1997

Recent Publications

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjil

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/yjil/vol22/iss2/8

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of International Law by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Recent Publications

Human Rights


People worldwide have an increasing consciousness of their membership in an ethnic or national group and its identification with symbols such as history, language, and culture. In the post-Cold War world this has threatened the legitimacy and stability of many multinational states. For example, multinational states such as the former Soviet Union and Yugoslavia were confronted with the failure of their respective governments’ policies to merge different constituent nationalities. These states ultimately disintegrated because the different ethnonational groups that felt their ethnic identity at risk responded violently to all efforts at political manipulation that had been undertaken in the name of state-communist doctrine. These are only two striking examples of a general failure in many other states to domesticate the idea of a nation within the institution of the state. Notwithstanding these object lessons, preserving a given state structure is still regarded by elites as a higher goal than securing values of human dignity through the fulfillment of an ethnic or national group’s fundamental needs. Consequently, elite strategies aim predominantly at securing domestic and international stability when the state is perceived to be threatened by internal ethnonational groups. Attributes of statehood, like absolute sovereignty and territorial integrity, are commonly invoked by dominant groups in order to dismiss the demands of minority groups for a greater share in power or for more respect of their distinct culture.

Hurst Hannum’s first edition of Autonomy, Sovereignty, and Self-Determination has already been praised as a legal reflection on the resolution of this kind of group and national conflict. There are several aspects of his book that deserve attention. First, Hannum’s approach is decidedly pragmatic: He is not primarily concerned with conceptual clarification of the term minority or with a doctrinal critique of the term autonomy. This allows him to avoid limiting his focus of inquiry. Hannum looks primarily at demands made by or on behalf of vulnerable groups that are commonly referred to as either ethnic, religious, linguistic, or indigenous minorities. According to Hannum, their characteristic claims concern the right to be different and to be left alone, and to preserve, protect, and promote values that are beyond the legitimate reach of the rest of society.

The second noteworthy aspect of the book is Hannum’s comprehensive and contextual approach. He considers historically relevant determinants, economic
factors, and domestic and international power-interest structures. Nine chapters offer empirical studies of the past and present treatment of vulnerable groups in a variety of sociopolitical contexts and describe resulting challenges that are to be solved with reference to international law. These challenges include incorporating Hong Kong's population into China; appeasing extremist forces in Punjab; ending discrimination of the Kurds in Turkey; settling the dispute between the indigenous people and the government of Nicaragua; resolving the conflict between the two communities that compose Northern Ireland; protecting the Saami culture in Scandinavia; ending the struggle for independence of the Basques and Catalans in Spain; managing the communal/civil war in Sri Lanka; and eradicating the religious intolerance in Sudan—an example intended to shed light on the ethnic and religious complexity in other African states. These examples share similar minority demands for autonomy and state reactions to these demands. For Hannum, autonomy is a matter of international legal norms and the issues of language, education, access to governmental civil service, land and natural resources, and representative local government.

Hannum skillfully explains that from an international law perspective, the legal problems in his nine case studies are closely linked to such factors as economic development, complex historic mosaics, geopolitical forces within and outside the states, and external interference by powerful actors. This means that the relevance and possible effectiveness of claims for self-determination, minority rights, indigenous rights, and human rights have to be understood and appraised in terms of the sociopolitical context of each situation. Hannum identifies the main intellectual task to be the pursuit of ways in which norms of international law—together with domestic constitutional arrangements—may be utilized to respond to the demands and claims of powerless groups.

In order to take contextual factors into account he promotes arrangements with flexible solutions. In eleven shorter case studies (including such interesting situations as the Saar between 1920–1935 and 1945–1956; the Free Territory of Trieste; and the Memel Territory) he surveys examples of certain flexible and creative structures of autonomy that have already been developed to respond to geographic, economic, political, ethnic, linguistic, or other differences within a single sovereignty. Hannum classifies these arrangements in three categories: federal or quasi-federal arrangements, internationalized territories, and preferable policies with respect to vulnerable groups.

Hannum's pragmatic and contextual elaboration of autonomy already has had a strong influence on the discussion about protection of vulnerable groups and minorities. His book should continue to serve as an important source in the future. He has attempted to introduce one of the core notions of liberalism—autonomy—as a principle, if not yet as a right, in the ongoing discourse about international group protection. As a liberal scholar he is deeply committed to promoting autonomy "in order to end conflicts over minority and majority rights before they escalate into civil war and demands for secession." However, even optimistic liberals might envisage problems in situations in
which the asserting group is significantly weaker than the dominant population. In these cases, demands for autonomy and self-determination are asserted against what Hannum refers to as an illegitimate government or even a state. It is here that the author has to admit the practical limits of autonomy when he puts it in an international perspective.

The third noteworthy aspect of the book is Hannum's critique. Hannum is not loathe to deride that which he considers responsible for these limits: the absence of conceptual clarity among scholars regarding the terms sovereignty and statehood. Even when the author seems too willing to take the modern liberal view on the state-system for granted and to join into mainstream scholarship regarding concepts such as sovereignty and self-determination, he is aware of the fact that international legal discourse must not be predicated on an unchanging system of states whose territories, competence, and role in international politics are immutable. A great merit of the book turns out to be that it criticizes the current interpretation and application of these concepts with regard to situations of group conflict in which they do not contribute to problem-solving; one may infer from his criticisms that Hannum questions the overall desirability of whatever may be termed territorial sovereignty in an interdependent world of states. The author also refers to the considerable disagreement among scholars about the proper understanding and usage of sovereignty and statehood. Lack of scholarly agreement, absence of conceptual clarity, and inapplicability of legal constructs such as 'territorial sovereignty' and 'statehood' in attempts to deal with ethnonational problems are striking considering the fact that these constructs have shaped the modern conception of international law and lie at the core of the modern body of international norms and policies. Hannum's analysis of the various ethnonational conflicts, however, makes it easy to understand why it is outmoded to approach critical events involving ethnonationalism solely with the help of these constructs. It is no longer clear who makes up the state populations and how we are to determine the state as well as the nation, and uncritical reference to a state's sovereignty seems not only questionable but also counterproductive for attempts to engage in problem-solving. Sovereignty, then, necessarily revolves around the concepts of ethnicity, nationalism, and identity, which are ambiguous, fragile, and always evolving.

