territorial claims covered?; can special groups or areas separate off?; what about colonies, and mandates and trusteeships?; and, procedures for self-determination.

I know that this book will remain on my bookshelf, that it will be much referred to, and that its pages will become dog-eared from use. Is there a better tribute to a book or an author?

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The International Law of Pollution. By James Barros and Douglas M. Johnston (eds.). New York: The Free Press, 1974. Pp. xvii and 476.

As the editors point out in their preface to *The International Law of Pollution,* "Few libraries in the world are arranged so as to be of maximum convenience to students of pollution control policy. Policy problems of this kind cut across familiar disciplinary lines, and the relevant materials usually have to be flushed out with greatest difficulty from different sections of the library system. In part, therefore, this collection is designed as a practical research tool for students of international pollution control problems," (p. xiii).

With this in mind they have put together a collection of materials under three general headings:

I. *The Pollution Problem in Science, Law and Policy,* in which they include some selected definitions, including that of "waste" from the Canadian Arctic Waters Pollution Prevention Act, together with a three-page list of pollutants, and a group of decisions of the United States Supreme Court, opening with *Missouri v. Illinois and the Sanitary District of Chicago* (1900) and finishing with *Sierra Club v. Morton* (1972). Unfortunately, no citations are given, and there is no table of cases, although the decisions are listed by name in the index;

II. *The Emerging International Law of Pollution,* covering such matters as (a) responsibility for extraterritorial environmental damage—with extracts from the *Trail Smelter* and *Corfu Channel* decisions and emphasis on the proposition that it is "every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States"; (b) pollution of international rivers and lakes—with special emphasis on Canadian-United States relations (although such rivers as the Rio Grande and the Indus are also included); (c) air pollution —with another extract from the *Trail Smelter* case, in addition to the International Joint Commission's Report of 1971 on the situation in the St. Clair-Detroit region; (d) marine pollution from oil and dumping of deleterious matters (in addition to the relevant international conventions, there is the text of the Canadian Arctic Waters Pollution Prevention Act, as well as the United Kingdom legislation on regulation of oil in navigable waters); and finally, (e) the texts of relevant documents on international environmental cooperation and regulation (in addition to the material on the Stockholm Conference and its consequences, there

is the agreement between the Soviet Union and the United States on environmental protection, with its memorandum of implementation, and also the joint communiqué on environmental issues resulting from the meeting between the United States and Canada in 1972); and

III. *Selected Issues in International Environmental Law,* which examines (a) the environmental problems of internationally shared areas—with extracts from the Geneva Conventions on the Law of the Sea, Antarctica, and outer space; (b) ecocidal weapons and those of mass destruction—by means of the Hague Regulations on Warfare of 1907, the Geneva Gas Protocol, the various United Nations resolutions on biological weapons, and the treaties that have been signed since 1963 on nuclear weapons; and finally, (c) international radiation hazards—with treaties establishing the International Atomic Energy Agency and its European counterpart, the Convention on the Liability of Operators of Nuclear Ships, and finishing with IMCO's Convention of 1971 on Civil Liability in the Field of Maritime Carriage of Nuclear Material.

It goes without saying that the editors have compiled a basic collection of material on the International Law of Pollution which should prove of great value to students. Admiralty lawyers and government legal advisors should also find the book of enormous practical utility, since nothing quite like it exists. The collection's value is enhanced by the bibliographical material which is appended to each section, as well as by the brief introductory material with which each section opens.

Despite the usefulness of this work, it does not provide "a conceptual framework for systematic inquiries into all aspects of the international legal process for the prevention and control of pollution." (p. 465.) In the editors' view, one of the principal difficulties in the way of such a work lies in the need to balance "conceptual integrity against the demand for practical utility." They emphasize the importance of recognizing the social complexities involved in this area of the law, arguing that the "legal scholar will have little to contribute creatively if he limits himself to 'traditional exercises in derivational logic'." While this may in fact be true, and while it may be necessary to recognize the significance for international law of the "policy science" approach of Lasswell and McDougal, it is also true that any scholar motivated to follow this advice need not necessarily commit himself to the language which to a great extent has become identified with the Yale approach, particularly as exemplified by McDougal's writings.

Given the increasing importance of environmental issues in interna-

tional law, including especially the control and suppression of potential pollutants, this collection by Professors Johnston and Barros will prove a most useful *vade mecum* which can be recommended for inclusion in the library of any serious student of the International Law of Pollution.

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A Treatise on International Criminal Law, Volume I and II. By M. Cherif Bassiouni and Ved P. Nanda (eds.). Springfield, Illinois: Charles C. Thomas, Publisher, 1973. Pp. xxv, 751 and xix, 426.[1]

A Treatise on International Criminal Law is the first major work on international criminal law to appear in English since the groundbreaking source book of G.O.W. Mueller and E.M. Wise.[2] The treatise consists of two volumes, entitled *Crimes and Punishment* and *Jurisdiction and Cooperation.*

The most significant feature of the treatise is its attempt to integrate two conflicting aspects of international criminal law. In this connection, the major division of the work is not along lines of substantive law and procedure, as the respective titles of the two volumes might suggest, but rather arises from the competing demands being placed upon workers in this relatively new field of international law. On the one hand, the contributing authors of this work strive to describe an existing academic discipline called International Criminal Law (I.C.L.). On the other hand, they wish to serve as the forerunners of a developing branch of international law, which is at present in its infancy, but which the various authors uniformly consider desirable, and toward which they wish to lead others in the international legal community. In a sense, the editors and their contributors are realists attempting to deal with a visionary subject, or perhaps they are visionaries in search of a realistic presentation of their beliefs.

