

January 1994

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### Recommended Citation

Theodore L. Banks, *European Community Law After 1992: A Practical Guide for Lawyers Outside the Common Market*, 22 *Denv. J. Int'l L. & Pol'y* 541 (1994)(book review).

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## European Community Law After 1992: A Practical Guide for Lawyers Outside the Common Market

### Keywords

Comparative Law, Attorneys, Legal Profession, Professional Ethics

# BOOK REVIEWS

## **European Community Law After 1992: A Practical Guide for Lawyers Outside the Common Market**

REVIEWED BY THEODORE L. BANKS\*

EUROPEAN COMMUNITY LAW AFTER 1992: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET; Edited by Ralph Folsom, Ralph Lake and Ved Nanda; Kluwer Law and Taxation Publishers, Deventer, The Netherlands (1993); \$162.00; ISBN 90 6544 643 5; 780 pp. (hardcover).

In order to be effective, a good business lawyer must know the facts relating to the business, understand the business problems facing the client, and then apply the law to that situation in order to solve the legal component of the client's business problem.

When working in one's home community, it is relatively easy to speak with authority about the local legal environment. When a U.S. lawyer is dealing with a foreign government, or an entity like the European Community (EC), things become a bit harder. First, the legal problems may not be evident, since a foreign jurisdiction presents issues that may not be of concern in the United States. Second, application of the foreign law may not be understood.

A U.S. lawyer may enlist an advocate in the foreign jurisdiction, assuming a competent attorney can be found who speaks a common language. It is important to find one who not only speaks your language, but who is also on your "wavelength." This means someone who understands business in general and can readily appreciate a client's commercial goals. This foreign lawyer also needs to be able to communicate quickly and clearly — he or she needs to be able to identify the key problems and express legal risks in a way a client can easily evaluate. In short, an ideal foreign lawyer has to be able to represent a client as you would.

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Searching for the ideal lawyer is hard and time-consuming. There is often little time to conduct a thorough search, and the client needs answers quickly. The impatient client, or one facing a business deadline, will turn to someone else, or may just act on his or her own intuition. In that case, the lawyer may have lost a client; worse, the client may be in deep trouble. Therefore, a lawyer should be expected to be able to give a fairly quick *preliminary* answer to a client on how things are. This can at least provide some "go"/"no-go" guidance and will avoid a monetary investment in legal impossibilities or wasted time searching for problems that do not exist.

For this preliminary answer, the U.S. lawyer needs to have a relatively easy path to the law. A great deal has been written about EC law since the 1950s, but trying to pin down the different sources can be daunting. This is where *European Community Law After 1992: A Practical Guide for Lawyers Outside the Common Market* comes in.

This handy, manageable volume provides briefing on EC law to help the U.S. lawyer become comfortable with the basics of European Community Law. The book covers most business situations and enables the uninitiated lawyer to help prevent an enthusiastic client from walking into a black hole. No matter how thorough this book is, however, remember the immortal words of Hans Solo to Luke Skywalker: "Don't get cocky." Local help will be essential to a competent representation. This book provides the basic instruction that a U.S. lawyer will need, but it won't substitute for the expertise of counsel based in an EC country. If the path seems clear, the client's planning process can proceed while the right local lawyer is lined up.

As the title suggests, this book provides a practical guide for lawyers dealing with common business situations in the European Community. For instance, if a client wishes to export technology to an EC member state, a lawyer may turn to the chapters entitled "Licensing of Technology in the European Community," by David Schollenger, as well as "Intellectual Property in the European Community," by Mark Abell. For a client selling products in the European Community, the book provides a section on "EEC Competition Law," by Stephen Johnson; "Product Liability," by Hanne Biloft-Knudsen and Mogens Yde Knudsen; "EC Regulation of Agency and Distribution Agreements," by Thomas Clasen and Christian Cabou; and "Franchising," by Martin Mendelsohn. Before selling products to the public sector, one should consult "Public Procurement Law," by Velia Leone.

In order to set up a business office or subsidiary in Europe, a lawyer would be well-advised to review "European Community Company Law," by Michael Gordon; "Securities Regulation," by Samuel Wolff; "Banking and Capital Movements," by Andrew Gamble and Gordon Travers; "EC Taxation in 1992: Harmonization Efforts and the Removal of Fiscal Frontiers," by Randall Costa, Robert Rich, and John Wilson; and "Mergers and Takeovers," by Joseph Griffin. The equal oppor-

tunity laws governing how employees are treated are covered in "Equal Pay," by David Larson, and "Employment Matters and the Social Charter," by Donald Dowling, Jr. If manufacturing operations are contemplated, then "European Community Environmental Policy and Law," by Ian Bird and Miguel Veiga-Pestana should be reviewed.

High-tech industries are also addressed in "Television Without Frontiers: The EC Broadcasting Directive," by Maria Nelson; "The EEC Directive on Computer Software," by Louis Bertone des Balbes; and "Telecommunications Law in the European Community," by Christina Beaton. Concerns under trade laws are covered in "Trading with Members of the European Economic Area (EEA)" by Leo Schmid and Waltraud Hakenberg and "Antidumping Proceedings," by William Davey.