Hannum describes not only the symptoms of ethnonational conflicts but analyzes conditioning factors and appraises some of the deeper causes in an attempt to offer solutions from a perspective of international law. Hannum's solutions appeal primarily to liberal scholars by enriching the debate about autonomy. But critical international law/relations scholarship will concede that his book contributes to scholarly discourse about problems that arise in great part from an emphasis on constructs that need to be questioned.
Humanitarian intervention, especially for the sake of religious minorities, gained prominence and acceptance during the nineteenth and early twentieth centuries. Originally regarded as unilateral military action by one state in the territory of another, its normative valence has changed. Interventions under the authority of international organizations increasingly are being accepted, although states and intergovernmental organizations continue to be reluctant to act.

Thus, no one intervened in the institutionalized genocide of the population in East Timor or in the ongoing group discrimination in Tibet. International concern in such situations is likely to mean little in the practical terms of international politics, unless the abusive treatment of people is deemed to threaten the peace. For example, the international response to Iraq's repression of the Kuweitis and the Kurds was triggered only when the Security Council defined them as threatening international peace and security in the region.

The outcome of the Iraqi crisis and of others that followed inspired Sean D. Murphy to pursue a historiogenetic legal study of the doctrine of humanitarian intervention, with particular emphasis on the role of the United Nations in authorizing or itself conducting such intervention. Murphy, a former attorney-adviser with the Office of the Legal Adviser of the U.S. Department of State, was recently awarded the Certificate of Merits by the American Society of International Law for creative scholarship.

Murphy's aim is to explore the roots of contemporary norms on the use of force for the protection of human rights. Murphy starts with the existing constraints on the use of armed force and the increasing desire to protect civilians and combatants from widespread and severe deprivations. He then distinguishes between three different forms of humanitarian intervention: intervention that is undertaken by the United Nations, by regional organizations, and by single states. Murphy favors collective intervention under the authority of the United Nations. He observes, however, that the ability of the United Nations to enforce its commands is largely, but not entirely, constrained by political pressures, and it relies mostly on ad hoc economic and military actions. Much of his study is dedicated to analyzing how the Security Council has weighed the values of order and justice in treating humanitarian intervention.

The preliminary chapters clarify definitional aspects of the term humanitarian intervention and reflect about the heuristic fruitfulness of current international law approaches as well as those of moral philosophy and political theory. Drawing from a relatively broad theoretical perspective, the author sketches a noteworthy methodology that seeks to combine the black-letter approach of conventional international law scholarship with the policy-oriented approach of the New Haven School of International Law (NHS). As to the
Recent Publications

latter, it is especially the incidents approach developed by Michael Reisman and Andrew Willard that, according to Murphy, is well suited to give an account of the rare occurrences of humanitarian intervention and to emphasize the reactions of key decisionmakers to particular incidents. After surveying different legal traditions that shaped the conception of the lawful use of force prior to the UN Charter, Murphy introduces the UN Charter's origins and its text. He then presents incident studies of interventions that occurred during the Cold War in Eastern Europe (Hungary in 1956 and Czechoslovakia in 1968), the Congo, the Dominican Republic, East Pakistan, Lebanon, Cambodia, Uganda, Central Africa, Grenada, and Panama to describe past trends in decision and to supplement the author's black-letter approach with information about relevant state practice and international custom. Murphy also analyzes contemporary trends in decision and provides further incident studies highlighting recent interventions in Liberia, Iraq, Bosnia-Herzegovina, Somalia, Rwanda, and Haiti. These arguably reveal evolving attitudes about the use of military force to protect human rights. Referring mainly to declarations of Security Council members and the Secretary-General, Murphy identifies an expansive view of what is seen as the prerequisite for humanitarian intervention: the existence of a "threat to the peace." For Murphy, the magnitude of the perceived threat may obligate the United Nations to play a role in addressing the threat, if necessary through enforcement action. Advocating the multilateral approach to intervention—conducted primarily with the Security Council as authoritative decisionmaker—Murphy takes a rather critical view of unilateral intervention. He finds it difficult to justify, despite the acceptance of its lawfulness by most scholars adopting a policy-oriented perspective.

The epistemology of Murphy's thorough examination reveals a rules perspective that fails in its attempt to draw from the NHS's conception of law as a policy-oriented and "comprehensive process of authoritative decision." The striking consequence is Murphy's inability to transcend the conventional focus on state elites. Attempting to understand international law as an inclusive process of decision, Murphy rightly observes that "the salient issue is whether the human rights deprivations occurring within the target state are so widespread that they 'shock the conscience of humankind,' not whether they shock the conscience of just a powerful state [elite]," but he does not seem willing to draw the obvious conclusion that the victims do not care who intervenes as long as someone does. In fact, Murphy tends to calculate the costs and desirability of humanitarian intervention primarily from the perspective of state elites instead of considering the deprivations suffered by the people who are actually concerned. He infers the human rights values at stake from the utterances of state elites. In short, he grants participation in formulation and implementation of policy to a very privileged segment of the world's population. In doing so, he reveals a sympathy with the narrow and conventional conception of international law that is irreconcilable with the NHS's notion of a policy-oriented and comprehensive process of decision.

Neither does Murphy succeed in relating his focus on rules to the notion
of authoritative decision. A realistic function of the international black-letter rules is to allow us to infer summary indices to relevant crystallized community expectations that permit creative and adaptive decisions. Integrating this in a study of the doctrine of humanitarian intervention would have been highly rewarding, mainly because the cases at hand contain evidence that may be used by both proponents and opponents of the lawfulness of unilateral intervention.

But Murphy did not grapple with the conceptual and methodological difficulties of combining the conventional perspective on rules with the NHS's conception of authority. Taking the NHS's notion of authoritative decision seriously would mandate that decisions are studied with regard to the degree to which they reflect policy content, authority signals, and control intention. As regards policy, it has already been mentioned that it is the widest scope of participants whose input should be sought, not that of state elites, which is what Murphy uses. As regards authority and control, the question is not who is formally endowed with decision-making but who has sufficient bases of power to put a community policy into controlling practice. Murphy, however, tends to confuse formal authority with authority backed by an effective international institutional muscle. It is Murphy himself who admits that the problem arises because the Security Council does not itself function as an institution. The Security Council has difficulties acting absent the support of a major power to commit the military and economic resources necessary to conduct an intervention. In addition, its actions are subject to political constraints when its members cannot agree on how to proceed in a particular crisis, as was evident in the Bosnia incident. Murphy nevertheless tends to overestimate the importance of the Security Council's formal authority for initiating collective action. Its power is not more than the sum total of the will and the power of its permanent members.