International crime has been with us since the days of the Odyssey. International Criminal Law, as a scholarly discipline, is of much more

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2. INTERNATIONAL CRIMINAL LAW (G. Mueller & E. Wise eds. 1965).

recent vintage, particularly in the United States. A leading American exponent of the subject posits 1965 as its birthyear in North America.[3] Since that date, there has been a rapid expansion of interest in the field, perhaps in response to the growing awareness of the dangers to the world community of unchecked acts of international lawlessness.

The split personality of the treatise is reflected in the use of the term International Criminal Law itself by the various contributing authors. As used in this work, "International Criminal Law" means alternatively, the penal aspects of public international law, or the international ramifications of municipal penal law. The editors wish to use the term in both senses, ostensibly devoting Volume I to the exploration of the various implications of the former sense, and Volume II to the latter sense.[4] In fact, however, the first one hundred pages of Volume I consist of five essays on the scope of International Criminal Law.

The first view of International Criminal Law—that which focuses on the penal aspects of public international law—encompasses legal provisions defining criminal conduct and its punishment on a supranational level, administered by an international agency, controlling in an international jurisdiction, and enforced by an international authority. This is International Criminal Law in a material sense. Thus defined, it is, at present, merely a call for action, a plan for the future.

The second category of International Criminal Law—that which focuses on the international ramifications of municipal penal law —includes extensions of domestic criminal jurisdiction to cover acts committed by nationals abroad, by foreigners domestically, or acts which result in an injury to a domestic interest. Also included are various forms of cooperation among essentially sovereign national agencies, for example, extradition, the recognition of foreign criminal law for purposes of res judicata and statutes of limitation, and international police assistance. Finally, included in this second category are municipal penal provisions for the protection of the freedom of the seas and airspace, peace, human rights, and other mutual interests of the community of nations. Thus, the second view is obviously broader, and permits descriptive, as well as normative or prescriptive analysis.

The issue is not merely one of semantics. The definition chosen

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3. 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 5 (M. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as 1 TREATISE].

4. M. Bassiouni & V. Nanda, *Preface* to 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW: JURISDICTION AND COOPERATION at *ix* (M. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as 2 TREATISE].

tends to represent the author's viewpoint on the necessity of an enforcement mechanism. The posture adopted by the author may reflect an evaluation of his own role primarily as an analyst of the prevailing state of international law, or as a prophet of desirable change in international law.

A minimal requirement for labelling a given system as International Criminal Law is suggested by H.L.A. Hart's general definition of law as ". . . the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication. . . ."[5] To the extent International Criminal Law is to be considered a legal system, its scope must be restricted somewhat in order to comply at least with Hart's criteria. More importantly, however, a sharp distinction should be drawn between International Criminal Law in the material sense and International Criminal Law in the broader sense.

The leading advocate of the narrow interpretation of International Criminal Law as internationally enforced criminal law is Schwarzenberger. He writes,

> Used in any other sense this term is merely a loose and misleading label for topics which comprise anything but international criminal law, that is to say, rules germane to international law with two essential characteristics. Such rules must be of a prohibitive character and be endowed with specifically penal sanctions. . . .[6]

Four of the five articles in Part I of Volume I deal explicitly with Schwarzenberger's criteria. Two reject this approach as simplistic.[7] Two endorse it.[8]

Van Bemmelen, in one of the articles on the scope of International Criminal Law, writes,

> While I agree with Professor H.L.A. Hart that international law deserves the title of "law," in my opinion, he ought to have added that because international law lacks sanctions and is not provided with a central organ for the enforcement of its rules . . . [,] international law is in no way I.C.L. in the material sense of the word.[9]

The broader view is exemplified by Mueller and Besharov, who write that I.C.L. is a "complex set of norms and conflict-resolving

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5. H. HART, THE CONCEPT OF LAW 95 (1961).
6. Schwarzenberger, *The Problem of an International Criminal Law,* in INTERNATIONAL CRIMINAL LAW, *supra* note 2, at 3, 14.
7. Mueller & Besharov, *The Existence of International Criminal Law and Its Evolution to the Point of Its Enforcement Crisis,* in 1 TREATISE 5; Ryu & Silving, *International Criminal Law: A Search for Meaning,* in *id.,* at 22.
8. Van Bemmelen, *Reflections and Observations on International Criminal Law,* in *id.,* at 77; M'Wendwa, *Sovereignty and International Criminal Law,* in *id.,* at 94.
9. Van Bemmelen, *supra* note 8, at 78.

