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Development Studies


Property tends towards amnesia. Our relationship to the things we “own” often seems natural, timeless, and unencumbered by legal rules. Most of us take for granted that if we buy a house we have the right to live in it, exclude others from it, and sell it when we choose. We tend to forget that our rights over assets are constructed on an invisible framework of jurisprudence, statutes, and social norms. We do not to spend much time marveling at the historical contingency of our current understanding of property; instead, we unconsciously rely on time-worn rules to enforce our rights over things and to sustain our daily transactions.

In his most recent book, *The Mystery of Capital,* Peruvian economist Hernando de Soto argues that such complacency is not shared by most of the developing world. According to de Soto, the mere existence of property law is not taken for granted in developing countries but rather is being hashed out on the ground-level, in squatter communities on the fringes of burgeoning metropolises, and in rural areas in which extralegal means of land ownership dominate. He contends that it is precisely in these informal settlements that the underdevelopment of the Third World (his term) originates.

De Soto’s thesis is deceptively simple: poor countries are poor not because they lack assets, but because they lack the property systems needed to transform their assets into capital. After several years of field work in countries throughout Asia, Africa, the Middle East, and Latin America, de Soto observes that the assets evident in even the most underdeveloped countries are tremendous, and the industry and thrift displayed by its citizens match that of the West’s most assiduous entrepreneurs. He throws out some staggering numbers: “the total value of the real estate held but not legally owned by the poor of the Third World and former communist nations is at least $9.3 trillion,” which is “about twice as much as the total circulating U.S. money supply” and “twenty times the total direct foreign investment into all Third World and former communist countries in the ten years after 1989” (p. 35). His reform agenda develops logically from these observations: institute an integrated, functioning property law system in the developing world and this tremendous but underutilized “dead capital” will be transformed into “live capital,” the kind you can put to work.

De Soto argues that international development efforts have failed largely because of the amnesia of the West. The economists at the helm of international aid institutions and the legal advisors to the leaders of developing countries are Western-trained but blind to Western history. They
fail to recognize that the Third World of today resembles the early American frontier—lawless, riddled with conflicting land claims, and populated by squatters and rugged entrepreneurs. Like the Wild West, the contemporary Third World, relying on informal organizations and communally enforced norms to maintain a tenuous social order, lacks an integrated property law system that would allow hard-working pioneers to become full-blown modern capitalists. De Soto concludes that, in order to compete in the global economy, developing countries must do what the West did: document and formalize property rights, provide legal title to land, and integrate diverse norms into a single system of property law.

De Soto’s argument is not unprecedented. The notion that the rule of law, particularly property law, can play a critical role in promoting the economic stability of the developing world has been articulated by “law and development” scholars since the mid-1960s. In the past decade, international development institutions such as USAID, UNDP and the World Bank have prioritized rule of law initiatives as part of their poverty alleviation campaigns. However, de Soto’s book effectively popularizes many of the ideas contained in the technical and academic literature. His book is an enjoyable read, employing creative prose and evocative metaphors to fashion his argument. Others may have made many of the same points but not in as accessible or engaging a manner.

De Soto’s work is also incredibly timely. While the law and development movement has, over the course of several decades, gained momentum within large international development institutions, recent waves of widespread evictions of squatters in such diverse countries as South Africa and Brazil illustrate a persistent tension between economic development and human rights. For instance, in the wake of land seizures by landless peasants in Zimbabwe, the South African government recently began conducting a series of massive evictions of squatters from publicly-owned land. As reported in the Washington Post, the African National Congress cited the need to “show the world that it respects the rule of law and property rights—and to convince foreign companies that it is safe to invest in South Africa” as justification for these often violent evictions. The housing rights of squatters, the rule of law expectations of international investors, and the economic development ambitions of national policymakers, as this example illustrates, often exist in opposition to each other. De Soto illustrates the falseness of this tension—evicting squatters and demolishing informal housing is a shortsighted waste of valuable capital. By his logic, international investors should align themselves with rule of law campaigns aimed at stabilizing squatter’s assets, not destroying them.

The obvious criticism of de Soto’s work is that he overemphasizes the lack of formal property regimes in explaining persistent poverty in the developing world. It is in the unkempt and untitled corners of the developing world that he locates the problems of unequal development, not in the hallowed halls of the World Bank and IMF or in the corruption-ridden chambers of municipal and federal governments (each of which are more common targets for development scholars). By endlessly repeating, mantra-
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like, that property law "is the place where capital is born" (p. 47), de Soto ignores other factors that may have stunted its expansion into the Third World. Isn’t the colonial legacy even somewhat relevant in the unequal distribution of capital in the globe? What about ethnic warfare, political instability, debt burdens, geography, or restrictive trade policies? The obvious question then becomes, whom does he let off the hook by insisting that the solution to the problem of development lies in creating legal title? By eschewing alternative theories for underdevelopment, de Soto places the responsibility squarely in the lap of leaders of the developing world to conform their property law systems to Western standards. It is perhaps not surprising that conservative policymakers in developed countries, weary of traditional anti-poverty programs and opposed to increased aid, have rushed to embrace his thesis.

De Soto also neglects to ask what will be sacrificed in the transition to a Western-style property regime. For instance, de Soto advocates uncritically for the replacement of informal, customary systems with formal, abstract ones. He repeatedly argues that lawmakers in the developing world must forget the “thing” (the asset owned) and instead focus on the property document, since, he claims, the modern capitalist system recognizes only such legal writings. In one particularly telling section, de Soto writes:

Capital is born by representing in writing—in a title, a security, a contract, and in other such records—the most economically and socially useful qualities about the asset . . . .

The moment you focus your attention on the title of a house, for example, and not on the house itself, you have automatically stepped from the material world into the conceptual universe where capital lives . . . . [Formal property] invites you to go beyond viewing the house as mere shelter—and thus a dead asset—and to see it as live capital (p. 50).

However, in making such an abstraction, it is unclear what meaning is lost. In a world in which shelter is hard to come by, abstracting away from the meaning of a house as shelter may be a dangerous move. Is this not precisely the logic that makes massive evictions, such as those in South Africa, justifiable?

Ultimately, de Soto’s book is much more effective as an antidote to the amnesia of First World readers than a prescription for Third World leaders interested in implementing effective reform. He unsettles the complacency in the West with our own property rules but does not tackle the concrete challenges involved in constructing a functioning property system throughout the developing world. He hints at a plan, but writes, “explaining the details is not part of this book” (p. 162). Instead, he advises interested readers to consult unpublished documents in the archives of the Institute for Liberty and Democracy, the think-tank he heads in Peru. Ideally, he would have saved us the flight.

"Basics of International Intellectual Property Law," by G. Gregory Letterman, offers an introduction to the complex and ever more important topic of international intellectual property law. As the first in a forthcoming series of books on international commercial law, it ultimately aims to be a practical guide for intellectual property ("IP") owners and also serves as a helpful overview for practitioners and law students.

This book is written primarily with the perspective of IP owners in mind. Letterman, the author of numerous treatises on international business law, begins by emphasizing the economic aspects of intellectual property, an increasingly significant source of income for companies but also a costly form of property to protect. He ends with a practical discussion of international transactions involving IP and the need for every company to have an effective internal IP protection program. He stresses the trend toward global harmonization of IP laws and practices, which has helped to make protection in other countries greater and easier to obtain, and urges IP owners to utilize this to their maximum benefit. He also points out that there are still gaps in the laws, which are not always enforced in the same way in all countries. Letterman alternates between a neutral explanation of existing laws and (at times urgent) warnings and advice to prospective IP owners.

Letterman begins by giving a general definition of IP and the IP issues that arise in an international context. He goes on to provide an overview of multilateral and international IP organizations, as well as IP conventions, treaties, and other agreements. After setting up the general framework of international IP, he shifts the focus to devote an individual chapter to each major area of IP (patents, trademarks, copyrights, and what he refers to as "other" IP such as utility models, industrial designs, the topography of integrated circuits, trade secrets and "know-how," and "personality," as well as two new technology areas, biotechnology and Internet/e-commerce). Finally, he ends with a discussion of IP international commercial transactions and a recommendation for every IP owner to adopt a program of international IP protection.

After giving an introductory explanation of what IP means—including its overall definition and major sub-categories, as well as the technical requirements involved in obtaining protection and the limits of that protection—Letterman briefly explores the particular opportunities (primarily for maximizing profits) and issues (such as IP piracy and the specific problems of exhaustion of IP rights and gray market goods) involved for IP owners in moving beyond national borders. In his overview of the major multilateral and international organizations related to IP protection, he touches on, among others, the World Intellectual Property Organization, the World Trade Organization, and the European Union. For each major IP treaty or
convention, he provides basic information—including when it was written, the number of signatory countries (particularly whether or not the United States is among them), its primary purpose, and its crucial provisions. Several of the documents are reproduced—including the Paris Union for the Protection of Industrial Property; the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods; and the Berne Convention for the Protection of Literary and Artistic Works.

Letterman refers back to these treaties and conventions when he addresses each major area of IP. For each category, he provides a general definition, a brief history, and a discussion of the major differences in national legal approaches to that particular form of IP (such as “first-to-file” vs. “first-to-invent” for patents), as well as its most controversial international issues (such as compulsory licensing for patents). Finally, he explains how major international or multilateral treaties, conventions, and agreements deal with each IP area. While Letterman does not focus extensively on new technological developments, he briefly discusses biotechnology and the Internet and e-commerce, noting the special challenges to IP owners in these two growing areas (e.g., for the Internet, difficulties regarding jurisdiction and enforcement of IP rights) and the body of law that is developing to address these issues.

Finally, Letterman examines international IP transactions, including licensing, transfers, sales, and franchising, explaining how they work (including usual approaches to terms and compensation), and how they can be affected by other factors not specifically related to IP (such as export controls, taxes, and competition laws). He ends with some broad recommendations for every business entity or other producer of IP to implement a systematic program ensuring a cost-effective identification of which IP to protect, how best to protect it, and where to protect it.

This is a useful book for IP owners, practicing attorneys, and law students who wish to gain a basic understanding of this complicated and evolving area of the law. The book’s strengths include a clear, well-organized presentation and a good summary of the most relevant information. In particular, the synopses of IP treaties and conventions (and the inclusion of the actual texts of several of these documents) may be the most helpful information in the book, since they provide an easily accessible compendium of international law on this topic. However, some of the choices regarding organizational structure, particularly the placement of the treaties, are somewhat confusing. For example, the texts of treaties, conventions and agreements are reproduced in different chapters of the book rather than being all grouped together, and the texts are sometimes in different chapters than their synopses. Furthermore, the summaries of the treaties might be enhanced by more frequent specific references to articles and provisions, so that a reader might be able to immediately know which sections were being paraphrased. However, these relatively minor, primarily structural points do not detract from the overall value of this book as a general introduction to international intellectual property law.
International Conflict Studies


A reflection of international legal scholars’ soul-searching in the wake of NATO’s humanitarian intervention in Kosovo, Michael J. Glennon’s most recent book is both a bleak post mortem on international regulation of the use of force and an optimistic agenda for reform. Glennon, professor of law at the University of California, Davis, focuses on the “cognitive dissonance” (p. 3) between the textual illegality of NATO’s use of force to prevent massive human rights abuses and its manifest necessity. He argues that the “failure of the legalist system” (p. 1) to meet the present needs of the world community should serve not as a pretext for “semantic sleight of hand” (p. 112) in the syntactic manipulation of the existing rules-based system, but rather as the catalyst for an assessment of the system’s deficiencies and the formulation of an alternative legalist order. His immediate recommendation is not the deus ex machina of a full-fledged legal order governing the use of force, which he posits as a long-term goal. It is instead a transitional turn to a contingent modality of cost-benefit analysis to be performed by states in weighing the merits and demerits of intervention. Over time, the repeated weighing of costs and benefits will yield a set of normative principles that scholars can then fashion into an alternative legalist order. Glennon does not question the validity or feasibility of such an order; he merely suggests that it be achieved through common law gradualism rather than positivist prescription.