Murphy gives an impressive account of the contemporary debate on the doctrine of humanitarian intervention and offers a profound discussion of a great variety of arguments favoring and opposing the three different options under the doctrine. There are, however, some epistemological and methodological limitations a reader might have to take into account.

International Sanctions


The plight of Iraqi civilians during the Gulf War and under the subsequent UN sanctions has received minimal media coverage and sympathy in the West. Only recently, six years after the war, has the United Nations made serious efforts to ship food and medical necessities to the starved and debilitated nation of Iraq, where civilian casualties continue to mount. In *The Scourging of Iraq,*
Geoff Simons, a former chief editor in a major publishing company and now a freelance author, calls on the international community to recognize the inhumane and genocidal effects of the UN sanctions on Iraqi civilians. Simons also accuses the United States of violating international law and morality by orchestrating both the Gulf War and the subsequent sanctions in order to achieve its own political and economic objectives in the Middle East.

Despite the author's cynical and even conspiratorial view of U.S. foreign policy, this book presents a systematic, impressively well documented, and carefully argued analysis of the UN sanctions and their debilitating effects on Iraq. The first chapter recounts the Gulf War and the events leading up to it. It points out the disproportionate extent of the military mobilization and attack on Iraq, which devastated Iraq's civilian infrastructure and environment, leaving numerous civilian casualties. Simons depicts in graphic detail a number of largely unpublicized, horrific atrocities that were committed against Iraq, pointing out repeated violations of international laws and conventions. He calls the reader's attention to the similarity of these events to violations committed in the context of the Nazi concentration camps and the Holocaust. In addition, the author argues that the systematic destruction of civilian facilities and infrastructure was implemented in order to demoralize the Iraqi population and thereby increase the pressure on Saddam Hussein's dictatorial government. This strategy, Simons adds, has also been pursued since the war through the economic embargo and sanctions levied against Iraq—in violation of international laws and norms against the use of civilians as pawns in warfare.

The end of the Gulf War only marked the worsening of the plight of the Iraqi population, as Simons painstakingly demonstrates in chapters two and three. Chapter two provides the reader with an elaborate chronology of the UN Security Council's trade sanctions against Iraq and inquires into the diplomacy and history underlying their adoption. This chapter emphasizes the United States' role in adopting and maintaining the UN sanctions, especially in its use of diplomatic maneuvers to prevent Iraq from importing food and medicine, primarily to gain leverage against Saddam Hussein's dictatorship. Simons also provides insight into how the Security Council Resolutions have been implemented, contrasting their *prima facie* humanitarian clauses with their destructive effects and characterizing the inclusion of such clauses as an exercise in "cynical realpolitik" and political propaganda. In light of the fact that Iraq's prewar oil-based economy had depended heavily on imports for the basic necessities of life, Simons argues that the complete ruin of Iraq during the war made the large-scale civilian impact of the sanctions readily apparent right after the war.

As chapter three illustrates, the real victims of the UN sanctions have been the "powerless": ordinary people, babies and children, pregnant women, the sick, and the old. This chapter draws upon a number of studies to portray the mind-numbing consequences of the sanctions on Iraqi children and women in particular, and cites a post-war civilian casualty count of several hundred thousand Iraqis thus far. Pointing to the widespread epidemics and starvation
sweeping a country suffering from rapid environmental degradation and contamination, Simons concludes that the sanctions amount to "virtual biological warfare" and infliction of a "silent holocaust."

In the final chapter of the book, Simons departs from empirical analysis. He engages the reader in the complex moral questions regarding the extent of the West's responsibility for the sanctions' genocidal effects, asking whether it is possible to transfer responsibility to Saddam Hussein, and whether the ends achieved could ever justify the harms inflicted on Iraqi civilians. Simons reminds the reader that international laws and conventions forbid acts such as "starvation of civilians as a method of warfare" (1977 Protocol I addition to the 1949 Geneva Convention). Although not all readers will be convinced by the author's marshalling of largely circumstantial evidence to prove that the United States conducted a brutal campaign against civilians to advance its economic interests, Simons' conclusion that the UN sanctions effectuated such deplorable harm against civilians provides a powerful historical lesson.

This book is essential for anyone interested in the intersection of human rights issues, international law, and the diplomacy of conflict, as well as for anyone who seeks alternate perspectives on the Persian Gulf conflict.


"Sanctions," in the most general sense, are an integral part of legal or political systems as the practical embodiment of censure. In the early part of this century, the term became singularly associated in international politics with penalties imposed by the League of Nations against member states who violated Covenant obligations. In International Sanctions in Contemporary Perspective, Margaret Doxey examines the roles, operation, and efficacy of the modern descendants of those sanctions. While this book is a work of political science, with little mention of specific legal issues and no citation to legal sources, it is still useful to those exploring public international law, as the politics of enforcement actions plainly has substantial repercussions on the exercise of the law itself.

The author, now an Emeritus Professor of political science at Trent University, Ontario, Canada, has been writing on the issue of international sanctions for over a quarter century. This is the second edition of a work originally published in 1987. Since the first edition was issued, the political changes wrought by the end of the Cold War have expanded opportunities for international organizations such as the United Nations to levy economic, diplomatic, and cultural sanctions; simultaneously, substantial empirical information has become available on the use of sanctions in Iraq, Haiti, and the former Yugoslavia, among others. Doxey's reexamination of sanctions thus comes at an opportune moment.
Doxey’s investigation adroitly fuses empirical description and analysis of particular instances of sanctions with more general examinations of sanctioning activity. The scope of the work is restricted to the consideration of sanctions that are “penalties threatened or imposed as a declared consequence of the target’s failure to observe international standards . . . or obligations” (p.9). That is, Doxey focuses on non-violent coercive acts used for international norm enforcement rather than acts undertaken for the aggrandizement of the sanctioning party. The emphasis, therefore, is on group action, generally (but not always) under the aegis of international organizations. While this focus leaves aside some interesting political and legal issues, the territory the book covers is sufficiently distinct and rich to justify separate examination.