Ultimately, lawyers may be called upon to advise clients regarding legal problems that require a visit to court. In such a situation, "Litigating European Community Law," by Ralph Folsom, may be helpful. Such problems may be avoided by drafting documents appropriately, and the section on "Choice of Law, Choice of Forum, and the Enforcement of Foreign Judgments Within the European Communities," by Ved Nanda and Deborah Bayles will be useful. If certain EC regulations disrupt the plans of a client, the chapters, "The European Community Law-making Machine," by Ralph Folsom and "Lobbying in Brussels and Strasbourg," by Patrick Thieffry and Philip Van Doorn may prove helpful. Special attention is given to problems presented by the reunification of Germany in "German Integration," by Michael Abels (pointing out that the use of the word "reunification" may be misleading).

The authors provide helpful historical backgrounds to make the reader comfortable with the topics before plunging into the current regulatory environment. The authors are distinguished by their expertise in their respective fields. The result is an excellent balance of in-house counsel, lawyers in private practice, and law professors, and the coverage presented in the book is neither too abstract nor too mundane.

An index would be helpful, and much of the regulatory source data could have been collected in appendices rather than in voluminous footnotes. Yet, on the whole, the material in the book is easily accessible through a logical organization structure, clear writing styles, and a welcome habit by practically all of the authors to get to the point. For a single volume reference to the EC legal environment, the breadth of this volume, combined with its relatively compact format, makes it a good investment.



# The Finnish Yearbook of International Law 1991, Vol. 2.

REVIEWED BY W. PAUL GORMLEY\*

THE FINNISH YEARBOOK OF INTERNATIONAL LAW 1991, VOL. 2. Helsinki: Ius Gentium Ry. Acta Societatis Fennicae Iuris Gentium A II, 1991; Pp. viii, 596; \$40.00.

Although it is one of the newest yearbooks of international (and comparative) law, the *Finnish Yearbook* constitutes a major contribution to legal literature. It parallels existing volumes in that the full range of international problems fall within its scope. Yet one of the unique contributions rendered by this most recent series is that a Finnish perspective is, to a significant degree, transmitted to a wider audience. This is not to say that volumes one and two are centered exclusively on Finnish scholarship or to Scandinavian legal issues; rather, a delicate balance between regionalism and internationalism has been struck. For instance, world-renowned scholars have joined the distinguished local academics and practitioners for the purpose of dealing with legal issues facing all of humanity, such as the need to stimulate environmental protection while simultaneously facilitating global development. Other common themes include preservation of water resources, fisheries, human rights; plus economic guarantees, social forces, the future role of international institutions; along with rubrics of traditional law and jurisprudence. Therefore, this huge volume will take its place alongside comparable volumes.

Eight major studies — that are in reality lengthy monographs — constitute the bulk of the text. Supplemented by shorter articles and comments that also render significant insights (plus a well chosen section of documents and reports dealing with Finland's International relations, including summaries of case law and appropriate treaty instruments), the Finnish perspective is dealt with in terms of contemporary international jurisprudence. This approach can be seen in the opening study by M. Fitzmaurice, entitled "New Developments in the Legal Regime of the Baltic Sea Fisheries." Following a review of geographical factors and ecological considerations, the Gdansk Convention is discussed from a law making perspective as the first phase leading toward the common fisheries policy of the European Union (EU). Delicate considerations had to be harmonized as a result of the EC accession to the Gdansk Convention and the introduction of the common

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fisheries policy, with the transfer of competence by EU member states to Brussels. The important factor is the extensive conservation measures that currently protect the Baltic Sea, especially its fishery resources, by the EU and the International Baltic Sea Fisheries Commission (IBSFC). This evolution was complicated by the unification of Germany and the inclusion of the East into the EU sphere. This trend of regionalism is being advanced by the IBSFC in its closer cooperation with the International Baltic Environmental Protection Commission. These recent developments should be closely monitored.

The second essay, "Restriction on Military Activities in the Baltic Sea — A Basis for a Legal Regime?" by Marja Lehto, logically follows. The legal rules imposed on warships necessarily affect the ecology of the region, along with the protection of fish stocks and, in fact, all life in the Baltic. Here, then, the force of customary law becomes involved with the United Nations' Law of the Sea Convention (LOSC), as these bodies of law regulate the innocent passage of warships and over-flight aircraft. In this instance, attention is placed on the exercise of power when coastal states seek to enforce their legal rights, pursuant to special regimes that are permitted by the LOSC. Furthermore, national legislation is applied by littoral states. In addition to the Scandinavian countries, the former Soviet Union imposed severe regulations on foreign vessels. For instance, notification was required prior to passage. Thus, a large corpus of military legislation and treaty law have become applicable. The as yet unresolved conflict concerns the relationship between these unilateral military restrictions, placed upon the use of the sea, with the "new" spirit of Baltic regionalism that should include a Nordic nuclear-weapon-free zone. There is obviously a need for stability within enclosed seas.

The third contribution, "Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others," by Katri Silfveberg, is a lengthy monograph that deals with an entire rubric of law, originating from the illegal traffic in persons. Attempts have been made by the League of Nations and currently by the United Nations, the Council of Europe, and the Nordic Council to control transboundary prostitution and traffic in persons, and even indentured slavery. However, the purpose of the study is to evaluate the modern approach, namely to place the protection of women and children within the orbit of human rights. This class — women and children — is the most helpless against the horrors of warfare, natural and man-made disasters, and sheer exploitation in defiance of national and international law. The author demonstrates how human rights law is emerging with regard to both limited, municipal rights, as well as universal guarantees. Special emphasis is placed on the protection of children by multi-national and international organizations. Also included is the newer topic of traffic in human organs and tissues, to the detriment of peoples in the developing countries. However, the thrust of this study is placed upon prostitution: its control and eventual elimination.