The caution with which Glennon advances these modest reforms likely stems from the book’s starting premise: the constraints that the U.N. Charter imposes on the use of force are little more than “legalist mythology” (p. 23). He begins his case against this legal myth system with a detailed analysis of the sources of the international legal norms governing the use of force and their breach in the Kosovo intervention. The relevant textual sources of law, namely the U.N. Charter and the Security Council Resolutions that preceded and followed the Kosovo intervention, are reviewed to demonstrate the shortcomings of the NATO allies’ text-based justifications of their use of force. Justifications that rely on state practice and custom also receive careful scrutiny. Glennon argues that whether or not standard conceptions of state practice are taken as indicia of state decision makers’ interpretation of “the meaning of a treaty” (p. 48) or as acts of law-making that shape customary norms—a distinction that is presented as “virtually impossible” (p. 48) to make—these conceptions are no more than “assemblages” of “fantasy-land rules” (p. 65).

This “sorry record” (p. 84) of state compliance with the U.N. Charter’s prohibition on the use of force for purposes other than self-defense demonstrates Glennon’s thesis that there are at present no binding normative constraints on states that undertake intervention. The actual practice of the Security Council meets similar criticism: the defense of the Council’s ultra
vires expansion of the scope of action it derives from the Charter is but "[a]n extreme adaptivist approach that reduces the law to a wad of putty . . . to be kneaded and shaped . . . by those strong enough to mold it" (p. 124). Given the malleability of international law, whose "analytic tools" Glennon believes "are not up to the task" (p. 85) of providing clear and consistent parameters for evaluating the permissibility of humanitarian intervention, the book then asks whether or not "the construction of a true legalist use-of-force regime is feasible" (p. 145). Glennon answers with a qualified no. "[T]he contentious international environment in which we still live" (p. 176) renders the kind of consensus that is the prerequisite of an international rule of law impossible for the time being. Thus, he abandons the enterprise of creating a new legal order from whole cloth in favor of a more modest task—the mapping out of a narrowly delimited common ground upon which to lay the foundations of a future legalist order.

Rather than postulating "an elaborate body of inflexible rules that are honored more in the breach than in the observance" (p. 177), Glennon proposes a transitional strategy. In their evaluation of future acts of humanitarian intervention, international legal scholars are encouraged to weigh costs and benefits in light of a core set of preferences: the intervenors should be democracies; these should be organized into a multilateral alliance; this coalition should "be formed around principle" (p. 199) before the "specific crisis" (p. 199) necessitating intervention takes place; and the states involved should have "real or potential economic and cultural contacts" (p. 199) with the crisis-stricken region. According to Glennon’s transitional modality for determining the legality of the use of force, the NATO action in Kosovo, a “[h]umanitarian intervention by [a] preexisting regional coalition of democracies” (p. 198), would satisfy the requirements of lawfulness. Acknowledging the deficiencies of such an analysis—which does not reach "the issue whether there exists a moral obligation to intervene” (p. 203) and is subject to distortions arising out of data-gathering that is “insufficient to permit any meaningful quantification of risk” (p. 204)—Glen non nevertheless argues that its repeated application is the only way to construct a new legalist order for the regulation of the use of force. A body of principles will develop that can be transformed into a comprehensive normative framework “embodied in a treaty” (p. 204). For Glennon, this common law gradualism is the surest means of vouchsafing the “universality and equality of obligation” that would characterize “an authentic legalist order” that “embodies [the world] community’s shared expectations” (p. 208).

The chief value of Glennon’s book lies in its willingness to recognize the near irrelevance of narrow rules-based discourse to the world decision-making process and in its avowed goal of devising a more context-sensitive alternative to the bloodless linguistic derivation that today goes by the name of "international law." Although its evocation of a shadowy future of positivist normative constraint risks falling into the very ingenuousness it criticizes, its steady focus on operations and its relentless exposé of legal myth is a bracing antidote to the acontextual deontology of most international legal scholarship. Amid the wishful thinking that governs international legal
discourse, including long parts of his own book, Glennon's cautious embrace of the "relativity of consequentialism" (p. 176) is a hopeful sign.


_Civilians in War_ opens with a powerful statistic. In World War I, only five percent of all casualties were civilian; in World War II, that figure rose to fifty percent; and in the conflicts of the 1990s, it reached ninety percent. Highlighting the limitations of law, combat has become more and more indiscriminate even as international conventions such as the 1949 Geneva Conventions have been promulgated to humanize war. This is the point of departure for _Civilians in War_, an important work edited by Simon Chesterman, an associate at the International Peace Academy. The book, drawing together writings by international relations scholars, legal academics, lawyers, jurists, and NGO leaders, is an effort to take stock of the myriad tools available to protect civilians during conflict and to identify prospects for improving and adding to those tools.

_Civilians in War_ tackles its subject matter in four parts. Part One addresses the need to place international humanitarian law in both a historical and local context, highlighting two important themes that recur throughout the book. This Part opens with a discussion of the historical evolution of the legal category of "civilian" in a contribution by Karma Nabulsi, a research fellow at Nuffield College, Oxford University. Looking well before 1949—the watershed moment represented by the Geneva Conventions—this chapter begins with the Hague Peace Conferences of 1899 and 1907, stressing their attempts to define and regulate belligerents without the references to civilians. Charting the evolution of the concern for civilians in international humanitarian law from this moment forward, the chapter asks in particular how this history informs the question of resistance to oppression. When civilians resist an occupying foreign army, at what point does this uprising turn them into legitimate combatants as opposed to illegal combatants or terrorists, and how do the dynamics of international power politics influence this determination? These queries are ultimately left unanswered.

Next, Guy Lamb, a senior researcher at the Centre for Conflict Resolution, emphasizes the need to consider humanitarian law in local contexts, using the examples of Namibia's war of liberation from South Africa and the recent years of Angola's civil war to investigate the ways by which the distinction between "combatant" and "non-combatant" becomes blurred. Lamb suggests a number of common conditions that may have led to attacks upon civilians, but he cannot demonstrate that correcting these problems would prevent such attacks in the future. Still, these ideas have value for international relations scholars, particularly the frequently cited notion that authoritarian leadership may contribute to human rights abuses. This idea, while not expanded upon in this chapter, could nevertheless prove to be an
important extension of democratic peace theory. Ultimately, Lamb’s contribution nicely brings out the complexity involved with applying general principles of humanitarian law to local problems.

Part Two, primarily a collection of case studies focusing on inducing compliance with international humanitarian law without recourse to the use of force, opens with Marie-Joelle Zahar’s discussion of civil-militia relations in internal conflicts. Although Zahar, a postdoctoral fellow in international studies at the University of Toronto, defines certain categories problematically, including, for example, classifying Hizb’ullah civilian hostage-taking as “guerilla” tactics, she effectively highlights a number of factors which affect domestic civil-militia relations. Zahar creates an interesting typology which fills a theoretical gap in the literature, providing a useful discussion of issues that will prove helpful to a policy-maker hoping to induce compliance with international humanitarian law in internal conflicts.

Pierre Gassmann, a regional director for the International Committee of the Red Cross (ICRC), uses the example of the ICRC in Colombia in the fourth essay to discuss tactics of persuasion by which international organizations influence the behavior of various actors to protect civilians. In evaluating the effectiveness of different approaches, he brings into relief the fading distinction between politically-motivated violence and organized crime, as well as describing the domestic political constraints limiting the action of organizations such as the ICRC. Next, William G. O’Neill, former Senior Adviser on Human Rights in the United Nations Mission in Kosovo, addresses the issue of inducing compliance without force from a broader perspective, using for illustration a number of U.N. human rights efforts to consider the effectiveness of different tools available to the United Nations. His chapter emphasizes the need to build human rights cultures and to measure the performance of human rights field operations, while highlighting the difficulties inherent in doing so. Finally, Alcinda Honwana, a senior lecturer in social anthropology at the University of Cape Town, discusses grassroots methods for protecting children during conflict, focusing on the histories of Mozambique and Angola.

Part Three, which considers enforcing compliance with international humanitarian law through international legal and military intervention, opens with Simon Chesterman’s interesting discussion of the implications of choosing to prosecute violations of international humanitarian law versus offering amnesty or using a hybrid approach. Chesterman stresses the need for social scientists to study differing social and political conditions within states that have experienced recent severe human rights abuses, and which are transitioning from governments of perpetrators to new regimes that promise to respect the dictates of international humanitarian law. In this way, he offers a more nuanced view of the ongoing debate surrounding whether, in such transitional periods, amnesty for former leaders is better than prosecution. He suggests that differences in social and political conditions—such as the extent to which the individuals considered to be perpetrators of human rights abuses will be necessary to the functioning of a newly constituted government—amount to crucial local considerations that must be accounted for when
deciding whether amnesty or prosecution is preferred. Considering options between these two poles, Chesterman effectively underscores the difficult “tension between ethical imperatives and political constraints” at the heart of the decision to prosecute or not (p. 159). This is a valuable chapter, although its general dismissal of international criminal tribunals eschews the possibility that they might represent the beginning of a broader trend towards the integration of criminal justice on an international level. If this is the case, criticizing international criminal tribunals for their limitations may be more accurately describing the infancy of international criminal law itself rather than inherent or inevitable problems with international tribunals.

Judge Navanethem Pillay of the International Criminal Tribunal for Rwanda (ICTR) next discusses the elevation of sexual violence from a common crime to an international war crime in the jurisprudence of the ICTR. Following is a chapter by Adam Roberts, Montague Burton Professor of International Relations at Balliol College, Oxford University, that evaluates humanitarian concerns as the basis for international military intervention. Roberts draws conclusions from the histories of the major interventions of the 1990s and articulates the need for consistency in the use of force, a firm commitment to use the level of force necessary to achieve agreed upon aims, and a coherent legal framework to govern such interventions. Roberts should be commended for his criticism of the 1999 Secretary-General’s Report on the Protection of Civilians in Armed Combat, a document whose oversimplifications of the history of the protection of civilians during war render its policy recommendations suspect.

Part Three concludes with Edward Luck’s analysis of the influence of political ambivalence on the commitment of states to use force to protect civilians under international humanitarian law. Luck, founder and executive director of the Center for the Study of International Organization of the New York University School of Law and Princeton’s Woodrow Wilson School of Public and International Affairs, focuses primarily on disagreements within the political culture of the United Nations but also considers ambivalence about humanitarian intervention from the perspective of individual state governments. He picks up where Roberts leaves off, questioning the capacity and will of states to act within an international system rife with internal contradictions, especially when one considers that payoffs of action are unclear and difficult to sell to a domestic constituency. His essay suggests an interesting connection between domestic reluctance to enforce humanitarian law on an ad hoc basis and a lack of commitment to build the necessary international machinery to ensure that proper enforcement steps are consistently taken.

Part Four addresses themes cutting across the first three sections, analyzing the goals and methods for protecting civilians during conflict in light of changing norms and conflicting political objectives. Claude Bruderlein, director of the Program on Humanitarian Policy and Conflict Research at Harvard University, argues for a critical reappraisal of the international community’s approach to international humanitarian crises. Bruderlein suggests enhancing the roles played by nonstate actors in
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protecting civilians and reasserting the importance of international norms to encourage greater commitment to their enforcement. Although his discussion of the relativization of the term “civilian” in the face of differing degrees of “innocence” could benefit from a more specific engagement with the history of this relativization, he offers valuable proposals, such as integrating provisions of the laws of war with local and regional initiatives involving human rights provisions governing the treatment of refugees and the process of development following periods of conflict.

Bruce Jones, Special Assistant to the U.N. Special Coordinator for the Middle East Peace Process, and Charles Cater, a doctoral student in international relations at Oxford University, conclude the book by discussing directions the international community might take towards developing a more effective regime for protecting civilians during war. Jones and Cater identify four levels of politics and policy that must be integrated in order to effectively address humanitarian issues: universal norms, international and regional organizations, strategies for protection, and local contexts. They emphasize the need to engage more with domestic politics—both in the regions requiring protection of civilians as well as the regions from where the protection ultimately will come—in order to achieve international success in protecting civilians during war.

Ultimately, Civilians in War achieves its goal of “expand[ing] the tools available to national and international actors to protect civilians in the time of war” (p. 2). It offers valuable commentary on shortcomings in how the international system is used to protect civilians and how this system might better be used to that end. This volume is of interest to academics, policy makers, and field practitioners working in this area, and it raises interesting and important questions of theory and practice relating to the protection of civilians during times of conflict.