After a brief introductory chapter outlining the ambit of the work and a typology of sanctions, Doxey lays out fourteen case studies that provide the grist for the examination in the rest of the book. These examples, all from the twentieth century, include paradigmatic historical cases such as the failed League of Nations sanctions against Italy in the 1930s and the mandatory UN sanctions against the newly (and illegally) independent Rhodesia in the 1960s; less obvious cases such as the Soviet and Eastern Bloc sanctions against Yugoslavia in the 1950s; and very recent examples such as the international sanctions against Haiti and Serbia/Montenegro. These brief descriptions provide not only details on the sanctions’ operations, but also sufficient historical and political context to allow easy comprehension without reference to other materials. This chapter is the longest of the book, an apt indicator of Doxey’s determination to keep her discussion firmly grounded in historical experience.

Each of the succeeding four chapters addresses a separate issue pertaining to sanctions. Doxey begins this discussion from the point of view of the sanctioning states, describing the contexts in which sanctions are pursued (largely institutional, through the United Nations or regional international organizations such as the OAS and the EU) and the goals that the sanctioners seek to achieve (e.g., deterrence, compliance, and signaling). She then outlines some of the problems that beset sanctioning efforts, particularly those of burden sharing and of the mechanics of implementation. Burden sharing is an issue not only among the various sanctioning states, but also within each sanctioning state, as imposing sanctions will create winners and losers in the domestic economic and political arenas. This difficulty is compounded by an inefficient institutional mechanism within the United Nations for mitigating such negative effects on the sanctioners. Moreover, implementing sanctions is hampered by the fact that international organizations, lacking the material means of enforcement, “farm out” enforcement responsibilities to member states; as a result, norm enforcement by sanction becomes politicized in a way often deleterious to the sanctions’ intended effect. Doxey next addresses the target states, explaining the circumstances in which a state becomes vulnerable to sanctions, and discussing target states’ responses to sanctions, including evasion and counter-measures. She also explores the impact of sanctions on the civil society of target states, an issue recently brought to the forefront in the
controversy over the humanitarian effects of UN sanctions on the Iraqi population.

In each of these analytic chapters, Doxey frequently refers back to her case studies, assisting the reader in putting together the pieces of the sanctions puzzle. Moreover, her internal organization of these discussions is exemplary, as she provides distinct attention to each major issue and uses sub-headings to delineate the contours of her argument. Notable throughout the inquiry is Doxey’s willingness to acknowledge the broad array of competing influences that make ex ante assessment of the probable consequences of sanctions so difficult. These include the effects of changing domestic coalitions, the difficulties in maintaining cohesion among sanctioning states, problems stemming from First World/Third World rivalry, and the consequences of shifts over time in international norms and political sensibilities. Though Doxey addresses each of these topics only briefly, their incorporation lends a cumulative richness to the analysis.

The final chapter presents Doxey’s conclusions about the usefulness of sanctions. Here, she explicitly frames the argument underlying the issue-specific discussion in the earlier chapters. Her central message is that given the manifold variables which affect the successful implementation of sanctions—variables operating in both the sanctioning and target states, variables involving both international and domestic politics—it is important not to expect too much. As she notes, “sanctions may be over-worked and under-supported” (p.113), difficulties to which are added, in the context of international organizations, mechanical administrative problems with sanctions and struggles to control institutional agendas. Ultimately, political will on the part of the strongest states (in current terms, the five permanent members of the UN Security Council) may be the single most important criterion for successful use. Nonetheless, Doxey remains guardedly optimistic about the efficacy of sanctions going forward. The book concludes with a discussion of the United Nations’ role in making sanctions effective, with further admonitions about the difficulties inherent in organizational decisionmaking and the need seriously to consider the humanitarian impact on target populations before commencing sanctions.

As the author herself notes, this brief work raises more questions than it answers, but this is perhaps the work’s greatest strength. By clearly (and, equally importantly, concisely) establishing the historical and conceptual landscape surrounding the use of international sanctions, Doxey helps us frame more nuanced and narrow questions about the legitimacy and usefulness of such measures—questions that may be legal, political, or social. A student or practitioner seeking a reliable first glance at the issue of international sanctions would do well to start with International Sanctions in Contemporary Perspective.
Trade


Since its inception in 1947, the General Agreement on Tariffs and Trade (GATT) has been relatively effective in reducing and eliminating tariff barriers in the international trading system. Successive multilateral negotiations under the auspices of the GATT, including the Uruguay Round, have cut industrialized countries’ MFN import tariffs from an average of greater than 40 percent to under 4 percent. Accordingly, the attention of policymakers and academics interested in further liberalizing the global trading regime has increasingly turned to lowering non-tariff barriers (NTBs) to trade. Unfortunately, though NTBs have recently assumed a higher political profile, little systematic, comprehensive, and generalizable information has heretofore been available regarding their effects.

In *Product Standards for Internationally Integrated Goods Markets,* Professor Alan O. Sykes begins to fill this void with regard to one category of NTBs: Technical Barriers to Trade (TBTs). TBTs are national regulations and standards that limit the importation of certain types of products. At issue is whether particular TBTs represent legitimate efforts to address important national concerns, such as the environment or health, or are instead merely disguised forms of protectionism. Professor Sykes offers a commendably thorough and balanced analysis of TBTs, providing a concise survey both of the kinds of TBT measures currently in use around the world and of the modern economic theories relevant to understanding the effects of TBTs on world trade. While the current lack of systematic empirical data makes his conclusions necessarily somewhat tentative, Sykes’ book nevertheless represents an important early step and a vital reference work for those producers, importers, or regulators who require an understanding of TBTs.

Using available anecdotal and survey evidence, Sykes begins by developing a taxonomy of TBTs, classifying them according to several distinguishing features: their nature as either “regulations” (with which compliance is mandatory) or “standards” (with which compliance is voluntary), their policy objectives (for example, the protection of health and safety or the prevention of consumer deception or confusion), and their proffered justification (to ensure “compatibility” of imports with existing products and services, for example, or to ensure that imports meet certain “quality” criteria). According to Professor Sykes, the location of particular measures within this classification scheme may suggest whether the existing heterogeneity in national standards and regulations is desirable, or whether greater international centralization and harmonization would be beneficial.

