BOOK REVIEWS

The Arab-Israeli Accords: Legal Perspectives by E. Cotran & C. Mallat (Eds.). Kluwer Law International, The Hague/London/Boston, 1996, ISBN 9-0411-0902-1, xxiv and 303 pp., US$ 117.-/UK£ 79.-/Dfl. 275.-.

One of the well-known political jokes of the Cold War era spoke of a group of American tourists visiting the Soviet Union and extolling the virtues of American democracy to a Russian crowd on Red Square in Moscow. When asked by one of the Russians to give a concrete example of the meaning of American democracy, the leader of the American group exclaims: "I can stand in front of the White House in Washington and shout: 'Eisenhower is a fool'". To which one of the Russians retorts: "Big deal. I can stand here on the Red Square and shout likewise: 'Eisenhower is a fool!'".

One cannot but be reminded of this joke while referring to the book here under review. It reproduces a series of papers submitted at a conference, held in London in December 1994, under the auspices of the Centre of Islamic and Middle Eastern Law of the School of Oriental and African Studies at the University of London, the topic of which now constitutes the book's title.

The participants at the conference hailed from Israel and the Palestinian community. But while the Israeli participants (academics of respectable professional standing and intellectual integrity, albeit with a clear identity within the Israeli political spectrum) did not hesitate to criticize various Israeli policies and practices, their approach was not reciprocated in kind by most Palestinian participants who vied with one another in denouncing ... (you guessed it!) Israel in a manner clearly reminiscent of the propaganda publications of the PLO. This should not occasion particular surprise, given the fact that the majority of the Palestinian participants are (or have been), one way or the other, functionaries of the PLO or of organizations affiliated with it.

This one-sideness of the conference's proceedings has been implicitly - and one assumes, unwittingly - conceded by the editors when they state in their preface that "the strongest indicator of the quality of the proceedings is the necessity to look carefully into the text to discover, perhaps, the national provenance of their authors" (p. xx). Translation into plain Eng-

lish: since both the Israeli and Palestinian contributors are critical of Israel, it is quite difficult to tell who is who.

Perhaps the worst offender in this regard is none other than Eugene Cotran, one of the two co-editors of the book who, according to the note on contributors is "one of Her Majesty's Circuit judges since 1992, Chairman of the Centre of Islamic and Middle Eastern Law since 1990, [...] and a Board Member of the Palestinian Independent Commission for Citizens Rights" (p. ix). Having regard to some of these credentials, it is perhaps not altogether surprising that Judge Cotran's paper offers 'a Palestinian View' of what ostensibly are 'Some Legal Aspects of the (Oslo) Declaration of Principles' (p. 67). The patent political bias of this author,[1] to the point of distorting his legal argument, is obvious throughout the paper. Perhaps one the most egregious examples of this biased approach can be found on p. 68 where he asserts that two "prime examples of legal significance" of Israel's recognition of the PLO as the representative of the Palestinian people are that there is a 'State' of Palestine and a 'Government' of that 'State'. While it is of course quite conceivable that the Oslo process has set in motion developments that may eventually lead to the establishment of such a state, it is quite clear that, on the legal level (to which Cotran allegedly addresses himself) the Declaration of Principles[2] excludes, pending the final status negotiations to be concluded by May 1999, the existence of such a state.

This overwhelmingly propagandistic approach (masquerading as legal argumentation), is reflected also in the contributions of other Palestinian participants. A case in point is the paper submitted by Mr. A. Al-Qasem,[3] on 'The Draft Basic Law for the Palestinian National Authority During the Transitional Period' (pp. 101-135).[4] Despite his solid legal credentials, even Mr. Al-Qasem could not resist the temptation to give his paper a distinctly propagandistic twist. This becomes quite evident in his dealing with the question of fundamental rights and freedoms. Thus, we are told, in his reference to every person's right to life, that "Palestinian lives are terminated daily by an Israeli shoot to kill policy which seems to have been sanc-

1. Himself of Palestinian descent.
2. Declaration of Principles on Interim Self-Government Arrangements, Government of Israel, Ministry of Foreign Affairs (1993).
3. A Barister at Lincoln's Inn and Chairman of the Legal Committee of the PLO's National Council.
4. The correct designation of the body established under the Oslo Declaration of Principles is 'Palestinian Authority' and not 'Palestinian National Authority'. However, in PLO parlance the latter version has been employed. Hence Mr. Al-Qasem's terminology.

tioned at the highest Israeli level" (p. 120). With regard to the draft's provisions concerning the preservation of the inherent dignity of detained persons, modelled on Article 10 of the International Covenant on Civil and Political Rights,[5] Mr. Al-Qasem points out that "it would be sufficient to recall the treatment of Palestinian detainees and prisoners at the hands of Israeli occupying authorities to see the justification [...] for the inclusion of these [...] provisions in the Draft Basic Law" (p. 125).