The numerous treaties and conventions and their sponsors are analyzed in considerable detail. These include the League of Nations, the United Nations, the Council of Europe, ECOSOC, and regional institutions. The valuable contributions of non-governmental bodies in furthering these programs are also accorded full attention.

The evolution of rights that are applicable to human beings generally, and women, children, handicapped persons, tortured individuals, prisoners of war, civilians in occupied territories, and classes of minorities specifically, has already achieved notable success. Nonetheless, the study concludes with a plea on behalf of those persons and groups still held in bondage and who are continually suffering.

Professor L.C. Green carries forward the examination of criminal justice in his study entitled "The Intersection of Human Rights and International Law." Professor Green explains how jurisconsults created traditional law, and the development of the field of international criminal law ensued. Accordingly, Professor Green employs a textual analysis to illustrate the manner in which this newer rubric is evolving from the classical norm of piracy, as interpreted by the Permanent Court of International Justice. Considerable attention is focused on those classical writers who set the foundation for newer, universal human guarantees, possibly encompassing humanitarian intervention, in appropriate circumstances. Indeed, he examines the opposing positions in considerable detail. Moreover, the scope of the inquiry is enlarged to encompass crimes that are committed against civilian populations in wartime or during occupation.

The essay does not have a set of conclusions; instead the technique selected is to indicate the weaknesses in contemporary law. Regrettably, on two occasions he slights the legal force of the Universal Declaration of Human Rights by stating that it "is nothing but a Resolution of the General Assembly and, as such, [is] devoid of any intrinsic legal authority," and that "the Declaration is a mere Resolution of the Assembly and therefore lacking in legal force." On the positive side, his approach leads up to a proposal that an international criminal court be established that would have jurisdiction to try offenders. Such jurisdiction would arise from a surrender of national sovereignty to the tribunal, presuming that states shall first agree on the nature of those human rights to be protected at the global level. Alternatively, if such agreement is lacking, national law must be modified in order to enable municipal courts to act against perpetrators. "In the absence of an international criminal court the only way that there can be a real intersection of human rights and international criminal law is by a universal codification indicating those human rights, the breach of which is to be considered criminal *jure gentium* and *erga omnes* granting every party the right to try."

The discussion of criminal law continues with Dr. Barry Feinstein's detailed chapter entitled "The Interception of Civilian Ves-

sels at Sea in the Fight Against Terrorism: Legal Aspects — An Israeli View." This discussion carries forward some of the issues examined by other contributors. In dealing with global issues, such as the law of the high seas and the nationality of vessels in terms of the law of the flag state, Feinstein is well aware of the rules governing innocent passage through territorial waters.

This review stresses that a logical and scientific approach should be adopted, relative to legal precedent; the study is even-handed when dealing with recognized exceptions, namely the duty of states to prevent hostile acts from taking place within their territories. Thus, an absolute duty is imposed on sovereign states. From this premise the author's main thesis emerges: the freedom of the high seas can become subject to the unilateral exercise of national jurisdiction in clearly recognized circumstances to freedom of navigation, primarily national defense, and also actions that endanger the integrity of coastal states.

At this juncture, the exceptions of terrorism and hostile acts directed against a specified territory give rise to the right of the coastal sovereign to board and search vessels, in contravention of the right to "innocent passage." In the instance of terrorism, a universal jurisdiction may be applied. Similar rights exist concerning the seizure of aircraft, especially those that have been hijacked. From this perspective, a full examination of previous seizures of vessels on the high seas, applicable conventions, and resulting case law are analyzed. Complete discussions of such events as the Cuban Missile Crisis, the Falkland Islands, and Algeria are employed to advance his thesis of acceptable unilateral action.

Naturally, Feinstein recognizes that this "right of self-defense" is not unlimited and must, henceforth, be exercised with considerable caution, even though the security of the state seems to be compromised by a particular set of circumstances. On the other hand, "the target State . . . will not sit idly by and allow the potential terrorist aggressors to retain the advantages of a buildup of resources and to be used ultimately against and to injure that State or its citizens. It is beyond doubt, then, that such a foreign vessel, even while sailing the high seas, will be the object of interception by the endangered State."

Notwithstanding the logical and forceful theses defended, this subject matter is far from settled; many additional controversies will arise in the future, when the competing rights of sovereign states necessarily come into conflict.

In the fifth study, "Self-Determination: An Overview of History and Present State With Emphasis on the CSCE Process," Juha Salo comes to grips with a topic of conflict that is present in every major area of the globe. In an article of nearly one-hundred pages, the author traces the historical roots of the concept, springing from President Wilson's Fourteen Points up to the present time. The author's specific

purpose is to determine "whether the CSCE process has added to the meaning of the concept." Indeed, a huge corpus of precedent exists, applicable to political and legal norms, particularly in the post-World War II period. Beginning with the common Article I of both United Nations Human Rights Covenants, self-determination arises as a human right, largely as the result of action within the United Nations. In fact, as a phase of the new international economic order, political and civil self-determination are being "extended" to include such approaches as economic self-determination. This extended focus of the norm will attract considerable attention in the future, notwithstanding its controversial nature, owing to the reaction within the United Nations General Assembly against economic colonialism.

A number of unique legal issues arise, as for example the place of self-determination within the orbit of human rights. To illustrate, it is being argued, with some justification, that "the realization of the right of self-determination has been claimed to constitute a necessary precondition for the enjoyment of all other human rights." Such issues as the rights of minorities and humanitarian intervention are ever-present, for these disputes have still to be resolved because of the distinction between peoples and minorities.