Building on this taxonomy, Sykes then explores the modern economic thinking on whether TBTs should be harmonized. He first stresses that certain
heterogeneities may be justifiable, either because of differing national preferences or simply because of the prohibitive costs of changing to a new standard. More broadly, Sykes cautions that existing market-based solutions may be effective in redressing problems posed by product incompatibilities, though perhaps less so with regard to product quality standards. Although economic theories alone cannot provide universally applicable normative recommendations, in a discussion which should inform debate over any particular TBT measure, Sykes meticulously highlights the potential costs and benefits of various market and governmental responses to TBT problems.

Having developed the economic rationale justifying certain categories of product heterogeneities, the book then compares and contrasts existing legal and political regimes in order to identify elements that may ensure that only TBTs representing legitimate policy concerns are enforced. Sykes presents a concise yet thorough description of various models for policing TBTs: the GATT/WTO system, the international standardization organizations, and the various approaches taken by the European Union, the NAFTA, and the judicial models of Europe and of the American federal system.

From a legal perspective, Sykes identifies the problems discovered through experience with these regimes, noting the weaknesses of institutional consensus voting and of open-ended judicial balancing-test approaches in resolving TBT issues. He concludes that perhaps the most effective principle for policing TBTs is the "least-restrictive means" principle: import regulations should embody the least restrictive means of achieving the stated policy objectives of the employing nation.

Finally, Professor Sykes brings together the historical, economic and politico-legal analyses in the conclusions and recommendations of his final chapter. Some recommendations, such as his call for more and better global information on TBTs, are unsurprising. Others, however, are more insightful and powerful, especially because they exhibit a remarkable political sensitivity to the realities of international negotiations. A keen sense of the political-economy of protectionism underlies many of Sykes' conclusions, which broadly aim to reduce the likelihood that private entities will capture the processes of international product-standard formation, implementation, and enforcement.

Overall, it is difficult to find fault with Professor Sykes' analysis. In part, this is because the author's intent seems to have been to provide a thorough reference work on TBTs rather than to argue for any specific approach. Sykes conscientiously achieves a balanced presentation; while the exposition may evince a slight pro-market sentiment, criticisms of market solutions are given a fair presentation. While Sykes' book may not provide decisionmakers with clear answers to TBT problems, it is a rich reference work that will enable them at least to ask the right questions.

The increasing international tendency toward the formation of regional economic blocs has generated concern about their potential effects on the emerging world order. One commonly raised scenario involves trade wars between antagonistic regional powers in a zero-sum economic conflict that may develop into military conflict. Another concern is that regionalism may interfere with the development of the global political economy. Regionalism and World Order applies an international political economy (IPE) analysis to address these concerns. IPE examines the roles of state actors and of the interdependent relationships among nations in shaping economic systems, particularly emphasizing theories of the hegemonic state as a means of analysis. This book’s application of IPE effectively supplements more orthodox approaches, exposing the complexity of international economic systems in terms of historical change in political order.

This is the first publication by a research group established as part of the Political Economy Research Centre of the University of Sheffield in 1993. The editors, Andrew Gamble and Anthony Payne, introduce the book by discussing the state of contemporary IPE methodology. Reviewing neo-realist and neoliberal theories of IPE, they conclude that the “New” IPE method of analysis, which emphasizes the influence of historical structures and conflicting conceptions of order on political economies, is better suited to understanding the new regionalism than are the orthodox approaches. New IPE was largely founded by Robert Cox, who applied the premise of critical theory, namely that there are no observer-neutral theories, to IPE by using historical analysis to question prevailing positivist conceptions of the world order. Gamble and Payne seek to show that the movement towards regionalism must be understood in light of the inability of the United States to continue its historical hegemony and the failure of any state to take its place.

Six essays apply New IPE to three regional economic blocs: the Americas, Europe, and East Asia. In the first of these essays Stephen George examines the changing tensions in the European Union over the past couple of decades, discussing the movement from an Anglo-French dynamic, centering around the role of the United States in European affairs and ideology, to the rising voice of Germany in the debate. Ian Kearns follows George with a fervent argument that orthodox theories of market liberalism cannot adequately address the unique historical circumstances of Eastern Europe. In the book’s most clear departure from liberal and realist theories of the IPE, he portrays Western efforts to aid economic development in the region as hypocritical, preaching free trade and open markets to Eastern Europe while maintaining strategic trading policies in the West’s own economies, a practice that Kearns argues will dangerously destabilize the region.

In the next pair of essays Payne and Jean Gruegel examine regionalist
tendencies in the Americas, focusing on the United States’ response to the end
of its global hegemony, in conjunction with the disappearance of Latin
American and Caribbean leftist ideology as a valid form of opposition to U.S.
influence. The authors argue that the end of the Cold War has allowed the
United States to increase its dominance in the region as Latin America and the
Caribbean restructure around openly “Western” ideology.

The book’s most intriguing and effective application of the methodological
features unique to New IPE surfaces in the sections probing the complex web
of regionalist tendencies and developments in East Asia. Ngai-Ling Sum and
Glenn Hook reveal how the dominant states, pursuing their national interests,
have made conflicting attempts to define East Asian identities. Sum sets forth
four conflicting and overlapping conceptions of East Asian identity, those that
are backed by and serve the interests of the United States, Japan, China, and
Singapore respectively, and analyzes each identity as it is manifested in
international associations in the context of the parties’ historical aspirations and
actions. Hook approaches the problem in a parallel manner, focusing on Japan’s
role in the growth of regional interdependence among East Asian nations. Both
Sum and Hook relate the lack of clear regional boundaries in East Asia to
opposing historical processes that both drive and sustain the creation of national
identities and orders.

Although the brevity of the book’s individual analyses precludes them from
presenting a comprehensive overview of the specific regionalist projects, as a
group these essays offer insights into the consequences for conceptions of world
order engendered by the loss of U.S. hegemony. The book is useful both as an
introduction to the claims and methods of the new IPE method as applied to
regionalism and as a partial solution to the weaknesses of more traditional
analysis by elucidating overlooked features of specific political economies in
terms of the historical development of conceptions of regional identity.