mechanisms adhered to by sovereigns within a particular jurisdictional unit, through agreement or the use of sanctions. . . ."[10] But even Mueller, who in his contribution to this volume scorns the essentiality of an enforcement machinery, has previously taken the opposite position. In his evaluation of the U.N. Draft Code of Offenses against the Peace and Security of Mankind, he wrote:

> Unlike the *victors' justice* of old, a modern system of international penal justice must rest on the consent of the nations whose citizens submit thereto, and unlike the visions of old, such a new system must have at its disposal "the proper means for the efficacious pursuit of its objective" and that requires a world monopoly of power in one righteous world community.[11]

While not necessarily in agreement with the requirement of a *monopoly* on power in a worldwide organ, many of the contributing authors dealing with specific international criminal law problems agree on the need for an international enforcement body. For example, Sundberg, dealing with piracy, advocates the creation of an international criminal court endowed with some enforcement machinery.[12] Bassiouni, writing on genocide, adopts a similar position.[13] Tran-Tam arrives at the same conclusion in his article on terrorism.[14]

The two main reasons why some writers on international criminal law are reluctant to emphasize the need for enforcement are first, the tendency of such writers to draw analogies between I.C.L. and international law in areas where enforcement machinery is not as crucial, and second, their reluctance to engage in "utopianism." However, efforts to develop a body of International Criminal Law by too close an analogy to Civil International Law are misleading. As Ryu and Silving point out:

> Efforts at formulating rational bases for an I.C.L. are obfuscated by a failure of the "international community" and its interpreters to recognize the sui generis nature of criminal law. Often standards of international law developed in contractual, commercial, or torts contexts are indiscriminately applied to I.C.L.[15]

A more fundamental reason for the existence of the sharp split in the definitions of International Criminal Law is the reluctance of the

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10. Mueller & Besharov, *supra* note 7, at 5.
11. Mueller, *The United Nations Draft Code of Offenses against the Peace and Security of Mankind: An American Evaluation,* in INTERNATIONAL CRIMINAL LAW, *supra* note 2, at 597, 626.
12. Sundberg, *Piracy and Terrorism,* in 1 TREATISE 489-90.
13. Bassiouni, *Genocide and Racial Discrimination,* in 1 TREATISE 522, 532. (footnote omitted).
14. Tran-Tam, *Crimes of Terrorism and International Criminal Law,* in 1 TREATISE 490, 497.
15. Ryu & Silving, *supra* note 7, at 22.

contributing authors to accept either the role of conventional commentators on an existing state of affairs, or of futurists urging the adoption of a radically new system. Instead, they prefer to straddle the fence. For example, Nepote, in his article on the role of an International Criminal Police in the context of International Criminal Law, deals both with the "purely hypothetical" question of the functions of an international police force in an I.C.L. system in the material sense, and the "quite concrete" question of the current cooperation of national police forces in the case of "international" crime.[16]

This ambivalence is reflected in many of the contributions on the two great issues of International Criminal Law—crimes against peace and crimes against mankind. Under the heading of crimes against peace are included essays dealing with aggression and the regulation of armed conflicts. Under the heading of crimes against mankind are included articles on piracy, terrorism, genocide, and related subjects. For example, dealing with the subject of war crimes, Baxter points out that the Anglo-American practice following World War II was to charge violations of international law, even in cases pending before domestic tribunals. Whereas, the approach in France was to consider conduct labelled as war crimes as violative of the *Code Penal.*[17] Neither approach, however, meets the requirements of I.C.L. in the material sense, which is presumably the reason why Baxter's article is placed in Volume II.

Writing in Volume I, Vogler states:

> The development of a scientific ICL requires an answer to the [defense of "superior orders"] . . . based on international law principles, since the principle of the preeminence of international law precludes recourse to justifications which are valid in the national legal systems. . . .[18]

Once again, the conflict between dealing with existing, albeit national, standards and proposing desirable, but idealistic, practices surfaces. This pervasive conflict and ambivalence does not destroy the aims of the editors, however. On the contrary, it serves two important ends. First, there is clearly an urgent need for the development of International Criminal Law in the material sense. It is becoming increasingly

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16. Nepote, *The Role of an International Criminal Police in the Context of an International Criminal Court and Police Cooperation with Respect to International Crimes,* in 1 TREATISE 676.

17. Baxter, *The Municipal and International Law Basis of Jurisdiction Over War Crimes,* in 2 TREATISE 65, 66-71.

18. Vogler, *The Defense of "Superior Orders" in International Criminal Law,* in 1 TREATISE 619-20.

apparent that the optimal jurisdictional unit for coping with such crimes as piracy and terrorism, aggression and genocide, is the community of nations. The impetus toward this development provided by this work is its most important contribution. As Bassiouni and Nanda write, "The contributing authors to this book agree . . . that we cannot afford to remain still because of these difficulties, for even if there is doubt about international criminal law, there is no doubt about international criminality."[19]

Second, while this treatise is not a definite restatement of its subject matter, it is a definitive introduction to it. The basic dichotomy which pervades it raises challenging questions, provokes thoughts, and may conceivably lead to some much needed action. At this stage in the development of International Criminal Law, that is the most that can be hoped for.

Alexander Geiger

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19. *Preface* to 1 TREATISE at *xii*.