European Union Studies


The European Union, which originated as Western Europe’s response to the economic devastation of World War II, has generally been heralded as a constructive establishment. Proponents of neo-classical and Keynesian economics, pointing to economic cooperation, the elimination of trade barriers, and free movement of labor, see in the European Union possibilities for economic growth and higher standards living. For Another Europe challenges this view. Guglielmo Carchedi, a Senior Researcher in the Department of Economics and Econometrics at the University of Amsterdam, quickly dismisses Keynesian and neo-classical economics as “unsatisfactory” and replaces these approaches with a Marxist class-based method. The outcome of his analysis paints an unusual and perhaps unduly grim picture of
European economic integration—a picture in which the European Union is depicted as an imperialist power that hinders the development of technologically lagging countries within and outside the European Union.

Carchedi looks at European economic integration from a historical, theoretical and pragmatic perspective. The first three chapters are theoretical. They lay the groundwork for the chapters that follow, which are critiques of specific E.U. policies and instruments such as the Economic and Monetary Union (“EMU”), the common defense policy (Western European Union), Common Agricultural Policy (“CAP”) and social policies. Each chapter contains a historical section, which traces the development of the particular instrument or policy. The Epilogue offers the reader an insight into an alternative Europe based on three tenets, which if realized, Carchedi argues, will result in a European “utopia.”

The book begins by addressing the variety of theoretical perspectives used to interpret European integration. After briefly mentioning the two most popular options, the (neo-) institutionalist and intergovernmental approaches, Carchedi presents his favored option—a class-based “perspective on European integration” (p. 7). This perspective posits that classes are the “essence” (p. 7) of society and that nation-states and institutions on the local, national, and international level arise from and are shaped by class conflict. Whereas both a (neo-) institutionalist and an intergovernmentalist would argue that one of the reasons for the European Union’s creation was a wish to curb Russian expansionism, Carchedi proposes that the European Union’s conception was, in fact, fueled by a desire to destroy the Soviet Union for ideological, political and Western European expansionist reasons. The remainder of the first chapter is devoted to an elementary and helpful explanation of the history and the internal composition and functioning of the European Union.

The next two chapters undertake a more detailed economic analysis. Carchedi critiques the basic neo-classical perspectives on trade, including the Ricardian theory of comparative advantage, the theory of opportunity costs, the Heckscher-Ohlin theory, and equilibrium analyses (partial and general). Though he acknowledges that these are the most widely accepted theories explaining the benefits of trade and economic integration, he discards them. In his view, they are based on invalid assumptions, most notably that the goal of societies is to conserve labor and that the economy tends toward equilibrium. He concludes that the only satisfactory economic theory is built on the concept “that all commodities share the feature of being products of human labor” (p. 59). Thus, in Carchedi’s reasoning, only labor can produce value.

According to this theory, the introduction of more efficient technology, which is highly beneficial from a neo-classical and Keynesian perspective, leads to negative results. The new technology leads to unemployment—workers become redundant, which in turn results in a decrease in purchasing power and consumer demand. As a consequence, prices fall and goods lose some of their value. The rest of the book analyses E.U. policies based on this Marxist value theory of economic integration.

Whereas chapter five strays from the subject of the book by delving into the imperialist tendencies of the United States, much of the book is devoted to
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depicting the "inherent imperialist nature" of the European Union (p. 114). The author sees the EMU as an instrument of domination, as the technologically advanced countries at the "center," led by German oligopolies, appropriate surplus value from the technological "laggards" through the imposition of their price system. The "laggards" cannot compete with the prices set by the German oligopolies. Furthermore, due to the single currency, the "laggards" cannot resort to devaluation to increase their international competitiveness.

Charchedi offers, as further examples of E.U. imperialism, the CAP and European Union social policies. In Carchedi's view, E.U. social policies such as restrictions on immigration and the Schengen Agreement repress the world's labor and bring legitimacy to racist and xenophobic groups. The CAP appropriates surplus value from the "dominated" countries through the dumping of E.U. agricultural products onto their markets, and it also increases pollution, due to the subsidization of environmentally unfriendly farming, and aids world hunger by way of practices meant to eliminate surpluses and increase prices. Carchedi provides compelling examples, such as the set aside system, through which farmers are paid not to utilize part of their land, as well as the practice of destroying crops and other food products.

Chapter Six is perhaps the most interesting chapter in the book, as Carchedi introduces very persuasive illustrations to substantiate his thesis. For instance, though the Europe Agreements with the Central and Eastern European countries (CEEC) were meant to assist economic development by making E.U. markets more accessible to CEEC products through the elimination of tariffs and quantitative restrictions, they have in fact served to benefit the European Union. From 1991 to 1996, E.U. imports from the CEECs increased slightly whereas E.U. exports to the CEECs tripled. The author makes a valid and important point when he asserts that the CEECs serve as markets for the absorption for E.U. industrial and agricultural products.

For Another Europe is a tough read that at times degenerates into complex economic analysis and therefore is not suitable for a reader looking to gain a general understanding of European economic integration. It is best suited for an audience with a basic knowledge of trade theory looking for an innovative and often overlooked perspective on the European Union. On balance, the book provides a thorough and provocative analysis of the European Union from a Marxist perspective, but two significant caveats come to mind. First, Carchedi unfairly avoids mentioning any positive accomplishments of European integration, such as the staggering growth of the Irish economy spurred on by E.U.'s Structural and Cohesion Funds. More importantly and more tellingly, perhaps, the title of the book does not accurately portray its content, for whereas the majority of the book points to negative aspects of past and current E.U. practices, only a few pages in the Epilogue are actually devoted to a discussion of the architecture of another Europe.

As the primary judicial organ of the European Union ("E.U."), the European Court of Justice ("ECJ") "probably [constitutes] the most influential international legal body in existence" (p. 229). A substantial literature has examined the doctrinal impact of European law on domestic member states, and recent interdisciplinary scholarship has placed the ECJ's doctrinal development in its political context. Establishing the Supremacy of European Law by Karen J. Alter, assistant professor of political science at Northwestern University, offers a welcome addition to this interdisciplinary strand of scholarship, synthesizing legalist and political science approaches to the study of European legal integration.

Alter seeks to explain "why national courts took on a role enforcing European law against their governments, and why national governments accepted an institutional change that greatly compromised national sovereignty" (p. 2). The book is organized in six chapters. Alter first delineates her theory of judicial interests in Chapters One and Two, and then examines the historical process of judicial evolution in Germany and France in Chapters Three and Four. Chapters Five and Six analyze why national governments accepted supremacy of the ECJ and conclude with a note on how the ECJ contributed to an international rule of law in Europe.

In Chapters One and Two, Alter provides a brief background of the ECJ and outlines her explanation of legal integration, defined as "the expansion and penetration of European law into the national realm" (p. 44). The preliminary ruling system, whereby the ECJ could monitor state compliance and interpret European legal questions, provided the mechanism of legal integration. Alter rejects previous accounts of the ECJ (specifically, legalist, neo-realist, and neo-functionalist theories), and proposes a general theory of judicial interests. She argues that the ECJ harnessed private litigants to enforce European law by the doctrines of direct effect and supremacy, which complemented institutional interests of national judges in "promoting their independence, influence, and authority" vis-à-vis other courts and political actors (p. 45). The doctrine of direct effect "established that European law could, under certain conditions, create rights for individuals that could be invoked before national courts" (p. 17), whereas supremacy "made European law supreme even to subsequent changes of national law, so that states could not pass any law or make any new policy that contradicted European legal obligations" (p. 17). In this manner, European law empowered national judges.

Chapters Three and Four present the bulk of Alter's research on the process of judicial acceptance of European law in Germany and France. Each chapter provides a detailed account of the historical development of the ECJ (conforming to historical institutionalist approaches in political science),
combining meticulous case research and interviews divided into five periods spanning from 1960 to the present. Alter finds that three variables determine the scope of reception of European law, namely (1) whether countries had a monist legal system (whereby international law is considered supreme to national law) as opposed to a dualist system, (2) whether countries had a tradition of judicial review, and (3) what national government positions on legal integration were. Alter argues that due to the hierarchical nature of the German legal system, lower courts managed to play Germany’s constitutional court, the Bundesverfassungsgericht ("BverfG"), off the ECJ, leading to a process which she terms “doctrinal negotiation.” A cooperative relationship between the BverfG and the ECJ developed, although the BverfG recently reclaimed some powers of constitutional review, leading to the understanding that “[a]s long as basic rights are protected sufficiently by the ECJ, the BverfG will not exercise its right to ensure that European law respects German basic rights” (p. 115).

In contrast, “[among] the original member states, French national courts had the hardest time embracing the ECJ’s supremacy doctrine” (p. 124). Unlike the vertical judicial rivalries in Germany, horizontal judicial rivalries amongst the three highest courts in France, the Conseil d'État, the Conseil Constitutionnel, and the Cour de Cassation, combined with domestic political changes (such as the election of the Socialists in 1981), gradually led to the acceptance of supremacy of European law. Horizontal hierarchies and political sentiments that initially opposed legal integration in effect barred lower courts from challenging the jurisprudence of the higher courts. French courts, unlike Germany’s, engaged in little direct negotiation. Alter also finds that with gradual acceptance of ECJ supremacy in France, French and German courts have recently exhibited doctrinal convergence with respect to European law.

Chapters Five and Six analyze why national governments allowed the ECJ to escape their control and discuss the judicial transformation process more generally. Drawing on principal-agent theory to explain how the ECJ escaped control of the member states, Chapter Six is perhaps the most innovative contribution to the literature. Alter argues that since politicians (pressured by material incentives, election cycles, and a “fire-alarm” system of oversight) operated under shorter time-horizons than the ECJ, the ECJ could increase its jurisdiction by trading developments of judicial doctrine for material incentives to politicians. In other words, the ECJ could expand its jurisdiction in the long-run by making material concessions to national politicians in the short-run.

The strength of Establishing Supremacy lies in providing the political and institutional context of European legal integration, filling the lacunae of earlier legalist approaches to international law. The careful historical analysis of the strategic interaction between national courts, politicians and the ECJ demonstrates the potential of synthetic research approaches to international law.

However, the book suffers from several weaknesses. First, given that a prominent realist critique of the ECJ contends that integration occurs precisely
because it serves the interests of the most powerful member states, one wonders whether the conclusions (based on evidence from France and Germany only) generalize to the less powerful E.U. member states. Alter's judicial interest hypothesis would be served well by incorporating developments in other E.U. countries. Second, whether a country has a monist system seems only to beg the question of the determinants of monism and reception of international law. Indeed, Alter concedes that the question in the monist system of France was not over the supremacy of European law, but rather whether French judges had the authority to consider the compatibility of French and European law. Third, although Alter provides a novel focus on the distributional consequences of European law, her judicial interest model seems more closely related to previous theories of legal integration, particularly neo-functionalism, than she claims.

Lastly, although Alter describes how the ECJ escaped the "vicious circle of international law" (p. 211), characterized by weak legal mechanisms and low levels of compliance, she provides few generalizations that may apply outside the context of Europe. The reader is left to wonder whether the European rule of law is doomed to remain an exception in international law or may forecast and explain developments of other transnational legal institutions as well.

Nevertheless, Alter provides a rich account of European legal integration that should prove of interest to legal scholars, political scientists, and legal practitioners alike.

Human Rights and Transitional Justice


The emblematic moment of Samantha Power's impressive book occurs as she recounts a tense White House meeting in July 1995 during which President Clinton finally turned in favor of an armed intervention to stop the slaughter of Bosnian Muslims in the former Yugoslavia. After years of waffling on the question of whether to commit American military resources to end a genocide in the heart of Europe, the President at last steeled his resolve. "This can't continue," he said. "We have to seize control of this . . . . I'm getting creamed!" (p. 437).