Fundamental Tax Reform and Border Tax Adjustments. By Gary Clyde
Hufbauer, assisted by Carol Gabyzon. Washington, D.C.: Institute for

Fundamental Tax Reform and Border Tax Adjustments responds to the tax
reform debate that arose in the wake of the 1994 elections. In this policy study,
Gary Clyde Hufbauer, Senior Fellow at the Institute for International
Economics, and his research assistant, Carol Gabyzon, investigate the border
tax adjustability of three plans that sought to reform the current corporate tax
structure by introducing a tax on business activity (TBA). The three plans,
which came before Congress in 1995, were the Unlimited Savings Allowance
Income Tax System (USA Tax) proposed by Senators Sam Nunn (D-GA) and
Pete Domenici (R-NM), the flat tax advanced by Congressman Richard Armey
(R-TX) and Senator Arlen Specter (R-PA), and the national sales tax advocated
by Congressman Bill Archer (R-TX) and Senator Richard Lugar (R-IN).
Congress has long considered replacing our current corporate tax system, which relies mostly on direct taxes, with a TBA. Almost every other industrialized nation already has implemented such a system, known more commonly as the value-added tax, because it both promotes savings and investment and results in lower collection costs due to its greater simplicity. Hufbauer and Gabyzon thus begin their analysis with an overview of the arguments for a TBA system, including an examination of its likely effects on U.S. levels of savings and investment. They then outline the various TBA proposals, paying particular attention to the credit invoice method found in many countries and the subtraction method used in the business tax component of the USA Tax. They summarize the merits of these two approaches with respect to administrative complexity, the use of multiple rates, and the accuracy of border tax adjustment.

Having established the background of the TBA debate, Hufbauer and Gabyzon then pose their central question: Do these TBA plans satisfy international rules on border tax adjustability? The authors begin their analysis of this question in chapter two by providing the intellectual history of border tax adjustments, and they proceed to describe current American, EU; and Japanese practice in chapter three. Chapter four then reviews the international rules on border tax adjustment established by the 1979 Tokyo Round and 1994 Uruguay Round agreements of the General Agreement on Tariffs and Trade, and by the General Agreement on Trade in Services of 1994.

Finally, in chapter five, Hufbauer and Gabyzon consider whether border tax adjustments under the USA Tax, the flat tax, and the national retail sales tax would be consistent with international rules. They conclude that the national retail sales tax and, to a lesser degree, the USA Tax, would be adjustable under current international rules. Their analysis of the flat tax, however, suggests that the United States may need to seek changes in international rules if it decides to pursue this approach.

Fundamental Tax Reform and Border Tax Adjustments thus provides a concise and thorough discussion of the border tax adjustability of these three tax plans. While the intensity of national debate over tax reform may recede, policy analysts should continue to benefit from this useful examination of the TBA debate.

International Litigation


International Litigation and the Quest for Reasonableness consists of ten essays, derived from lectures given by the author at the Hague Academy of
International Law. The author, Andreas F. Lowenfeld, is a professor of international law at New York University School of Law and a member of the Institute of International Law. He also served as an Associate Reporter on American Law Institute’s Restatement (Third) of the Foreign Relations Law of the United States, an experience that informed much of his thinking on private international law and the essays collected in this work.

In his opening essay, Lowenfeld defines the concept of private international law and introduces the Laker Airways litigation of the 1980s to illustrate the complex issues that arise in private international law disputes. In the following chapters he explores each of these issues, primarily by way of an incisive analysis of European and U.S. cases that illustrate the development of the law in each of these areas. Throughout the essays, Lowenfeld also develops two main themes. First, he argues that there is international convergence toward a principle of reasonableness comprising a movement away from international confrontation involving absolute values toward cooperation that recognizes the importance of interest balancing. Second, the author brings out the public law character of private international law by demonstrating that the issues arising in private international litigation increasingly involve traditional public law questions regarding national interests and international cooperation.

In essays two and three, the author uses cases from Great Britain and the United States to explore extraterritorial jurisdiction, or jurisdiction to prescribe. Lowenfeld argues that courts should determine jurisdiction by evaluating competing state interests rather than by applying a strict “effects test.” Similarly, in the fourth essay, the author argues that courts deciding whether to exercise jurisdiction over nonresidents should weigh private and public considerations, including international principles of comity.

Essay five addresses the difficulties surrounding the legal status of multinational corporations. Through an analysis of several cases, the author compares two theories on the subject. The corporate entity theory regards each subsidiary as an independent corporation, while the corporate enterprise theory focuses on intracorporate links. Lowenfeld argues that each theory applies under different circumstances, requiring that courts take into account the nature of the case and the type of plaintiff involved when determining whether to shield a parent company from judgments against a subsidiary.

Essay six explores the recognition and enforcement of judgments abroad, while essays seven and eight delve into the conflicts that arise among courts in different jurisdictions during discovery and the gathering of evidence. As in the previous chapters, the author demonstrates a trend toward inter-jurisdictional cooperation. He confronts the issue of European resistance to American discovery requests, suggesting ways in which greater progress can be made toward reconciling the very different judicial philosophies of the two continents. Essay nine considers the parties’ influence over choice of law, choice of forum, and agreements to arbitrate. The concluding essay summarizes the arguments and briefly lays out some of the author’s hopes for the future development of private international law.
The essays, written in a lively and engaging prose style, probe a variety of domestic and international decisions in substantial depth, and yet remain accessible to those new to the field. Most importantly, Lowenfeld accomplishes his objective of showing that private and public law issues are interlinked in international litigation, a fact that warrants further progress toward international judicial cooperation.


Over the past decade there has been a striking increase in high-profile transnational tort cases. Two notable examples are the Union Carbide disaster in Bhopal, India and the complex fraud arising out of the BCCI dispute. The increasing movement of people and industries across borders makes it likely that this trend will continue. In 1992, the International Law Association established the Committee on International Civil and Commercial Litigation, composed of international experts from both the academy and legal practice, to research jurisdictional issues in transnational tort cases. Such issues are crucial to the disposition of these cases, which can be quite complex when the parties are from one jurisdiction, the cause of action arises in another, and the action is brought in still a third.