An even more troublesome issue is the possible imposition of *jus cogens* — a peremptory norm of international law — to self-determination. Salo quite correctly concludes that while applicable in the political realm, when applied by the U.N. organs, "self-determination does not fit very easily into the category of *jus cogens*." It cannot be included within this category.

The final portion of the study, Part III, is directed to the CSCE process. The thrust of the work returns to a European and Finnish viewpoint. From this context, it is helpful to recall that it was a 1969 Finnish initiative that led to negotiations relative to security and cooperation in Europe. These negotiations led to the signing of the Final Act at Helsinki.

The CSCE process, which remains closely tied to Helsinki, was followed by successive conferences in Belgrade, Madrid, and Vienna that proved somewhat less than encouraging. On the other hand, the availability of this forum may ultimately prove to be of considerable value, at such time as Europe and the United States seek to aid Eastern Europe. The potential of the CSCE process must not be minimized. Admittedly, there is some question whether the CSCE can deal with these issues — including the deterioration of Yugoslavia — so clearly recognized.

Self-determination is set forth in Principle VIII; however, the mention of territorial integrity seems to set some limits on the exercise of this principle. The author reviews the lengthy process of negotiation, begun at the Geneva Preparatory Meeting, during 1973 to 1975. A

number of rubrics, such as peoples and minorities, are discussed by several of the contributors and the conclusion reached is that minorities are not accorded a right of succession by the Final Act. Nonetheless, these issues continued to be discussed at the follow-up conferences in Belgrade, but no additional rights were granted to minorities — nor was self-determination strengthened. Claims for independence are still being pressed by minorities in European states. An example is the Baltic region.

Despite pressing political and legal controversy, the concept of self-determination remains ambiguous. As a result, each case must be decided on its own merits. Hopefully, certain guidelines will be perfected, since some degree of certainty in law and practice is required. "There are signs that such guidelines may be attainable, and their desirability has become apparent within the CSCE. But it must not be forgotten that every situation has its special features, and thus no all-embracing, universal formula can be given," in spite of the Helsinki Final Act.

"Recent Developments in the Work of the International Court of Justice," by Professor Ruth Donner, sheds considerable insight into the current case-load of the ICJ and the precise legal questions at issue. At the beginning of June, 1991, eleven contentious cases were pending before the court; additional cases are being filed. Accordingly, it is valid to conclude that the ICJ is assuming a greater role in the relations between states. Hopefully, the United Nations Decade for International Law has some relevance in promoting the peaceful settlement of disputes.

Professor Donner divides her text into three main sections. First, there is the new trust fund administered by the U.N. Secretary-General. This fund is designed to assist poorer states in their resolution of disputes through the utilization of the International Court of Justice, which in reality also supports the parent United Nations in maintaining peace and security. Here, then, financial support is provided in those instances in which disputes are submitted by means of a special agreement or the execution of a judgment resulting from such special agreement. Conversely, the fund does not provide financial support for proceedings based on compulsory jurisdiction. The reviewer submits that this unduly limits the aid that can be provided to lesser developed countries. On the other hand, the court's jurisdiction is not placed in contention. Though narrow in scope, these measures for assistance may stimulate the use of special agreements.

In a departure from the all too numerous cases from the 1970s and 1980s, in which respondent states refused to appear in the Hague and defend their positions, there are no pending cases wherein states are refusing to enter an appearance. Though there are still challenges to the court's jurisdiction by means of preliminary objections, when compulsory jurisdiction is invoked, the huge majority of cases are sub-

mitted by mutual consent. Yet, the possible utilization of the preliminary objection remains a source of difficulty. As such, Professor Donner reviews the various means by which compulsory jurisdiction can be obtained. Under present conditions, the main sources are to be found in treaties and conventions, pursuant to article 36(1) of the court's statute.

The court must determine in which instances states may be permitted to intervene in a pending case. Specifically, a great deal of discretion lies with the judges, but it is exercised sparingly. In fact, the first instance in which a state was permitted to intervene occurred in the 1990 Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, (1990 I.C.J. 92). Professor Donner's extended analysis continues with a review of the employment of chambers, for the reason that it has become the newest and possibly the most effective source of the court's competence.

There remains the issue of interim measures of protection; it is one of the most difficult and challenging measures of relief that can be granted, because of the fact that an extremely high (possibly excessively severe) standard of proof is demanded by the judges.

The Case Concerning Passage Through the Great Belt, Request for the Indication of Provisional Measures (Finland v. Denmark) (Order of 29 July 1991, 1991 I.C.J. 12; this order is also abstracted in the documents section of the Yearbook at 559-90) was discontinued on September 3, 1992, pursuant to a friendly settlement between the parties. Yet its precedent will remain significant, as part of the ICJ's jurisprudence.