Power, the Executive Director of the Carr Center for Human Rights at Harvard, suggests that in Clinton's use of the word "I" we can find the key to understanding American responses to genocide in the last half of the twentieth century. U.S. policy toward Bosnia did not shift because human beings in faraway places were being systematically "creamed" on account of their ethnic origin, but rather because the President was getting "creamed" at home in the opinion polls. Although the Clinton administration was famously sensitive to the whims of polling data, it was by no means alone in permitting
domestic politics to dictate the nation's response to genocides around the world. Time and time again, from Cambodia during the seventies, to Iraq during the eighties, to the former Yugoslavia and Rwanda during the nineties, administration after administration decided to minimize American reaction to atrocities because of the political calculation that there was little to gain and everything to lose from a robust response to such crimes.

Power's scrupulous documentation of the domestic roots of this persistent inaction to genocides abroad is what makes *A Problem from Hell* unique. But the author bookends this study nicely as well. Power opens with a discussion of the origins of the Genocide Convention, including a fascinating account of Polish-American attorney Raphael Lemkin's tireless work to bring the crime of genocide into being and into the international consciousness. (Lemkin literally had to begin at the beginning: He first needed to coin the word "genocide" before he could make ending it his life's work.) She finishes with a chapter examining the application of the Convention at international criminal tribunals today.

Still, the real heart of Power's book is its blow-by-blow account of how the American foreign policy establishment largely failed to stop genocides-in-progress over the span of the twentieth century. With detailed studies of official American reactions, starting with the Armenian genocide of 1915 and considering, in turn, the most notorious genocides of the twentieth century, Power identifies a consistent lack of political pressure for intervention from within the government bureaucracy as a central explanation for why presidents and their senior advisors rarely deviated from a policy of official indifference. Even though there were congressional staffers and foreign service officers who agitated for a response each time a genocide erupted, the more pervasive attitude in the bureaucracy was that disagreement with the opinions of those at the top would earn neither professional advancement nor an alteration of policy. The result was an unsurprising lack of bureaucratic activism as genocides ran their course. Bosnia is the exception that proves this rule for Power. That was the first case of internal dissent reaching a fevered enough pitch to produce a wave of official resignations; it was also the first case of an American policy reversal and a decision to intervene.

Of course, Bosnia was also the first genocide that captured, as it was occurring, the sustained attention of Congress, the media, and the public at large. Sustained inattention has been the more typical status quo. In her chapter on Cambodia, for example, Power describes the near perfect apathy that confronted policymakers as they looked to gauge public sentiment on the Khmer Rouge-perpetrated genocide. Scarcely a syllable concerning the slaughter in Cambodia could be found in the congressional speeches, editorial pages, and public protests of the day. Such society-wide silence has continually made it easier for senior officials to make the political calculation that getting involved in ending a genocide would be far costlier than keeping the troops at home. Power relates the story of a meeting between an official from Human Rights Watch and National Security Advisor Anthony Lake two weeks into the Rwandan genocide. Lake informed the official that he had received hardly any phone calls from constituents concerned with the
genocide and urged her to “make some noise!” (p. 509). Precisely this popular silence licensed U.S. policymakers to persuade themselves that they were doing all they could—and all they should—in light of the apparent constraints of domestic politics.

In the end, however, Power reserves special ire for those at the top who saw genocide occurring and yet rationalized American inaction. The supposed fetters of popular sentiment are an invalid justification for failing to intervene because, she argues, “American leaders have both a circular and a deliberate relationship to public opinion” (p. 509). It is circular in that the electorate need not only lead the leaders; the leaders are able to lead as well. This is especially true in the context of foreign affairs, where the public is only rarely aroused by such incidents as genocides in the absence of committed political leadership. It is deliberate in that there has been American leadership in such circumstances. The problem is, this leadership has been primarily devoted to the goal of minimizing public outrage over the nation’s failure to respond to cases of clear moral evils.

A former Balkan war correspondent, Power is at her best when wearing her reporter hat. She writes with skill and passion and nabs her story through dogged research and a knack for just the right quotation. She seems a little less persuasive when in her prescriptive mode, but perhaps only because the problem she has diagnosed runs so deep as to defy a ready solution. Her calls for greater accountability of executive policymaking to congressional and international scrutiny, and for more complete disclosure of documentation surrounding the nation’s responses to past genocides ring true. Still, they reflect the way in which, short of having willful leaders such as Madeleine Albright during the Kosovo crisis, reforms in this arena can work only on the margins, subtly shaping the terms of the debate and shaming those otherwise disinclined to act. Given these constraints, however, it is difficult to imagine a better salvo in the battle against American indifference to genocide than Power’s book.


Liberalism demands justice. Wrongdoers are found, tried and punished. The end of the Cold War and its polarized vision of international political morality, however, has done as much to affirm the endurance of core liberal values as to expose their limited application to demands for justice in the messy domain of group identity and historical memory. According to Elazar Barkan, a professor of history at Claremont Graduate University, restitution provides an alternative model for achieving justice within the liberal framework. In *The Guilt of Nations,* Barkan divides a variety of case studies into two categories—“The Residues of World War II” and “Colonialism and its Aftermath”—and asks whether restitution politics represent a new international moral order and can serve as a mechanism to bridge the gap
between individual and group rights. For Barkan, restitution is an improvement in redressing past wrongs because it demands voluntarism and negotiation, and because, in principle at least, it takes local circumstances and values into account.

Barkan’s introduction provides a helpful discussion of the terms of his argument. His restitution is not only a legal convention but “a cultural concept” (p. xix). Restitution includes the specific return of actual objects or land, such as Native American skeletons that have been returned to their descendants. But it also encompasses reparations, such as payments made by the U.S. government to Japanese American victims of internment and, especially as a first step, an apology. Barkan offers several examples of such “first steps,” including Bill Clinton’s 1998 apology for American slavery; legislation adopted in 1993 by Congress apologizing for the 1893 overthrow of the Kingdom of Hawaii; and Queen Elizabeth’s 1995 apology to the Maori of New Zealand for treaty violations.

Part I, “The Residues of World War II,” begins with the Holocaust, which came to be the seminal event in restitution history. Although culturally speaking the German nation did not begin to come to terms with the history of the Holocaust until much later, Barkan observes that restitution was a political “cornerstone” of the newly-formed Federal Republic and essential to Germany’s moral rehabilitation in the eyes of the international community. This example underscores a basic connection between democracy, rule of law, and restitution. Barkan also notes a second phenomenon of the restitution experience: Jewish reservations over German payments typify the reservations of victims in nearly every restitution case. More specifically, these reservations entail a reluctance to accept “blood money” and, in so doing, offer what might be perceived as forgiveness for unquantifiable losses. There is also revulsion at the reality that restitution is often as beneficial to perpetrators as to victims. This is the case of former “comfort women,” prisoners who were exploited as sex slaves by the Japanese military during World War II. Barkan explains that many former comfort women have refused to accept financial restitution from the Japanese government in the absence of a formal, sincere apology; on-going restitution efforts are slowed by the government’s lack of cooperation and denial of national guilt. Nonetheless, Barkan argues that the restitution movement has had other important effects, reopening questions of Japan’s wartime aggression and present-day nationalism. In contrast, Japanese Americans successfully convinced Congress to apologize and provide financial restitution to internment victims, and the restitution campaign itself, as for Jews and the Holocaust, became a constitutive element of group identity. Most importantly, Japanese Americans legitimized the moral desirability of restitution in American society—restitution became a means for the nation to live up to the ideals of freedom, equality, and justice as enshrined in the Constitution.

Barkan also examines the phenomenon of wartime plunder, particularly Soviet efforts to relocate countless works of art from Germany to Moscow, asking whether wartime revenge should be legally undone. Beyond the
repatriation of art, Barkan sees the potential for restitution negotiations as an unseized political opportunity for Germany to rethink its relationship with Russia. In the case of Switzerland, pressure over continued obstruction on the part of Swiss banks holding the assets of Holocaust victims led to such a moment of political choice. The Swiss wisely "embrace[d] world criticism" (p. 105), publicly rethinking their history and establishing a fund to begin restitution.

As a lengthy postscript to his discussion of World War II-related restitution, Barkan addresses restitution efforts in Eastern Europe for the loss of rights and property under communism. In most cases, restitution policies reflect conceptions of national identity. For example, Poland has privileged the Catholic Church; Czech reforms have benefited the middle and upper classes; and Romania has focused on the peasantry.

Part II, "Colonialism and its Aftermath," compares restitution efforts on behalf of different indigenous peoples and examines how restitution affects (and effects) national identities. In the United States, Native Americans have fought for land rights and the return of human remains collected by museum anthropologists. Restitution has been achieved piecemeal, through court decisions and legislation, and has become essential to cultural and economic tribal revival, even if the kind of restitution available may determine the direction revival takes. Barkan separately examines the case of Hawaii, where indigenous people have largely achieved restitution at the level of historical narrative, but still struggle to transform such recognition into political or economic power, or to separate the celebration of their culture from its profitable exoticization.

In Australia, Barkan argues that "the politics of identity" defines the ongoing restitution to Aborigines, in contrast to the American focus on "the politics of justice" (p. 258). Australian efforts seek not just to redress past wrongs, but indicate that part of restitution includes a willingness to incorporate the native population into national identity. A similar reshaping of identity is difficult to imagine in the American context. The Maori people of New Zealand have similarly rewritten their country's national identity and, with greater success than either Native Americans or Australian Aborigines, obtained considerable political and economic power.

Rather than identity or culture, restitution for slavery (in the U.S. and elsewhere) is motivated by the current social deprivation of slavery's descendants. Barkan suggests that dwindling support for affirmative action in the U.S. may make reparations a more attractive alternative, and the success of Japanese Americans provides an encouraging moral, if not legal, precedent.

Barkan concludes with a useful theoretical overview that puts restitution into the context of neo-Enlightenment international moral theory. Restitution is best understood as a mechanism for conflict resolution rather than comprehensive justice theory. It engages the ambiguity of the historical record and works with "vague shared values" (p. 320) in the absence of "a universally accepted moral principle" (p. 346). Barkan draws on the voices of John Rawls, Martha Nussbaum, and Michael Walzer to discuss the notion of an acceptable minimum threshold of human rights. Considerations of local
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tradition are essential to the legitimacy of restitution, but traditions cannot function as an absolute principle. The moral pragmatism of restitution privileges negotiation and settlement, harnesses the guilt that injustice produces in liberal societies, and gives local choice a greater voice. Claims of "justice and truth" are replaced by "a voluntary agreement among the protagonists" (p. 347).

This is an important book on international justice and historical memory. Restitution is especially worth considering as an alternative to the international criminal justice model that has recently assumed greater public prominence but often seems more for the benefit of the international community than the victims. Barkan’s vision of restitution forces us to ask what kind of justice is meaningful to whom, and what kind of response to injustice more effectively empowers different group histories and identities for a greater good. Negotiated settlement and a “fuzzy” morality may well be preferable to traditional findings of right or wrong in the context of historical trauma. Restitution is always a compromise in that economic limitations are placed on what amount to infinite moral claims. This, however, is consistent with Barkan’s argument: some resolution is better than none at all.


Hannah Arendt’s phrase “the banality of evil” has itself nearly been rendered banal through overuse, but Mark Osiel argues that the famous coinage from Eichmann in Jerusalem is still not understood for what it is—a critique of criminal law’s ability to handle mass atrocity. Osiel believes Arendt’s book leveled a devastating accusation which legal scholars have consistently failed to address, that criminal law is ill-equipped to account for and respond to state-orchestrated massacres. Criminal law always requires a conscious mental element, but according to Arendt the individuals who commit mass atrocities at the behest of a state may lack a guilty mens rea. In this original and thoughtful book, Osiel, a professor of law at the University of Iowa, considers the merits of Arendt’s critique in the context of Argentina’s “Dirty War” and suggests, in the light of Arendt’s argument, ways in which the prosecution of mass atrocities could be made more socially valuable and morally defensible.

Osiel divides his book into an Introduction and five chapters. After explaining his project in the Introduction, he summarizes the events of the Dirty War and Argentina’s post-war efforts to try the officers responsible for its worst abuses in Chapter One. Chapter Two explores Arendt’s critique of criminal law as applied to mass atrocity. Osiel then demonstrates that the usual explanations for “ordinary crime” fit neither Eichmann nor an Argentine analogue, Alfredo Astiz. In Chapter Three, he compares how the structures of authority in Nazi society and in Argentina under the juntas affected the
culpability of perpetrators. Chapter Four examines the role of the Catholic Church in Argentine society and legal thought, and Chapter Five concludes.