This volume of thirteen essays is the result of the first research effort of the committee's members. It aims both to provide a general framework for understanding jurisdictional issues in transnational tort cases and to present specific information about substantive law in areas of particular interest.

The first four papers concern jurisdictional theories of tort law. Campbell McLachlan's opening chapter gives an overview of the present status of transnational tort litigation. He argues that traditional domestic tort law principles cannot adequately explain the behavior of litigants or courts in many cross-border tort disputes. Among his many examples, he cites Asahi Metal Industry Co. v. Superior Court, in which a court ruled that there was no jurisdiction at the place of injury, and In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India, in which the suit was dismissed on forum non conveniens grounds, though it was brought in the corporation's home state. In a typical domestic tort suit, for a court to hold that the defendant's place of incorporation is an inconvenient forum would be highly unusual, if not bizarre. According to McLachlan, however, such outcomes occur frequently in transnational litigation because jurisdictional principles have not been standardized. He goes on to consider the possible bases for ending this "anarchy of national jurisdiction rules" (p.15) in American, British, and European jurisdictional principles.

The next three papers provide theoretical accounts of the jurisdictional principles in English common law, U.S. law, and the civil law countries. Peter
Nygh argues that the principle underlying the pure common law approach to jurisdiction is the ability to serve process; historically, without legal service of process, no judgment could be rendered, whereas with such process, jurisdiction could easily be established. Nygh then points out that because of its emphasis on service of process, the U.K. never adopted quasi in rem or in rem bases of jurisdiction comparable to those that developed in U.S. law. Nor was a minimum contacts standard adopted in the U.K., even for corporations. Instead, the common law sought to define rules for when a corporation was “present” as a means of establishing in personam jurisdiction over it. Finally, Nygh traces the evolution of these principles, arguing that the central role of service of process in the common law system has gradually been eroded by the rise of forum non conveniens. Today, service of process retains its dominance only in Australia and the pure common law jurisdictions, where forum non conveniens has not taken hold.

After the introductory essays come papers on products liability, transnational fraud, defamation, intellectual property, securities, competition, traffic accidents, environmental damage, and restitution. All of these essays are primarily expositions of the jurisdictional principles in pure common law, American, and civil law systems, though each includes a few suggestions for reform. A continuing theme is the inability of traditional domestic tort principles to deal with the complex issues involved in injuries that cross borders.

For example, Peter Schlosser’s essay on products liability begins by describing the basic difference between the common law and civil law approaches to the issue. Common law regimes focus on “physical power” over the defendant and due process concerns; civil law regimes focus on the court’s competence to hear the action. Thus, there is no forum non conveniens doctrine in any civil law country’s legal system. Competence principles underlie the jurisdictional schemes embodied in the Brussels and Lugano Conventions, which govern most cross-border European tort disputes. Schlosser then uses these different jurisdictional frameworks to explain differences in products liability laws. For example, in the United States, numerous cases address the circumstances in which a court has jurisdiction in products liability cases. The large volume of case law reflects the uncertainty of the underlying doctrines, such as forum non conveniens. In comparison, the European system has little case law, because the rules are more rigid. The civil law system allows more jurisdiction than its common law counterpart. While the United States’ ambiguous system provides defendants with too many avenues by which to escape jurisdiction, the European system is unreasonable in forcing manufacturers to defend themselves in cases in which their due process rights are clearly violated. Schlosser concludes with an analysis of how the shortcomings of both systems may be used to inform a more rational approach to international tort disputes.

If there is a weakness in this collection, it is that it claims to describe a global range of international litigation, but focuses on only the United States,
the British Commonwealth countries, and Western Europe. This is particularly striking since Peter Nygh mentions in the foreword that committee researchers were given lectures on Indian and Japanese law to help in their studies. Overall, however, *Transnational Tort Litigation: Jurisdictional Principles* offers the reader both a clear conceptual framework for understanding jurisdictional principles in common and civil law systems, and specific applications of those principles to important areas of tort law.


Ever since the adoption of the U.S. Constitution in 1789, Americans have tended to malign the loose union of states that existed under the Articles of Confederation. Many readers will thus be astonished to learn that at least one contemporary observer regards the Articles of Confederation as a far more important contribution to world political development than the United States' more centralized federal system of the past 200 years. In this volume, Frederick Lister, a retired United Nations official, examines confederations, a form of loose union between sovereign states and argues provocatively that they stabilize international politics and prevent war.

Lister provides a number of criteria to distinguish between a federation, which the United States exemplifies, and a confederation, which existed in the thirteen states before 1789. He explains that a federation creates a new nation from units that give up at least some of their sovereignty. In contrast, a confederation creates a form of union between states that, while explicitly declining to surrender their sovereignty, nonetheless cede control over some important areas of policy (most typically trade and defense) to the new entity. Lister provides helpful analogies. A federation, he argues, resembles a marriage. The spouses (states or peoples) stop thinking of themselves as individuals and start thinking of themselves as members of the same family. A confederation, on the other hand, can be compared to a police officer sent to patrol an area inhabited by numerous and mutually suspicious neighbors (again, states). While the police presence does not break down the distinction between the households and fuse them into one family, the officer does provide them with a guarantee of protection against each other. As a result, the neighbors no longer need to protect themselves from aggression, and as their fear of attack recedes, cordial exchanges among them may increase, perhaps ultimately leading to friendship and the creation of a sense of community where none existed before.

To continue the analogy, the problem with the current state system is that no police officer stands on guard in the "neighborhood" where the peoples of the world live. And just as there are few individuals one likes or trusts enough to marry, there are few "couples" in the community of nations; nations view
themselves as distinct and typically have no wish to merge with one another. At the same time, like citizens in a neighborhood, peoples or states may be able to live in peace if they are protected from each other by an outside authority.

Lister argues that a confederation can provide such an authority in a world of hostile states unwilling to contemplate full consolidation into a single world government. Because this refusal to contemplate full union limits the viability of a federation, the Articles of Confederation, which featured close cooperation between independent states, may provide a more realistic model for resolving current international conflicts than the U.S. Constitution, which envisioned the creation of a single nation. In other words, the trick is to identify a moderate level of union that protects states from each other and yet remains politically viable. Lister argues that such a level of union can be identified and achieved.