Professor Maurice N. Andem deals with pressing problems that are being intensified by the new international economic order (NIEO) in his study "International Law as an Evolutionary and Dynamic Legal System — With Special Reference to the New International Economic Order." Professor Andem seeks to detect solutions to adverse situations that have been building up for the past several centuries. In rejecting selected norms from classical international law (e.g., the use of force and colonialism), he attempts to support the evolving world order, concluding "that significantly greater progress has been made in the development of contemporary international law during the last four decades of this century than in previous centuries." Not only have greater numbers of peoples become independent, but there is a growing awareness of the need for economic cooperation. Yet, despite experiments in bilateral and multilateral cooperation at the regional level, there is a definite need for the establishment of a NIEO. Moreover, considerable attention is devoted to substantiating this thesis, which is based on the lack of consent on the part of former colonies at the time of the formation of the United Nations and related agreements, such as the Bretton Woods system, the IMF, World Bank, and GATT. Be-

yond question, the historical discussion — including his analysis of appropriate resolutions of the U.N. General Assembly — sheds needed insight into the current North/South crisis. A significant portion of his reasoning necessarily depends on the legal force of resolutions of the U.N. General Assembly and other institutions. Henceforth, resolutions and declarations in appropriate situations, “particularly in politically and economically sensitive areas of contemporary international relations, should be recognized both in theory and practice as having binding force on all the member states of the UN.” He concludes that “it is imperative to recognize some aspects of the law making functions of the UN system.” Accordingly, he quite properly maintains “that resolutions, decisions and declarations adopted by its principle organs (the General Assembly and Security Council) will play a major role in the implementation of the New International Economic Order.” Fundamental to any advanced economic system, precise recommendations (e.g., model laws), a total commitment, and the active participation of all states, institutions, and peoples will be required, for the purpose of perfecting new legal solutions that can deal with ongoing relations between states and economic blocs.

Following these major contributions, a section of shorter articles and notes is offered. Special notice should be taken of Professor Raimo Lahti's “Life's Beginnings: Law and Moral Dilemmas,” in which he attempts to detect how human dignity and integrity can be protected by moral reasoning, i.e. structural reasoning. The goal is legal regulation based on harmonization of rules.

Johanna Jalas presents an excellent insight into global migration, a difficulty confronting all industrialized states, in “Immigration Into the European Community — the Community in Need of a Common Policy.” Although devoting the scope of the study to the European Union, the author is well aware of the impact caused by the migration from the former Eastern Bloc.

Given this situation, the unique regime perfected by the European Union — currently being strengthened by the Single European Act and the Maastricht Treaty - is now confronted by extreme pressure as the free movement of persons and the right of establishment come into play, particularly as to nationals of non-member states. Obviously, measures have been taken, as for example the Community Charter of the Fundamental Social Rights of Workers, the Convention on Asylum, the External Bonds Convention, and the Schengen Convention, that represent stages leading toward a common immigration policy. The goal, for humanitarian and economic reasons, is the integration of foreign workers. Consequently, the Maastricht Treaty on Political Union may prove to be a significant stride forward in the realization of a common immigration policy, that may serve as inspiration for other regional groupings and the international sphere.

The volume concludes with a carefully selected section of docu-

ments with appropriate commentary. "The Restoration of the Independence of Estonia, 1991" is especially useful, as are the documents devoted to seizures of aircraft during 1990 in the Soviet Union. As shown above, the Request for the Indication of Provisional Measures in the Case Concerning Passage Through the Great Belt is reproduced.

In sum, these studies and current documents are a welcome addition to existing yearbooks. In the present instance, the Finnish Yearbooks constitute a permanent contribution that will not become outdated. These fundamental legal issues, explored at length, will remain relevant and timely. Hopefully this review has demonstrated that a Finnish perspective is extremely helpful to practitioners and scholars, even though the contributors demonstrated an international perspective. The contributors all seek global solutions based on a peaceful world order, pursuant to their unyielding respect for humankind.





# **International Law in Transition: Essays in Memory of Judge Nagendra Singh**

REVIEWED BY DR. LYAL S. SUNGA\*

INTERNATIONAL LAW IN TRANSITION: ESSAYS IN MEMORY OF JUDGE NAGENDRA SINGH; Edited by R.S. Pathak and R.P. Dhokalia; with Foreword by R.Y. Jennings, President of the International Court of Justice; Martinus Nijhoff Publishers, Boston (1992); ISBN 0-7923-1715-7; 415 pp.

*International Law in Transition* brings together articles from twenty-one leading international jurists in tribute to the late Dr. Nagendra Singh, distinguished Judge of the International Court of Justice, who served as its Vice-President (1976-1979) and President (1985-1988). Throughout his illustrious career Judge Singh was involved in various diplomatic conferences as delegate to the Second Geneva Conference on the Law of the Sea, Indian delegate to the U.N. General Assembly, Chairman and delegate to numerous U.N. commissions and conferences on such diverse areas as trade and development, shipping and maritime matters, and uses of atomic energy, among many others.

Judge Singh's scholarly accomplishments are reflected in his extensive academic writings. His more notable works are *Nuclear Weapons in International Law* (London, Stevens, 1959); treatises and published lectures on merchant shipping: *The International Law Problems of Merchant Shipping* in *Recueil des Cours*, 107 (1962-II), *International Conventions on Merchant Shipping* (British Shipping Law Series Vol. 8, London, Stevens, 1963); and books on the relation of international law and the law of India: *India and International Law: Ancient and Medieval* (State Practice of India, Series Vol. 1 Part A, New Delhi: Chand, 1973), *The Theory of Force and Organization of Defence in Indian Constitutional History* (Bombay: Asia Publishing House, 1969), and *Commercial Law of India* (Delhi: Thomson Press, 1975). Perhaps his last work, *The Role and Record of the International Court of Justice* (Dordrecht: Martinus Nijhoff Publishers 1989), will prove to be his most famous.