Osiel offers a brief but useful history of Argentine atrocities and responses to them. Leaders of the Argentine military took their campaign against left-wing terrorism underground in the mid-1970s, devolving authority onto 340 secret detention centers. These centers employed criminal tactics, including kidnapping, torture and summary executions, to combat suspected “subversives.” By the time civilian government was restored in 1982, the Dirty War had claimed over 10,000 victims, and none of the military perpetrators had answered for their crimes in court. In the two decades since, Argentina has been unable to hew to a steady course for the prosecution of offenses committed during the war. Plans first for limited, and then extensive, prosecutions were scuttled in the late 1980s in favor of sweeping amnesties and pardons. These in turn were declared unconstitutional by a federal court in 2001.

Osiel looks to Arendt to provide guidance for how Argentina should respond to this sad history. He focuses not on her indictment of “mass society” for its capacity to enlist ordinary citizens to commit inhuman acts, but rather on her less-noticed critique of criminal law for its conceptual inability to sit in judgment of such acts. Osiel translates Arendt’s criticism of the doctrine of “manifest illegality” into the language of criminal law as follows: in order to establish the requisite *mens rea* for criminal conviction, the Israeli court which tried Eichmann conclusively presumed against him the manifest illegality of his acts. That is, the court determined as a matter of law that no reasonable person could be unaware of the wrongfulness of organizing extermination camps to execute millions of Jews. The problem with this presumption is that in a totalitarian state, normal citizens may be unable to perceive atrocities as wrongful. When a state penetrates every aspect of civic life, as the Third Reich did, displacing community values with its own perverted ones, the signals which ordinarily give citizens moral feedback are squelched. Under these circumstances, a conclusive presumption of manifest illegality is a legal fiction which serves the interests neither of justice nor of an honest confrontation with the past.

Osiel applies Arendt’s critique to the case of Argentina and considers its implications for the prosecution of the so-called “dirty warriors.” Fundamental differences between Germany and Argentina, however, make this application an uncomfortable fit at best. Osiel’s “Eichmann” is Navy Captain Alfredo Astiz, a notorious squad leader implicated in thousands of deaths. Astiz, like Eichmann, is strikingly normal: the “conventional accounts of monumental wickedness” (p. 30), composed of malice, character defects, or psychopathy, plainly fail to explain either man’s crimes. At a deeper level, though, the two men are quite different. At trial, Eichmann showed a profound indifference to the policies and ideology of the Third Reich, arguing that he followed orders not because he believed they were right but because they were orders. Astiz, on the other hand, was deeply committed to the goals of his regime, seeing in the conflict a civilizational struggle for the soul of Argentina. Argentine officers like Astiz were emphatically self-aware, and their quixotic quest to
counterpose a resurgent Catholic nationalism in Argentina to what they saw as the twin "materialisms" of capitalism and communism was anything but banal.

Osiel compares not only these middle managers of atrocity but also the states for which they acted, and here again he finds striking differences. Most importantly, Argentina was not a totalitarian state. While the Nazi regime radically centralized power, Argentina’s military leaders took the opposite tack, granting considerable autonomy to junior officers. By the time the Holocaust began, Hitler had consolidated all sources of authority in his own person—under the “Fuhrer principle,” his word was literally law. Argentina, by contrast, was riddled with conflict. The state was fighting to establish its primacy over competing sources of authority, including not only guerrillas but also left-leaning elements in civil society. The Dirty War faced opposition from journalists, intellectuals, human rights activists, and even judges. Arendt’s critique of manifest illegality only applies when a state becomes an echo chamber, in which the only messages citizens hear are those the state transmits. Argentina, in contrast, resounded with cacophony.

But though Argentina’s regime was not totalitarian, Osiel argues that the role of the Catholic Church in the Dirty War could be thought to reduce the culpability of officers like Astiz, just as the Nazi domination of life in Germany could explain away some of Eichmann’s guilt. The Church sanctioned the anti-subversive campaign as a “just war” and actively promoted it. In a state whose jurisprudence is built around natural law, such a sanction had legal as well as spiritual force. Indeed, natural law looms particularly large in Argentina, even trumping positive law under the terms of the Constitution. Thus, while a “dirty warrior” could not claim that he did not understand the moral enormity of his actions, he could maintain that he believed himself to be fighting on the right side of a conflict with the sanction of both Church and law.

Following upon this discussion, Osiel concludes that Arendt’s critique applies to prosecutions arising from the Dirty War, notwithstanding the vast differences between Argentina and Nazi Germany. In neither situation should manifest illegality be conclusively presumed against these mid-level agents of administrative massacres. This conclusion leads to Osiel’s unique contribution. While Arendt is content to criticize, he proposes a constructive and simple solution. The presumption of manifest illegality should remain, but defendants should have an opportunity to rebut it. Officers like Astiz should be permitted to mount a defense of reasonable mistake, for instance by claiming that they were reasonable in relying on the Church’s interpretation of the legality of their acts. Osiel argues that such a defense, evaluated on a case-by-case basis, would rarely prevail, but that the principles of criminal justice demand the opportunity to make it.

*Mass Atrocity, Ordinary Evil and Hannah Arendt* is a creative and valuable addition to the growing literature on atrocity trials. Osiel’s argument is ultimately coherent, but its presentation is not as perspicuous as the reader might like. The middle chapters meander before coming to a point, and the chapter and section titles are too vague to provide much guidance about the
structure of the book. Still, Osiel ultimately succeeds in carrying Arendt’s analysis beyond the Eichmann case to suggest how the doctrine of manifest illegality should be applied in future trials. The thorough footnotes and extensive bibliography are valuable resources for those wishing to pursue the topic further.

International Environmental Law


In early 1992, the press caught hold of a singularly crass and damaging internal document. The damning memo, drafted by then-Chief Economist of the World Bank Lawrence Summers, argued forcefully for the migration of more polluting industries to developing countries. Direct and unrepentant, Summers explained the “impeccable” economic logic behind a toxic transfer to “under-populated” and “vastly under-polluted” poorer nations. The public was rightfully incensed by Summers’ callous indifference to considerations of morality, equity, and environmental justice. But perhaps, as Jennifer Clapp, an Associate Professor of Environment and Comparative Development Studies at Trent University, has argued in her bitterly incisive new work, Toxic Exports, the public was not so much offended, but exposed. It was, in short, embarrassed and enraged by the prospect of self-awareness.

Toxic Exports is essentially an attempt to explain and resolve one of the more invidious byproducts of globalization: that as exposures to toxic wastes have decreased dramatically in the United States and other developed nations over the past several decades, these gains have often occurred at the expense of developing nations. Facilitated by an increasingly interconnected world economy, richer nations have effectively engaged in massive efforts at displacement and diversion. Until the late-1980s this was accomplished mainly through direct shipments of hazardous wastes to developing countries. But as lurid stories of environmental devastation reached the public, and a strong international consensus arrested the most blatant disposal practices, developed nations were forced to resort to more sophisticated measures of evasion. Thus today, the transfer of toxic wastes has been replaced by the wholesale migration of toxic industries to nations with less stringent health and environmental regulations. Clapp expertly traces the evolution of this hazard problem within the broader themes of globalization, NGO advocacy, and international governance, in an attempt to define a more enduring framework for resolution.

Clapp charts the origins of the international movement in hazardous wastes to the increased liberalization of the global economy beginning in the 1970s. Coincident with the emergence of popular environmental movements in many Western nations, burdensome regulations and rising costs of disposal led manufacturers to seek foreign markets for their hazardous wastes. Often
suffering from weak regulatory capacities, and desperately in need of foreign exchange to pay down rapidly mounting debts, developing nations were powerless to resist these hazardous shipments. With eroded trade barriers and lowered transportation and communication costs, the export of hazardous wastes to less industrialized countries soon became a "simple and lucrative business for waste entrepreneurs" (p. 11). Public outcry resulting from several high profile disasters eventually led to international efforts at regulation. In March of 1989, the Basel Convention on the Transboundary Movement of Hazardous Wastes was adopted by thirty-five nations. Although some of the largest generators of hazardous wastes, most notably the United States, have declined to ratify it, the Basel Convention has actually proven enormously successful at its express purpose of reducing the international transport in hazardous wastes. By the mid-1990s, the global trade in toxic wastes had declined dramatically. Moreover, despite severe power differentials in the negotiating process, many developing nations had begun to assert an active role in the ongoing discussions, lobbying for increasingly stringent regulations and stronger enforcement measures.

Predictably, though, the Basel Convention was rife with loopholes. Clapp devotes a large portion of her book to exploring the various ways in which waste generators have been able to circumvent the treaty's rules. Principal among these has been the recycling exception, which exporters have abused by relabeling their wastes as "recoverable commodities." Upon reaching the target nations, these "commodities," if treated at all, are often incinerated or otherwise transformed and disposed of under highly dangerous conditions. Promising efforts have been made in recent years to address the recycling exception and other deficiencies of the Convention. In the meantime, however, waste exporters have devised even more elaborate means of evasion. Beginning with Foreign Direct Investment in factories in developing nations, regulatory subversion has now evolved into the systematic relocation of entire industries. Clapp provides extensive documentation of this southerly migration of some of the world's most highly polluting and hazardous industries. With little regulatory oversight, these mines and factories are rapidly creating environmental and public health crises in their host nations. Yet, despite these highly visible consequences, industry migration has proven virtually unmanageable in that it does not fall within the jurisdiction of the Basel Convention or other international accords. Indeed, many critics have alleged that it is the stringency of these very agreements that has precipitated the exodus of dirty industries to the poorer nations.

In response to the perceived excesses of international regulation, attention has focused in recent years to more voluntary initiatives to address the problems of hazard migration. Surveying the various emergent approaches, from the transfer of clean production technologies to voluntary environmental management systems, Clapp gives a compelling account of their inadequacy. While acknowledging the potential of voluntary market-mechanisms, Clapp argues that, in practice, these strategies have been captured by industry as a means of deflection. According to Clapp, industry's preemptive efforts to avoid more stringent regulation have resulted in a
“privatization of environmental governance (p.148),” whereby NGOs and developing countries are largely excluded from the decision-making process. The result has been a continuing sanction of hazard transfer from rich to poor.

Although *Toxic Exports* could easily dissolve into fatalism, given the enormity and seeming intractability of the hazardous waste problem, Clapp concludes in a rather inspiring fashion. In the final chapter, Clapp outlines several proposals for improved waste management. Although seemingly intuitive and even mundane, her proposals, basically stressing greater adherence to existing conventions and greater collaboration between affected parties, are what make the book so refreshing. Readers are spared the grand policy innovations and ideological debates that have for so long forestalled meaningful progress. Instead, Clapp provides a thoroughly researched, well-argued, and eminently pragmatic approach to an exceedingly complex problem. Vividly written, with sensational stories of corruption and exploitation, but always grounded in solid socio-economic and scientific research, *Toxic Exports* provides an invaluable framework for anyone seeking resolution of the waste problem, as well as many of the broader crises of globalization.


Are the tools of international law strong enough to save an unusually appealing and economically valuable species from extinction? Whales attract tourists to amusement parks and seaside resorts in the United States and compose a major part of the traditional diet of Japan. Hunted close to the brink of extinction, these charismatic creatures of the deep pose one of the most intractable challenges to international law of the twenty-first century. International management of whales and whaling pits some of the most powerful nations in the world against each other in negotiations that illustrate uneasy relationships between morality, science, politics, and international law.

Whales first came under the purview of international law with the 1946 International Convention for the Regulation of Whaling, which created the International Whaling Convention (IWC). *Toward a Sustainable Whaling Regime*, thoughtfully edited by Professor Robert L. Friedheim of the University of Southern California, tells the story of the creation of the IWC, its failure to prevent disastrous over-exploitation and collapse of world whale stocks, and today’s stalemate in negotiations that threatens to unravel what limited international cooperation exists. The essays composing this book, many written by international law practitioners and scientists who have first-hand knowledge of the IWC, provide a frank and eye-opening account of the way that international law, domestic politics, economic interests, and scientific concerns intersect in an international organization. The picture that emerges of the prospects for international negotiations to produce an effective and fair whaling regime is grim. As John Knauss, retired administrator of the
National Oceanic and Atmospheric Administration and U.S. commissioner to
the IWC, notes in the book’s foreword, “As an example of good faith
international negotiations, the IWC is mostly a disaster” (p. viii).