Lister's claim invites an obvious rejoinder. If a confederation is so desirable, why have no actual confederations existed on the planet for more than a century? Indeed, the last two historical confederations that Lister identifies, the American Articles and the German Confederation of the nineteenth century, both dissolved into more centralized successors: the United States and imperial Germany. The reader might well suppose that the conspicuous absence of confederations suggests that, for whatever reason, they are not viable in the contemporary world. Lister anticipates this challenge and responds by pointing to one full-fledged confederation, the European Union (EU), and one embryonic but even more ambitious confederation, the United Nations.

Lister posits that the EU may be the first twentieth-century confederation. For him, the EU is not a political anomaly with no clear provenance and no peers. Rather, it is the first contemporary revival of an ancient institution. Lister hopes that viewing the EU this way will encourage observers to set up similar confederations in other parts of the world.

Furthermore, documenting the EU's short bursts of progress toward union as well as its years of stagnation, Lister concludes that a clear pattern has emerged in its development. While the EU has won support for cementing intra-European economic links and limited foreign policy cooperation, it has faced overwhelming resistance to acquiring the attributes of a real state. For Lister, this demonstrates that modest programs for confederal union can prove highly beneficial, even though grandiose plans for a federation are usually doomed to failure.

In his analysis of the other would-be confederation—the United Nations—Lister evinces more disappointment. In his view, the United Nations has failed to develop from a mere inter-governmental organization, where states talk to each other, into a confederation that could actually restrain aggression. Lister develops a complicated institutional explanation for the United Nations' "sclerosis," which in turn is responsible for the United Nations' inability to gain the support of the world's people, most of whom still are not willing to entrust collective security arrangements to the United Nations. Thus, the United Nations has failed to live up to its original promise of removing self-help from
the international system.

At this point Lister's ultimate goal—international cooperation to prevent aggression—becomes clearer. In concluding his study, Lister seeks to justify foreign intervention to protect peaceful states against invaders. He argues that if the great powers adopt a consistent policy of intervening to deter aggression, states could in time overcome the anarchy of the contemporary world system. In short, a world confederal arrangement could emerge if the great powers take on the responsibility of guaranteeing non-aggression.

Lister is to be commended for his exploration of a neglected and potentially promising form of political organization. However, since many of his most ambitious claims could themselves be developed into individual monographs, the work sometimes reads more like a prospectus for a lifetime of research than a completed text. All too often, Lister's arguments are sketched rather than fully developed, and his conclusions are hinted at rather than stated clearly. Still, readers who share Lister's nuanced view of the current state system—that it cannot be abolished but can and needs to be transformed—will find this a valuable volume.

European Community


Even after the Maastricht amendments, many commentators assert that the legislative process of the European Community (EC) still suffers from a "lack of democracy." In *Private Parties in European Community Law*, Albertina Albors-Llorens argues that, in light of this deficiency, the ability of private parties to obtain judicial review of Community actions is of particular importance. Albors-Llorens, a professor of European Community Law at Cambridge, examines in detail the relevant case law of the European Court of Justice and the Court of First Instance. She lauds the gradually improving ability of individuals to challenge Community actions, while calling attention to situations in which this is not yet possible.

The greater part of this study is devoted to annulment proceedings, the primary means by which a private individual may challenge Community actions. Article 173 of the EC Treaty imposes two severe *locus standi* or standing requirements on private parties who wish directly to challenge Community measures. First, if the applicant is not the addressee of the decision in question, he must prove that he is *directly and individually* concerned. Second, only Community decisions may be challenged; actions against regulations or directives are not admissible.

The first of these requirements is the more formidable and the more strictly enforced by the Court. According to the traditional interpretation, private
parties are only deemed to be directly concerned with a Community measure when the addressee of the measure has no discretion in its implementation. Moreover, the Court seems to require that natural and legal persons suffer damage to their legal rights, and not merely their factual interests, to be deemed directly concerned. The Court has been slightly more flexible on the question of individual concern. To be individually concerned, an applicant must belong to a “closed” category of persons who are affected by the challenged measure; the membership of this category must be fixed at the time the measure comes into force. This requirement has been relaxed, most notably in challenges to decisions adopted in the course of competition proceedings.

The second locus standi limitation in annulment proceedings, that only Community decisions may be challenged, has been relaxed significantly. This is due, in part, to language in Article 173 that suggests that private parties may challenge regulations or directives that are, in essence, “disguised decisions.” Many have recognized that this provision has been applied inconsistently and with increasing leniency, and even the Court’s Advocates General have brought attention to the Court’s struggle with this issue. The EC Treaty does not explain how a regulation or directive differs from a decision; the Court has had to draw this distinction through its case law. The Court has repeatedly emphasized that regulations are of general application and are aimed at abstract categories of people, whereas decisions are directed at identifiable groups of natural and legal persons. Albors-Llorens observes that through this definition the Court has, in effect, merged the test of legal nature with that of individual concern. She explains the Court’s inconsistency in applying this test as a result of its slow merger of these two locus standi requirements.

Annulment proceedings are not the only means by which private parties may obtain review of Community measures. If a Community measure requires implementation by a Member State, a private person may challenge the national measure before the national court. The national court may then refer a question about the validity of the Community measure to the European Court, which may then give a preliminary ruling on its validity. This approach has the advantage of avoiding the strict locus standi requirements of annulment actions. However, referring questions to the European Court is at the discretion of the national court, and the European Court may decline to give a ruling. Additionally, the national court has the discretion to decide the scope of the questions referred, which may adversely affect applicants who wish to make different allegations.

Albors-Llorens concludes that neither the system of preliminary rulings nor other, more specialized actions are adequate alternatives to annulment proceedings. In a detailed examination of the case law, the author provides examples of private parties who were deprived of all judicial protection from potentially illegal Community actions. She concludes that either further relaxation of locus standi requirements in annulment proceedings or an increase in the availability of alternative means of review is necessary to “fill the gaps” in European Community law. Private Parties in European Community Law
provides a close study and critique of the existing methods by which private parties may challenge Community actions, well supported by the case law in this area.