That international law is presently in danger of being overtaken by the events of the day is a recurrent theme in *International Law in Transition*. Dissolution of the Cold War order has brought greater political instability with attendant new dangers to international peace and security. Gross violations of international humanitarian law per-

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\*. Dr. Lyal S. Sunga. Ottawa, September 23, 1993; B.A. Carleton University, Ottawa; LL.B. Osgoode Hall Law School (York); LL.M. Essex University, United Kingdom; Ph.D. Graduate Institute of International Studies, Geneva, Switzerland.

petrated in the territory of the former Yugoslavia exemplify the horrors wrought by increased instability and political uncertainty in the post-Cold War world. Increasing political violence in many of the former Soviet Socialist Republics such as Georgia, Azerbaijan, and Armenia, if left unchecked, also carry the potential for a devastating rupture in international peace and security. These new threats to world peace have arisen when chronic open sores on the international body politic, such as the gross denial of human rights of the people of East Timor, have yet to be treated effectively, let alone cured. However, new opportunities for international cooperation to solve these problems have appeared as East-West tension has diminished. The U.N. Security Council's unequivocal condemnation of Iraqi aggression against Kuwait and the extensive United Nations humanitarian involvement in Somalia indicate that with the reduction of East-West political tension, the U.N. can operate as an effective institutional means to restore international law and order.

The book is split into two parts: the first, entitled "Contemporary Issues," focuses on problems presently facing the global community; the second, entitled "Perspectives," focuses on emerging trends in international law.

In "Internal Conflicts and International Law," Oscar Schachter summarizes, in remarkably succinct fashion, the international law relating to internal conflicts. He states straightaway that internal conflicts, as a general rule, lie beyond the application of international law. There are two categories of exceptions to this general rule. These exceptions flow from (a) the application of international humanitarian law and of international human rights law to certain kinds of internal armed conflict; and (b) cases of intervention by a foreign State in the internal affairs of another, contrary to principles of non-intervention in international law. Following a clear treatment of the international legal norms applicable in each of these two categories, Schachter deals with two other related cases not generally considered: intervention of a non-forcible character and United Nations intervention in international conflicts. Schachter's concise analysis brings an accurate perspective to the international law on internal conflicts.

Ian Brownlie's "Politics and Principle in Major International Settlements" studies the "interplay of political principle, policy decision . . . in relation to major settlements of the kind which followed the two world wars." Brownlie reminds the reader of the sweeping impact of general multilateral settlements of European territory in the nineteenth century, those affecting Europe and parts of Africa put in place by the 1919 Peace Treaty of Versailles following World War I, and peace settlements concluded after World War II relative to Europe, Asia, and Africa. He argues persuasively that the political machinery that brought these momentous changes have been by and large neglected by international law scholars. Brownlie argues that principles

of openness, fairness, and impartiality were well served in the peace treaty conclusion process, especially following World War II, lending them a much more juridical character than is commonly assumed. Following a brief survey of the process and effect of postwar settlements on the legal status of territory, Brownlie concludes that "[w]hat is remarkable about the settlement machinery created by the United Nations after 1942 is not the dominance of politics but, given the scale of the political operation, the extent to which considerations of international policy, matters of principle, and decision by consensus entered into the procedures of settlement."

In "Complexities of the Distinction between *Old* and *New* International Law: Empirical Question Marks," the late George Schwarzenberger examines the distinction between "old" and "new" international law from four angles: 1) pitfalls of reasoning; 2) comparabilities; 3) relativities; and 4) implications. The paper attempts to promote a clearer understanding of international law as a normative system that mirrors its social environment. He advocates conscientious attention be paid to the origins and infrastructures of contemporary international law to reduce distortions in the image of international law. Schwarzenberger's paper is replete with headings and subheadings that appear to add little of explanatory value to the treatment of the distinction between "old" and "new" international law and is overly analytical. Nonetheless, Schwarzenberger properly lays emphasis on the use of inductive and empirical methodology in the study of international law. His arguments provide a much needed corrective to traditional doctrinal approaches that try to deduce principles of international law from general abstractions, glossing over inconvenient complexities in the law.

Gillian White's "Structural Adjustment with a Human Face and Human Rights in Development: New Approaches in the Fourth Lomé Convention" draws attention to certain innovative and important provisions of the most recent Lomé Convention concluded between the European Community (with its twelve member States) and sixty-nine developing States of Africa, the Caribbean, and the Pacific. She analyzes provisions on financial support from the EC and the effect this support has on structural adjustment and the populations of recipient countries. She looks also at provisions designed to incorporate human rights as a fundamental factor of development. White's treatment of the subject provides readers with a useful background on structural adjustment policy in the Convention and on pertinent policies and practices of the International Monetary Fund and World Bank, before turning to consideration of clauses relating specifically to human rights and development. White examines Article 5 — the non-discrimination clause — with respect to the issue of ensuring that living and studying conditions of developing country nationals in E.C. countries are accorded legal protection no less favorable to that of other foreigners in Europe. Article 5 links international cooperation, structural

adjustment development policy, and human rights, but it recognizes development only as a principle, not as a right. The author concludes that "[o]nly time will tell whether the approaches taken in Lomé IV to both human rights as such and to structural adjustment 'with a human face' are well founded politically and psychologically and whether they can be said to have contributed positively to the development, in its fullest sense, of the [African, Caribbean, and Pacific] countries and their peoples."

"The New Law of the Sea and Navigation: A View From the Mediterranean," by Budislav Vukas, discusses solutions to problems on international navigation adopted in the Third United Nations Conference on the Law of the Sea (UNCLOS) of special relevance to Mediterranean countries. The author focuses on new developments brought by UNCLOS concerning the right of innocent passage in the territorial sea, straits used for international navigation, the Exclusive Economic Zone, and settlement of disputes concerning navigation.