The book opens with a powerful introductory essay by Friedheim in
which he describes the IWC as on the verge of collapse. Friedheim, a
professor of international relations, is at his best when describing the
complexity of institutional dynamics. While anti-whaling nations have
succeeded in imposing a whaling moratorium, whaling members of the IWC
flout the existing catch limits, and other whaling nations (some sixty states
take cetaceans in their Exclusive Economic zones, but only about forty states
are members of the IWC) refuse to join. The breakdown in constructive
engagement has led two whaling nations, Canada and Iceland, to withdraw
from the Commission. Friedheim describes meetings in which “accusations of
murder (and, sometimes, blood-colored liquid) are flung at delegates from
member states who wish to resume whaling, and accusations of racism are
flung at representatives of those states who wish to consolidate the present
preservation regime” (p. 3). How has an international organization with a
legal mandate to “ensure proper and effective conservation and development
of whale stocks” and “thus make possible the orderly development of the
whaling industry” (p. 32, quoting the 1946 Convention for the Regulation of
Whaling) degenerated into such a circus? Friedheim explains that domestic
constituencies in the United States, Japan and elsewhere have deeply held
moral beliefs about the rightness of their views: securing justice for people
and for whales is the ostensible goal of all negotiators, and the strength of
these beliefs has superceded willingness to work within a rules-based legal
system to improve whale management at an international level.

Following Friedheim’s opening remarks, Part I critiques the
performance of the whaling regime. William T. Burke, professor of law
emeritus at the University of Washington, delivers a detailed analysis of
whaling under international law. There are serious questions about the legality
under international law of the moratorium on whaling imposed by the IWC,
an organization with a mandate of regulating the whaling industry, not
eliminating it. Burke reminds us that the IWC’s chartering documents have to
be read together with the U.N. Convention on the Law of the Sea (UNCLOS),
which as a later convention to which more countries adhere is the more
binding source of obligation. Burke presents the provocative argument that
UNCLOS provides a legal forum for dispute resolution, and that members of
the IWC who object to the moratorium as ultra vires have the right to bring a
complaint: “Members of international organizations who impose restrictions
in violation of their basic charter not only infringe that agreement but are in
violation of Articles 87 and 116 of UNCLOS. A dispute between parties to
 UNCLOS over this interpretation of UNCLOS is subject to compulsory
dispute procedures” (p. 63). Burke is unsure of the outcome of such a
procedure, but he believes that out of respect for international legal
mechanisms it should be tried. Burke’s arguments about the necessity of the
IWC’s returning to activities that can be justified under its original mandate
are reinforced by Jon L. Jacobson’s essay. Jacobson, professor emeritus at the
University of Oregon School of Law, writes about the role of constituent documents in international law. He expresses dismay that, in the name of trying to protect whales, environmental groups and anti-whaling states have been “ignoring clear but inconvenient legal mandates and strictures” (p. 81). He warns that by advocating positions in the IWC that flout the treaty establishing the Commission, environmental groups and anti-whaling states are undermining efforts to establish and implement treaty-made international law governing other areas of critical environmental concern.

The next three essays in Part I present interesting perspectives on the causes of the IWC’s inability to overcome conflicts among its membership. William Aron describes the failure of the IWC to effectively collect and use scientific data that would have enabled the organization to establish a sustainable management regime for whales. Aron gives a first hand account of the functioning of the IWC, having served as a member of the Scientific Committee of the IWC from 1971-1977 and U.S. commissioner to the IWC in 1977 (he is currently professor at the College of Ocean and Fisheries Sciences at the University of Washington). In many ways, Aron’s essay is the deepest indictment of the capacity of international law to produce desired outcomes: under the IWC’s watch, blue whales and humpback whales were almost hunted out of existence as decision makers failed to use scientific data effectively. Ecologist Milton Freeman, Senior Research Scholar at the University of Alberta, asks whether money is at the root of the problem. Analyzing the different ways that whaling nations and anti-whaling nations perceive of the cash economy’s impact upon the ability of local communities to manage whaling sustainably, Freeman concludes that anti-whaling states exaggerate the extent to which the sale of whale meat represents a threat to the survival of whales. New York University law professor Russel Barsh presents a somewhat enigmatic argument about “food hegemony” (p. 150). He suggests that the opposition of anti-whaling states and western environmental groups to the consumption of whale meat represents a form of imperialism in the form of the imposition of food tastes upon others. Barsh provides an explanation for the perception of whaling states that the IWC’s moratorium on whaling is a racist attempt to force change upon indigenous communities.

Part II of this volume explains and critiques the politics of the whaling regime. Elizabeth DeSombre’s essay on membership and voting in the IWC describes the practice of NGOs as well as states of paying membership dues for states that promise to vote with them. DeSombre, professor of environmental studies and government at Colby College, suggests that this form of “bribery” raises questions about the legitimacy of the IWC as an international decision making body (p. 185). Robert Friedheim’s essay on negotiation in the IWC environment analyzes the reasons that the organization has reached its current stalemate. Friedheim warns against relying on the United States or external change, and urges negotiators to recognize the gains that could be made by good faith negotiation.

Part III of this volume is focused upon identifying the range of solutions to the problem of international whaling management that have emerged out of the essays in the first two parts of the book. Christopher Stone, professor of
law at the University of Southern California observes that the question of whether the whaling regime is honoring its original intent is subject to numerous answers under international law, but applauds Burke's call for the use of mandatory dispute procedures under UNCLOS as a way of calling attention to the issue. David Victor's essay, titled "Whale Sausage" in an apt reference to the danger of looking too closely at the process of lawmaking in any forum, is the most challenging of the group. Victor, currently a Fellow for Science and Technology at the Council on Foreign Relations, proposes that nothing should be done to the current international whaling regime because the current regime, for all the slippage between what it purports to do and what it actually does, approximates the interests of all concerned in maintaining a forum for debate but not imposing binding management rules: "[T]he interest of most of [the participants in the current regime] could not be better satisfied by any feasible alternative to the status quo" (p. 293). Friedheim replies to Victor in the closing essay to the volume, in which he argues that change is inevitable and that "the outcome will depend to a considerable extent on the willingness of reasonable people on both sides to accept the risk of resuming some whaling" (p. 331). The main difference between Friedheim and Victor seems to be over whether law is the sort of thing that is susceptible to the efforts of "reasonable people." Friedheim proposes that a committee of what he calls "Wise Persons" be assembled to draft a negotiation text of a whale management plan laying out sound scientific principles for whale management. Freidheim is convinced that a "technically sound plan can be assembled" (p. 323) by experts who perceive a possibility for mutually advantageous bargaining over sustainable harvest quotas for whales. Victor responds that law is less about technically sound plans than about engaging incompatible interests in a debate.

With the exception of Victor, most of the contributors seem to believe that the current international whaling regime must be reformed. Otherwise they foresee a collapse of the regime, leading to unregulated exploitation of whales. The authors in this volume are equally concerned, however, with the impact of such a collapse upon the perceived importance of international law to world decision makers. As Friedheim writes, "Whaling may . . . be an example of 'intermestic' policy in which bargaining at the international level may be mere posturing to satisfy one or more domestic constituencies. Therefore, it is possible that those concerned with what has been occurring in the IWC are spinning their wheels, when the real action is elsewhere and the real decisions will be made by decision makers having little directly to do with the IWC" (p. 27). The real tragedy in Friedheim's account is that international law becomes no more than an empty shell; rather than spurring domestic authorities towards better management of whales, the IWC becomes merely another forum for symbolic posturing. Law-oriented readers may be disappointed that, in the end, Friedheim seems to rely on his expert committee of "Wise Ones" instead of the development of better legal processes in order to clean up the mess at the IWC. But the lack of a satisfactory conclusion is no real weakness in a book about the ongoing evolution of a contested international regime. Given that a tendency towards grandiose rhetoric
coupled with an unfortunate disregard for concrete policy accomplishments plagues international organizations generally, the fate of the international whaling regime has enormous implications for both the survival of whales and the emergence of international law as an effective framework for international problem solving.

The contributors to this volume explore the question of whether acknowledgement of the problems in the current regime can produce reform that will restore some semblance of legitimacy to the IWC. The book admits, through the variety of opinions expressed by various contributors, that there is no single satisfactory response to the question of how the IWC should proceed, or more broadly to the question of how international law can and should evolve. No ideological filters were used to select contributors, who range from lawyers to economists to biologists to political scientists. The essays explore and evaluate possible responses to the problems posed by the international whaling regime. No one answer emerges as the last word: the authors take conflicting positions on the severity of the problems facing the IWC and what can and should be done to resolve these problems. For the scholar interested in how international law operates in practice and what reforms might be possible, the diversity of perspectives is invaluable.


In 1492, a popular community-based organization known as the Water Tribunal formed to resolve water conflicts in Valencia. Five centuries later in the same city, Riccardo Petrella, a social scientist at the University of Louvain, presented the initial work that eventually became _The Water Manifesto_. In the same spirit of respect for mutual interests demonstrated by the 15th century Spaniards, Petrella argues for the world’s symbolic, political, and practical need for a water revolution. Like the historic Water Tribunal, _The Water Manifesto_ grounds its goals and actions in the belief that access to water is a common social right, and that its efficient management, allocation, and use require solidarity and cooperation.

The first of the three chapters that make up Petrella's concise text argues for the globalized world's need for a water revolution, suggesting that his conception is superior to similar initiatives taken in the last twenty years. Petrella’s world water revolution would involve a new system of governance and regulation of the ownership, appropriation, distribution, management, protection, utilization and conservation of water. Central to the need for action on an international scale is the author’s conception of water as a “common global heritage” (p. 8). Petrella establishes the urgent necessity of considering water in this way by citing national and international water shortage statistics, the cost of corporate competition to sustainable development, the harmful effects of the privatization of water, and recent agreements between California
and neighbouring states to end interstate water conflicts. Exactly how these examples support the conception of water as a common asset, however, is not explicitly explained.

Leaving this discussion off rather abruptly, Petrella pivots into a discussion of three changes that must occur in the next ten to fifteen years in order for the water revolution to succeed. First of these is a move from a “techno-economic” (p. 8) conception of water into one of water as the first global res publica. In order to prevent water from “going the way of oil” (p. 14), Petrella foresees the mobilization of NGOs, trade unions, and local and global intellectuals, especially those in the media and “the creative professions” (p. 14). Unfortunately, he does not specify how these agencies and individuals can affect such a change. The second change necessary to the water revolution—the de-statization of water—does not mean privatization but the creation of a new system of regulation and control that entrusts the integrated management of water to public bodies such as local communities and cooperative societies. The third necessary change, Petrella argues, is to stop the transformation of peasant agriculture into intensive industrial agriculture and to slow the rapid growth of cities worldwide, two trends that currently contribute to the water crisis.

These changes, he concedes, are difficult to make. Indeed, the rest of the chapter is dedicated to answering the question of why, despite the number of major initiatives taken over the past twenty years with considerable investment and involvement of thousands of NGOs, the water crisis has continued unabated. For Petrella, the failures of previous initiatives have been caused by an incomplete understanding of the water crisis as rooted in the unequal distribution, waste, mismanagement, and worsening pollution of water, as well as population growth. For example, he cites the World Bank’s ‘water bomb’ theory—that the main reason for the water crisis lies in the growing surfeit of human beings for a limited and shrinking resource. Petrella claims that this and other arguments tend to overlook the inequality of consumption among human beings worldwide. Petrella proposes alternative reasons for the water crisis, including economic interests and power plays, with a view to regional hegemony. The conflicts that occur as a result of water scarcity, he argues, are actually one of its causes. Among other factors that engender the water crisis is the unequal power to direct and control the modes of resource regulation and distribution among different socio-economic groups. In short, the conventional explanations overlook the role of power in the water crisis, a role of which Petrella’s water revolution is acutely aware.