In "The Concept of International Law at the End of the Twentieth Century," Milan Sahovic raises critical questions on the changing nature of inter-State relations against the backdrop of a panoramic view of international law. He observes that in the past three centuries, the imperative of mutual cooperation between States gave rise to expectations that the effective functioning of the international legal system would find support in the municipal law of each State. However, due to the highly decentralized nature of law-making at the international level and the lack of a super-State to enforce and implement international legal norms, these expectations were never fulfilled.

Instead, the creation of international law became subject to the individual consent of the States — a situation that remains fundamentally unchanged today. Limits to the effectiveness of international law derive chiefly from the inability of the international community to enforce compliance where a State refuses to honor its international legal obligations. Nevertheless, unprecedented change in international relations since 1945 has altered the structure and character of international law.

A new era of increased international cooperation and institutionalized interdependence has been heralded in with the emergence of the U.N. and other international organizations, the emergence of newly independent States from colonialism, revolutions in science and technology, and the blossoming of international human rights law. Sahovic maintains that evolution in the modern system of international law ". . . is going in the direction of the construction of one united, integrated and coherent system of law." He cites two trends in particular to support his thesis: the emergence of a hierarchy of norms and the "foundation of one objective international legal order independent of the subjective wills of States."

Further, the monist approach to international law appears to be gaining ground as States increasingly adopt constitutional provisions that accord formal recognition to norms of international law. Institutionalization in the codification and progressive development of international law through the International Law Commission continues to represent an active "legislative" approach to international norms. One would have hoped that Sahovic's treatment of these important structural changes would not have been so brief — his article is a mere six pages — because his arguments raise some of the most critical issues in contemporary international law in a most coherent fashion.

Two articles on the global refugee problem appear in the book. The first, entitled "Problems of Refugees in the Developing Countries and the Need for International Burden-Sharing," by J.N. Saxena, sketches the dimensions of the current refugee crisis, discusses the definition of "refugee," and reviews the principles of non-refoulement, asylum, international solidarity, and burden-sharing. The definition of "refugee," codified in the 1951 Convention relating to the Status of Refugees, has become sorely outdated as both the volume and complexity of the world refugee problem has exploded. The author argues that rather than calling into question the mandate of the U.N. High Commissioner of Refugees or the principles set forth in the 1951 Convention or 1967 Protocol relating to the Status of Refugees (the latter broadened the definition of "refugee"), these instruments should be rendered more effective through expansive interpretation.

In the other article on the refugee problem, "Progressive Development of Refugee Law and Its Codification," Luke Lee discusses the need for a systematic codification of refugee law. Lee also draws attention to the work and considerable influence of Judge Singh in the progressive development of refugee law in connection with the International Law Association, located in Brussels.

In "The Human Rights Committee in 1990," P.R. Gandhi highlights precisely and succinctly recent developments in the Committee's practice and procedure. He examines the more significant developments in recent cases on procedural questions (such as admissibility) as well as on substantive aspects. Gandhi remarks accurately that while the volume of work of the Committee and of human rights organs in the United Nations Centre for Human Rights has increased greatly, funding, staffing, and administrative support for the Centre remains terribly inadequate.

In "Nuclear Weapons and International Law: Some Reflections," B.S. Chimni considers the argument sometimes put forward that the threat or use of nuclear weapons is not a violation of international law because there is an absence of express prohibitions in treaty law. Nagendra Singh countered that existing conventional law already prohibits nuclear weapons by way of the *de Martens* Preamble to Hague Convention No. IV concerning the Law and Customs of War on

Land, which codified customary law. In the context of international humanitarian law the question is whether nuclear weapons can possibly figure in the balance between military necessity and humanitarian considerations, since the distinction between combatants and non-combatants — basic principles of international humanitarian law — would likely be rendered irrelevant in the event of nuclear attack.

International legal norms on the environment have shown perhaps the most rapid development in recent years. In "The Greenhouse Effect - Need for Legal Control," Gurdip Singh relates the greenhouse effect to depletion of the ozone layer and then briefly chronicles landmarks in the emergence of legal norms on the problem, albeit in a rather superficial way.

The changing role of the World Court and the International Law Commission's role in the codification and progressive development of international law are examined in "Perspectives of the New Trends in Contemporary International Law" by T.O. Elias, late Judge of the International Court of Justice. Elias surveys trends in international law mentioning important developments in U.N. codification, the United Nations operations in the Congo as a watershed in contemporary international law, and the upsurge in human rights and international humanitarian law.

In "A New Political Thinking and International Law," Grigory Tunkin argues that international law must attain primacy over the narrow political self-interests of States such that common interests can prevail over national egoism. However, Tunkin contends that for this to occur, international mechanisms for international dispute settlement, control mechanisms, and mechanisms of law enforcement must be improved.

G.H. Guttal's "Sources of International Law: Contemporary Trends," considers law-making at the international level. It begins with an arid and somewhat disjointed discussion of the question as to whether "international law" is "law" before discussing the law-making significance of Resolutions of the United Nations General Assembly.

R.P. Dhokalia's "Reflections on International Law-Making and its Progressive Development in the Contemporary Era of Transition," is perhaps the heart of *International Law in Transition*. The author brings the outmoded character of international law — a set of norms that continues to represent a crumbling status quo — into disturbingly sharp contrast with irrepressible and momentous world change. Dhokalia focuses on social revolutions that currently undermine the legitimacy and authority of the modern nation-State. Contemporary international law, premised on the classical foundation of inter-State relations, is also suffering through a crisis of identity and legitimacy. Many countries object to the blatant double standard whereby the more powerful States flout international law when convenient for them

to do so yet insist that weaker States accord international law scrupulous observance. Against the backdrop of a world undergoing tumultuous change, effective codification and progressive development of international law becomes all the more imperative. As Dhokalia observes, the International Law Commission, hampered by problematic working methods, has achieved only limited success.

The final six articles in *International Law in Transition* explore the operation, function, and legitimacy of the International Court of Justice and prospects for a greater role in future — issues to which Dr. Singh devoted much of his attention and energy.

Yogesh Tyagi, in "The World Court after the Cold War," observes that the end of the Cold War and the breakdown of superpower rivalry enhances prospects in the peaceful settlement of disputes and that these developments have raised expectations that judicial organs such as the International Court of Justice (I.C.J.) will be allowed to be more effective. The author critically examines various initiatives that have been put forward to strengthen the World Court relative to psychological, jurisdictional, and functional aspects of international adjudication.

In "The World Court on Trial," R.P. Anand praises the Court for its demonstrated impartiality and for excellence in the quality of its decisions. He then draws attention to the hostile attitude shown by the United States toward the jurisdiction of the Court, despite the major role of the United States in the Court's establishment. Anand places particular emphasis on the U.S. Government's disastrous withdrawal from the Court's compulsory jurisdiction in the *Nicaragua Case*.

Stephen Schwebel surveys questions of human rights that have arisen before the Court in "Human Rights in the World Court." As Schwebel points out, few cases or advisory opinions in the World Court have centered on human rights questions. He reviews the human rights jurisprudence of the Permanent Court of International Justice, centered primarily on interpretation of minority rights guarantees in peace treaties concluded after World War I. Turning to jurisprudence involving human rights in the I.C.J., Schwebel provides a useful synopsis of a number of advisory opinions and contentious cases from the human rights angle.

A distinctly Indian perspective is brought by V.C. Govindaraj to "Law, Human Rights and Socio-Economic Justice — An Indian Experiment." In this piece, Govindaraj examines Indian jurisprudence on the protection and promotion of civil and political rights on the one hand, social and economic human rights on the other, and then discusses the Indian approach to integration of the two in relation to the rise of the welfare State in India. He first outlines provisions of the Constitution of India relative to the protection of human rights. Under the Indian Constitution an individual has a right to challenge a law or government action where an abridgement of fundamental rights is alleged by

invoking the original jurisdiction of the Supreme Court of India directly, rather than having to petition the High Court first. The author surveys landmark Supreme Court of India cases on basic human rights, highlighting constitutional provisions designed to advance socio-economic reform, and then focuses on international human rights as interpreted and applied by Indian courts.

In "Selected Recommendations to Enhance the Effectiveness of the International Court of Justice: Perfection and Application of Confidence Building Measures," W. Paul Gormley looks incisively into the way the I.C.J. actually functions. The Court's jurisdiction in each case depends upon the consent of parties to the dispute. The author explores the United States policy in the *Nicaragua Case* and the U.S. objections to the filing of the memorial by Iran in the *Aerial Incident Case*. In a number of other cases, respondent States have chosen to ignore the I.C.J., rather than to defend their position. This trend undermines the legitimacy of the Court.

On the other hand, the Court has earned the confidence of the international community for consistently producing work of excellent quality. Gormley takes note of short and long range innovations in the Court such as revision in the rules of the Court and the novel use of special Chambers.

Finally, the author examines some far-reaching recommendations for improving the operation of the Court, including widening the *locus standi* of the Court to include individuals and non-governmental entities, using the I.C.J. as an appellate tribunal rather than as a court of first instance, widening the Court's advisory jurisdiction, developing "evocation procedures" (which authorize the Court or perhaps a Chamber of the Court to clarify a particular point of law in a case or dispute pending in another forum), and improving the Court's investigatory and fact-finding powers.

In the last article, "The International Court of Justice: The Integrity of an Idea," I.C.J. Judge M. Shahabuddeen considers the balance that must be maintained between the judicial character of the International Court of Justice, on the one hand, and the fact that its jurisdiction is based on the voluntary consent of States on the other. The author considers whether the I.C.J. is truly a court of justice. Shahabuddeen contends that in practice States *accept* the jurisdiction of the I.C.J. or not, but this is not the same as saying that States *confer* jurisdiction upon it. He argues the difference is not merely terminological but relates to the fact "that the International Court of Justice is a court of justice independently of the voluntary acceptance of its jurisdiction in any particular case, with the consequence that its claim to be considered a real court is not affected by the voluntary nature of that jurisdiction." The author then emphasizes differences between arbitration and judicial settlement and argues that the use of Chambers is likely to undermine the judicial character of the Court because



the process whereby parties may indicate which Judges they prefer to preside militates against universal, impartial, and independent adjudication.

Unless international legal norms keep pace with rapid change in the contemporary human condition, they will fail to serve interests vital to the international community and be judged anachronistic, outmoded, and irrelevant. *International Law in Transition* affords rich insight into the perplexing transformations presently under way in international law and politics, especially on current problems and prospects facing the International Court of Justice. By bringing together views of a number of eminent authors on pressing problems of our time, the book offers clear-eyed vision on prospects for a more responsive international legal system. *International Law in Transition* will undoubtedly be of interest to both generalists and specialists in international law and relations.