Following this identification of power as the root of the problem, Petrella argues in Chapter 2 that those who use water as a conduit for power, wealth and domination—the lords of water—are the main obstacles to solving the water crisis. As a point of contrast he reminds us that The Water Manifesto is founded on equality, justice and solidarity. The author defines a waterlord as an entity that derives its power from ownership and control of water, allowing it to capitalize on the goods and services generated by water. The legitimacy of the waterlord’s power, furthermore, is a function of his capacity to provide access to water for those under his authority.
More specifically, Petrella categorizes waterlords into warlords, money lords, and technology lords. Warlords are defined as social groups representing military, economic, ethnic or religious interests that perpetuate conflict and domination between and within states in order to gain control over certain resources. As an example, Petrella describes upriver states, which espouse absolute territorial sovereignty, pitted against downriver states, which advocate absolute territorial integrity. Applied to water, these principles match claims of exclusive ownership of water resources against the right to benefit from the natural flow of watercourses originating in other countries. Yet the common anecdote to water related conflicts is also rejected in The Water Manifesto's description of money lords, those that believe in the commodification of water as a marketable good. Petrella's relatively extensive discussion of money lords makes clear his staunch opposition to treating water as an economic asset. One central argument is that water is not a matter of choice, but a basic asset that is needed by everyone to survive. In contrast, one distinctive feature of a marketable good is that it is replaceable and that a consumer should be able to choose among several goods of the same nature. By treating water as an economic good, then, the emphasis would not be on water as a common global heritage accessible to all, but for an efficient management of a limited resource, whose accessibility would be regulated by the pocketbooks of its users. Petrella also describes the water industry and the limits and problems of water privatization as part of his discussion of moneylords. Finally, he introduces the technology lords, such as water bottlers and dam builders, whose power depends on the technological imperative that everything that technologically could be done also should be done. Throughout these descriptions, Petrella criticizes the lords of water as selfish, shortsighted and power hungry, and reminds the reader of the Water Revolution's concept of water as a global common heritage. The stream that leads to the bay of real solutions, he reminds us, passes through the political, cultural and socioeconomic changes described in Chapter One.

Finally, Chapter Three, entitled "The World Water Contract," is a bold call for international action to resolve the world water crisis. Petrella does not champion the contract as a cure-all for the world water problem. Rather, he regards it as one of a series of actions undertaken by various actors that address the global shortage of water. He cites a lack of rules and control by both international bodies and local governments as one of the mainsprings of trouble in the ownership, use, and management of water. In response, Petrella spells out the principle objectives of the World Water Contract: basic access to water for every human being and integrated sustainable management of water in keeping with principles of solidarity. In light of these objectives, one of Petrella's ideas is to modify existing national constitutions or water laws or to pass new legislation. Petrella also identifies "priority targets" (p. 98), which are more immediate and tangible goals, such as initiatives to defuse water conflicts, reduce waste, and change irrigation systems. In achieving the targets and objectives of the world water contract, Petrella suggests that the principle actors will be parliamentarians, community movements and organizations of civil society, scientists, intellectuals, the media, and the trade unions. These
actors should organize into a worldwide “Water for Humanity” (p. 102) collective, a network of movements and organizations that would promote, organize and implement campaigns. They should also establish a network of “parliamentarians for water” (p. 104). This network would be made up of parliamentarians from various countries who would work together to publish an open letter to the world explaining why water is a common asset, and organize a conference of peace through water parliaments. The parliamentarians for a water network might also encourage the creation of parliamentary assemblies at the level of interstate basins.

Throughout The Water Manifesto, Petrella provides useful anecdotal and statistical support for his arguments. He channels information from various wells of data, including well-recognized international bodies such as the United Nations, the World Health Organization, and the World Bank, as well as academic works and newspaper reports. He also cites information from a spectrum of countries, such as France, the United States, and India. However, despite this attempt to ground his claims in empirical bedrock, ideologically The Water Manifesto clearly flows towards the left. A simple example of the author’s “us versus them” mentality is his use of the terms money, war and technology lords to describe capitalists, warring bodies, and technocrats. Also, in writing about agriculture, Petrella declares “if land degradation continues, it is because those involved want it to . . . . But the solutions are well known, in fact, as are the ways of reinventing an efficient and sustainable peasant agriculture.” (p. 18) It is difficult to believe that this is in fact the case. If the answers were staring people in the face, why then, would they not do the right thing? This and similar conundrums result in a caricature of the parties that he both criticizes and needs for success of the water revolution. If the founding principle of the Water revolution is indeed global solidarity, then the problem of how best to incorporate the so-called Lords of Water in the World Water Contract will eventually warrant further inquiry.

International Institutions


The Legitimacy of International Organizations undertakes a “philosophically-oriented examination” (p. 2) of the evolving responsibilities of global international organizations in the post-Cold War era, focusing on the concept of legitimacy. It presents a wide swath of pertinent philosophical theory, debates, and challenges; and it discusses the changing roles expected of these institutions. The book, divided into three thematic sections, consists of twelve chapters by leading scholars.

The first Part, entitled “Theoretical and structural issues,” begins with “Democracy and International Governance,” an essay by Susan Marks, lecturer in the Faculty of Law at the University of Cambridge. Marks argues
that international organizations suffer from a democratic deficit and considers how this problem can be remedied. She grapples with three competing theoretical visions of global democracy: world government, pan-national democracy, and democratization of global governance. Ultimately she supports the third category, originally developed by David Held, which "involves simultaneous efforts to deepen democracy within nation-states and extend it to international and transnational settings" (p. 53). The next Chapter is entitled, "Intergovernmental Societies and the Idea of Constitutionalism." Written by Philip Allott, Professor of International Public Law at the University of Cambridge, the Chapter examines constitutionalism as a social theory. Allott traces the ancient roots, development, and competing notions of constitutionalism. He argues that the term may be a useful tool for conceptualizing the nature of international organizations.

Jose E. Alvarez, Professor of Law at Columbia Law School, follows with "Constitutional Interpretation in International Organizations." Describing the use and effects of creative "constitutional" analogies in lawyers' interpretive approaches to the charters of international intergovernmental organizations, Alvarez provides an analysis of the constitutional arguments for and against the use of force by NATO in Kosovo viewed against the provisions of the U.N. Charter. Veijo Heiskanen, Secretary-General of the Claims Resolution Tribunal (Zurich) and Commissioner of the Property Claims Commission of the United Nations Interim Administration Mission in Kosovo, contributes "The Rationality of the Use of Force and the Evolution of International Organization." Heiskanen traces the use of the term "rationality" from Clausewitz's formally accepted concept of "absolute, unlimited warfare" to the twentieth century's "policy of collective security" and the "policy of peace," to the new, more piecemeal "international crisis management" approach that is currently dominant. He argues that the Clausewitzian military tools of today are not well-suited to the needs of "international crisis management." More specifically, the military assets of today's military reflect Clausewitzian thinking of "destroying the enemy," not the "protection of civilians in armed conflict, or the peaceful but forceful separation of the warring parties" (p. 176).

The book's second thematic Part is entitled "Current issues: The changing environment of international organizations." Its first Chapter, by Gerd C. A. Junne, Professor of International Relations at the University of Amsterdam, is entitled "International Organizations in a Period of Globalization: New (Problems of) Legitimacy." Junne argues that "the process of globalization has had a mixed impact on the legitimacy of international organizations" (p. 218), and notes that while the demand for international organizations has increased, their effectiveness has diminished. Next is Jan Klabber's "The Changing Image of International Organizations." Klabbers, Professor of International Law at the University of Helsinki, charts the development of the law of international organizations by focusing on the doctrine of implied powers. Drawing on the experience of the European Union, Klabbers argues that international organizations seem to have been "forced to tone down the scope of their ambitions" from years past (p. 246).
The following Chapter, "International Democratic Culture and its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s," is by Jean-Marc Coicaud, a Senior Academic Officer in the Peace and Governance Program of the United Nations University in Tokyo. Coicaud contrasts U.N. peacekeeping operations during the Cold War with the post-Cold War period (1992-1996). He identifies reasons why, in the latter period, the U.N. failed to achieve its goals and discusses the negative fallout on its legitimacy in dealing with such conflicts. Tetsuo Sato, Professor at the Faculty of Law, Hitotsubashi University in Tokyo, argues in the Chapter "The Legitimacy of Security Council Activities Under Chapter VII of the U.N. Charter After the End of the Cold War" that "the Security Council has increasingly stepped into legally grey areas from the perspective of the U.N. Charter" (p. 340). In order to increase Security Council legitimacy, Sato prescribes adopting a "functional separation of powers" doctrine, such as granting the ICJ judicial review powers over the legality and constitutionality of Security Council resolutions.

The third thematic Part is entitled "International Organization in Transition." Its first Chapter, "The Legitimacy of the World Trade Organization," is by Robert Howse, Professor of Law at the University of Michigan. Howse provides an analysis of the issues which enhance—and undermine—the institution. Later focusing on the cases brought to its dispute resolution mechanism, he argues that the WTO can counter its legitimacy problems of "democracy, inequality, and instability through moderation and new-found modesty in rule-making and rule-interpretation" (pp. 395-96). Marc Uzan, Executive Director of the Reinventing Bretton Woods Committee, investigates Asia's capital outflow crisis of 1997 in "The Process Towards the New International Financial Architecture." After analyzing the initial causes and prolonging factors behind the crises, Uzan critically examines the proposed institutional solutions for amending the current Bretton Woods system and for preventing similar crises from happening in the future. Given that exchange controls have since the 1970s "been rendered essentially ineffectual," he notes that "states must further compromise their domestic autonomy in the name of effective cooperation" (p.431). He concludes that "major, formal overhaul of the global financial system is not needed; the successful path to future progress has been established and is practically implementable" (p. 436). Indeed, he argues that the need for reform of the international financial sphere must include domestic reforms in matters such as increasing transparency: "constructive reform of the global financial system—if it comes—will be the result of improved standards of management in all countries desirous of participating in the global system" (p. 435).

The following Chapter, "Distributive Justice and the World Bank: The Pursuit of Gender Equity in the Context of Market Reform," is written by Kerry Rittich, Assistant Professor in the Faculty of Law/Women's Studies at the University of Toronto. She criticizes the effects that the World Bank has had on gender equity in developing countries by privileging neoliberal principles. While Rittich is pleased that in the mid-1990s the World Bank placed gender equity on its list of official development objectives, its
implementation of this objective "has been equivocal at best" (p. 463). Thus, Rittich advocates a stronger move in this direction. She argues that the Bank should pursue stronger, interventionist policies which "challenge" rather than "supplement the [Bank’s usual] central neoliberal [policy] tenets" (p. 468). She advocates, for example, adopting strong antidiscrimination polices and substantially increasing the promotion of women’s labor market participation. Finally, Joyeeta Gupta, senior researcher at the Institute for Environmental Studies at the Vrije Universiteit of Amsterdam, contributes the twelfth and final chapter “Legitimacy in the Real World: A Case Study of the Developing Countries, Non-governmental Organizations, and Climate Change.” Gupta shows how negotiations over environmental treaties and agreements differ from other types of negotiations. Demonstrating why environmental compliance is likely to be lower than with other agreements, she highlights why the legitimacy of the negotiations takes on an added importance. She concludes with a variety of suggestions proposing how to increase the legitimacy of the negotiations. They include “providing weaker countries with some sort of ‘legal aid’ to assist in the negotiations;” allowing countries “some sort of a ‘right to scientific rebuttal!’” to give them time to critically assess new scientific information; and “developing a method to help poorer countries build the capacity to implement decisions” (p. 510).

Each of the contributors thoughtfully analyze their respective topics and concisely argue their points. While the book is clearly aimed at an academic audience, its prose is highly accessible. When jargonistic academic terms are used, the authors generally explain them in simple, clear language. In sum, this book is a very helpful guide for scholars grappling with the pertinent literature’s often arcane terminology, as well as those interested in the general "legitimacy" issues confronting contemporary global international institutions.

One area where the book could have been stronger, however, is in more closely connecting its philosophically-oriented discussion to the normative views of specific contemporary political actors. In its extensive 19-page index, for example, the book has virtually no entries for senior Clinton administration officials, nor for those in the first Bush administration. Other major political actors which are very rarely, if ever, mentioned are members of the U.S. Congress, interest groups, senior bureaucrats, political parties, NGOs, and activists. Thus, the more pragmatically oriented reader will sometimes be left wondering to what extent the philosophical terms discussed in the book have been actually endorsed, invoked, or even rejected by these major political players. Moreover, by neglecting to closely examine the normative philosophy of these types of political actors, the book misses opportunities to inform readers about the nuances, supplementing or countervailing principles, and prescriptive differences within and between various political ideologies. Drawing more explicitly from these differing political actors’ normative frameworks would have made the book more compelling and rich—even on its own "philosophically-orientated" terms.
Comparative Law


Recent interest in Islamic law following the events of 2001 is a reminder of the growing importance of comparative law. For those interested in the development of the field, Rethinking the Masters of Comparative Law, edited by Annelise Riles, a professor at Northwestern University School of Law, is a timely discussion of the promises and pitfalls of comparative legal scholarship.

This collection of essays explores the nature of comparative law as a discipline. Each contribution examines the work of a particular comparative scholar. The arrangement of the volume into four sections, each corresponding to different historical periods, allows for treatment of only a limited number of scholars. However, the collection is not designed to provide a historical survey, but instead to illustrate characteristics in individual scholars' work that continue to mark the comparative legal enterprise. Consonant with this project, some general themes mark the collection as a whole. Perhaps most apparent is the observation that previous scholars, with their methodologies and projects, exercise continuing influence and have left legacies that need reevaluating. Also central is an acknowledgment of the political character of comparative law. Finally, the volume indicates that the shape of comparative legal scholarship is profoundly affected by domestic legal debates. Many of the individual scholars examined used comparative law as a means of promoting their domestic legal and political commitments.

The first section begins not with comparative legal scholars per se but with the foundational figures of Baron Montesquieu and Max Weber. The opening Chapter on Montesquieu's The Spirit of the Laws, by Robert Launay, professor of anthropology at Northwestern University, highlights the role of domestic politics in Montesquieu's writing. Contrasting the differing legal and political systems of Oriental despotisms and ancient republics with those of monarchical France, Montesquieu argued for maintaining aristocratic privilege as a bulwark against the French monarchy's trend toward despotism. The inherently political character of methodology is the subject of the next essay, Ahmed White's treatment of Max Weber. White, a law professor at the University of Colorado, argues that while Weber was less explicit in his domestic political commitments, his rigid categorizations and Neo-Kantian assumptions were justified by the conservative and imperialist dynamics of his time. White criticizes comparative law's continuing use of Weberian categorical comparison and calls for the development of a framework that can better address the complexity and dynamism of law.

In the next section, Vivian Curran's treatment of Hermann Kantorowicz, covering the decline of legal formalism, is less critical. As the founder of "free law," Kantorowicz has been faulted by some legal historians for providing the basis for the Nazi departure from the rule of law. He is also credited with
laying the foundation for the American legal realist movement (though he later criticized it). Curran, who teaches comparative law at the University of Pittsburgh, debunks the connection between “free” law, which sought to fill in the gaps of formal law, and Nazi law, which rejected as inconvenient earlier formal law. Curran also argues that Kantorowicz’s differences with American legal realism resulted from his civil law background. Next, Riles herself addresses the amateurism of comparative legal scholarship through her essay on John Wigmore. Riles argues that amateurism, and its related lack of analytical development, is a defining feature of comparative legal scholarship. This lack of analysis both allows for more participation in the field and also reveals its limitations.

The third section examines the use of comparative law by scholars involved in legal modernization projects in their home countries. An associate professor of comparative law at Hitotsubashi University, Hitoshi Aoki looks at the life of Nobushige Hozumi, the drafter of the Japanese Civil Code and the father of modern Japanese comparative law. After providing a summary of Hozumi’s career, Aoki turns to Hozumi’s article, “Taboos and the Law,” which relied on the work of James Frazer, a western anthropologist. Aoki shows that despite extensive reliance on Frazer, Hozumi was able to reject Frazer’s theory where it was not convincing in the Japanese context and to modify his scholarship accordingly.

In the following essay, Amir Shalakany, legal advisor to the Palestinian Negotiation Team and visiting professor at Bir Zeit University Law School, discusses the most influential of Arab comparativists, Abdel-Razzak Al-Sanhuri. There are some obvious similarities between Sanhuri and Hozumi. Each drafted his country’s Civil Code, and each is considered the father of comparative law in his own country. Nevertheless, the tenor of Shalakany’s essay is notably different from Aoki’s treatment of Hozumi. In contrast to Hozumi’s success in Japan, Sanhuri is widely regarded in the Arab world as a failure, a scholar whose Civil Code is not an authentic expression of Arabic law. Shalakany argues that this search for authenticity is misguided and that a hybrid conception of law should be embraced. This Chapter is also interesting for its portrayal of Edouard Lambert, the great French comparativist, and his involvement with the Egyptian project of modernization. The section closes with a Chapter on Ernst Rabel by David Gerber, professor at Chicago-Kent School of Law, discussing the continuing influence of Rabel’s function/context methodology.

The book concludes with two essays covering the post-War years. The first of these, by Northeastern University law professor Jorge Esquirol, is about French scholar René David. Esquirol focuses on David’s organization of legal systems into families. Noting that David’s classification remains uncontroversial, Esquirol argues that it nevertheless contains ideological elements that need more examination. In the final essay, Ugo Mattei, law professor at both the University of California-Hastings and the University of Turin, traces the relation between Rudolfo Sacco’s structural comparativism and Rudolph Schlesinger’s Common Core methodology.
This group of essays will be most useful for those interested in the historical experience of comparative legal scholarship and the projects associated with it, an experience that can both inform and warn the contemporary scholar.

Dignity and Liberty: Constitutional Visions in Germany and the United States.

"Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." So begins the section on "Basic Rights" in the Basic Law of the Federal Republic of Germany as promulgated in 1949. This vision of human dignity animates the modern German Constitution and forms the basis of Dignity and Liberty: Constitutional Visions in Germany and the United States, a comparative study of the German and American Constitutional regimes by Edward Eberle.

Eberle, a professor of comparative law at Roger Williams University School of Law, presents in his first chapter a comparison of the American and German Constitutional traditions. Chapter two deepens the analysis of human dignity as understood by the German Constitutional Court. Chapters three through seven provide an analysis of how the contrast between German and American Constitutional traditions affects a variety of legal and policy-related questions including personality and freedom of action, inner freedom, identity and autonomy, abortion, and freedom of expression. Chapter eight offers some concluding thoughts pointing the reader toward the twenty-first century and the issues surrounding the protection of human personality in an information society.

The American Constitutional tradition emphasizes liberty, argues Eberle. This emphasis grows out of the experience of a colonial people living under the control of England. American desire for liberation from the oppression of a foreign power served as the spark that ignited the American Revolution and eventually the country’s Constitutional framework. The United States’ founding constitutional vision is better understood, Eberle argues, as addressing not so much the desire to protect individual rights but rather the concern of a people who had just rid themselves of a large foreign power and were not particularly keen to see a centralized domestic one rise up in its place.

In contrast, the German Constitution grew out of the crucible of World War II and the evil of Nazi oppression. Unlike the American Revolution, which involved no catastrophe akin to the Holocaust and did not call into question a legal order based on English common law, Nazism destroyed the basic fabric of civilization in Germany. Germany’s Basic Law had to do much more than fill in the procedural details of a Declaration of Independence or provide the skeletal framework for a limited national government. Rather the new German Basic Law had to constitute a new nation committed to universal
human rights and actively engaged in protecting its citizens from violations of human dignity. Dedication to the principle of human dignity and to a “militant democracy” (p. 20) able and willing to defend such dignity resulted in a German constitutional framework ostensibly oriented not primarily toward liberty from a central power but rather toward the proactive seeking of the common good.

This overarching observation leads to a useful comparison of the two countries’ constitutional jurisprudence. Eberle stresses in particular how Germany’s Constitutional Court has confronted modern threats to human dignity. For example, the use of information technology to gather personal data can promote the common welfare, but it can also threaten personal integrity. The Constitutional Court recognized the threat that certain forms of technology might hold for personal integrity when it limited the collection, sharing, and use of personal information under the Federal Census Act of 1983. As Eberle notes, “at the root of the Constitutional Court’s decision was the vision that human dignity and autonomy must be preserved against the onslaught of the modern computer age” (p. 92). In short, the German Court had held that no person should be reduced to a series of 1s and 0s. In contrast, the American tradition of privacy rights, Eberle argues, articulates a different vision of personal autonomy grounded in the “right” to be left alone. The American vision offers little protection in an age where technology can leave an individual “alone” but at the same time allow others to manipulate one’s future through knowledge of deeply personal information.

Eberle also discusses how the Constitutional Court of Germany has limited the right to free expression more substantially than has the United States Supreme Court as a result of the German Basic Law’s emphasis on the dignity of the human person. For example, in the Strauss Political Satire case, the Court held that a prominent national politician from Bavaria, Franz Josef Strauss, had a right to be protected from defamatory caricatures that showed him as a pig copulating with other pigs dressed in judicial robes. In contrast, the United States Supreme Court’s well-known decision in New York Times Co. v. Sullivan held that false statements against political figures were protected by the first amendment unless actual malice could be shown. The United States Supreme Court’s view of the importance of free expression values was affirmed again in Hustler Magazine v. Falwell, when the high court ruled that a cartoon depiction of the Reverend Falwell in a compromising position with his own mother was protected under the First Amendment.

Germany also shields its citizens more vigorously from hate speech than does the United States. Hate speech does not deserve the state’s protection because its very existence in Germany is deemed both a threat to the general peace and an attack on human dignity. Here again, history provides a guide. In Germany, the so-called “paradigm case”—although pre-constitutional—was Nazi speech connected to the Holocaust. In contrast, the paradigm free expression case in the early days of the United States was sedition libel, reflecting a less threatening historic reality that has allowed the United States
to pursue a different jurisprudential track toward broader rights for political expression.

Abortion is another area of contrast in German and American constitutional jurisprudence. In *Abortion I*, the first important abortion case before the German Constitutional Court, the justices held that “developing life also partakes of the protection of human dignity” because “where human life exists, human dignity attaches” (p. 165). Eberle argues, “by this reasoning, the Constitutional Court established that an unborn person is entitled to human dignity and the article 2 guarantee of a right to life, as an independent legal value” (p. 166). The Constitutional Court met the conflict between the right of the unborn person to life and the woman’s right to self-determination through the fundamental principle of concordance (*Koncordanz*). The Court concluded that abortion, while it must be treated as moral wrong and violation of the legal order, may be permitted in rare circumstances. In contrast, the U.S. Supreme Court has denied the personhood of the unborn person and has instead emphasized the women’s right to an abortion as emanating from the spirit of privacy rights found in the Bill of Rights.

Eberle’s comparative account of German and American Constitutional visions provides a useful primer to those interested in the legal similarities and differences between two of the leading democracies in the world. However, the author appears at times to stretch the contrast between Germany’s Basic Law and the United States Constitution too far. For example, Eberle argues that “in the United States, free speech is the preeminent value” (p. 235). Other scholars might locate our preeminent national value not in freedom of speech, but rather in the principle that “all men are created equal,” and point to the Civil War, the Reconstruction Amendments, and Civil Rights Movement as popular affirmations of this national commitment. Perhaps, Eberle is referring to free speech as the preeminent “procedural” value, which is a far less contentious claim; indeed, for a democracy founded on the principle of popular sovereignty cannot long endure without vigorous protection of free speech and open dialogue. Eberle stretches the contrast again when he states, “the American Constitution is silent over a right to life generally, including that for a fetus” (p. 178). While the question of the status of the personhood of the fetus may be unsettled, can the text of the fifth or fourteenth amendments leave any doubt about whether the Constitution contains a general right to life? Finally, Eberle writes, “perhaps America needs to define freedom less as a value unto itself and more as a value in relation to community” (p. 236). The preamble to the United States Constitution suggest that the Founders had already anticipated this possible criticism: “We the People of the United States, in Order to . . . promote the general Welfare . . . do ordain and establish this Constitution of the United States of America” (emphasis added).

Despite these shortcomings, *Dignity and Liberty* provides a wide-ranging and scholarly account of how the lived experiences of the German and American people have resulted in constitutional traditions that emphasize different substantive values.