One wonders why countries like Sweden, the Netherlands, and New Zealand (to give but a few random examples) should be expected to respect these and other human rights. After all, they have not suffered the aftereffects of the trauma of Israeli occupation.

This reviewer would suggest a more plausible and mudane justification for the human rights provisions of the Draft Basic Law, namely, the dismal human rights record of virtualy all Arab regimes, including the Palestinian Authority. According to human rights groups monitoring the issue, torture by the Palestinian police has been widespread ever since the Palestinian Authority began self-rule in the Gaza Strip and in parts of the West Bank in May 1994; at least twelve Palestinians have been tortured to death or shot while under interrogation. Under these circumstances, it should not come as a surprise that, as of the time of writing (February 1997), the Basic Law which the Palestinian Council[6] has asked to enact is languishing, for lack of signature, on Yasser Arafat's desk.

A rather humorous note (presumably unintended) is injected into Mr. Al-Qasem's paper on p. 122, where he asserts that "historically, the destruction of the second Jewish temple[7] was at the hands of occupiers and not indigenous Palestinians. Similarly, the exile of the Jews from Jerusalem was not the act of Palestinian Arabs".[8]

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5. UN Doc. A/RES/2200 (1966).
6. The legislative body of the Palestinian Authority.
7. In Jerusalem in the year 70 of the Common Era.
8. Incidentally, when referring to the Second Jewish Temple, Mr. Al-Qasem apperently begrudges the capital 'T' in the word "Temple" and spells it, in a rather petty fashion, with a small 't', in keeping with accepted PLO orthography.

Mr. Al-Qasem is correct on the facts, but for reasons very different from those apparently motivating him:

1. no Arabs, Palestinian or other, could exile the Jews from Jerusalem in the year 70 for the simple reason that they arrived there only some 570 years later;
2. there did not exist 'Palestinian Arabs' in the year 70 for an additional reason, namely, that 'Palestine' came into being only at a later date. The term was coined by the Romans in the second century in an attempt to erase the Jewish history of the country known until then to everyone (including the Romans themselves) as 'Judaea', i.e., the Land of the Jews; and
3. hence, obviously there did not exist 'indigenous Palestinians' at the time of the Temple's destruction; the 'indigenous' population of the country at the time was predominantly Jewish.

This passage is certainly revealing by showing that in his propagandistic zeal even as erudite a person as Mr. Al-Qasem is not above playing havoc with historical facts.

It is regrettable that Messrs. Cotran, Al-Qasem, and other Palestinian participants could not bring themselves to admit that their papers, while employing the tools of legal terminology, were primarily politically motivated, aimed at promoting the perceived political interests of the Palestinians. Such an admission of political motivation was made openly and candidly by Professor R. Gavison.[9] In her well-researched and tightly argued paper on 'Transition from Conflict to Reconciliation' (pp. 21-44), she states: "I must confess I am writing this paper not as an academic. Rather, I am writing it as an individual who believes that a negotiated compromise is the only hope for the region" (p. 26, note 13).

A similar approach of intellectual honesty characterises also the papers of Professor E. Benvenisti on 'The Status of the Palestinian Authority' (pp. 47-55), and of Professor D. Kretzmer on 'Domestic Politics, Law and the Peace Process; a View from Israel' (pp. 81-99), both of the Hebrew University.

In contradiction to the Palestinian contributions in the first half of the book, those contained in the chapters of its second half, dealing with

9. Professor of the Hebrew University of Jerusalem, Israel.

'Economy and the Law' (pp. 155-195), 'Water and the Law' (pp. 197-226), and 'Creating Legal Institutions' (pp. 227-267) reflect, on the whole, a much more balanced and business-like attitude.

Messrs. S. Elmussa and M. El-Jaafari offer on pp. 173-195 a Palestinian view on the Israeli-Palestinian Economic Protocol of 29 April 1994.[10] An Israeli perspective of the 'Legal Aspects of the Israeli-Palestinian Economic Relations' is given by Dr. C. Wasserstein Fassberg of the Hebrew University.

Mr. Elmusa also adresses himself to another burning issue facing the nations of a semi-arid Middle East (and thus crucial to peace-making in the region), namely, the water problem, as reflected in the Jordan-Israeli Water Agreement (pp. 199-212). The water problem is also dealt with by Dr. E. Feitelson of the Hebrew University in 'Joint Management of Groundwater Resources: Its Need and Implications' (pp. 213-226).

If there is a redeeming feature to this publication in general, it is to be found in the Palestinian contributions in these chapters. They serve as a clear demonstration that a forward-looking, problem-solving attitude aimed at identifying spheres of activity of common interest and mutual benefit is definitely preferable to a sterile, backward-looking, polemical approach that accentuates past grievances, real or imagined. It is certainly regrettable that, viewing the book as a whole, the polemical approach of the Palestinian participants has overshadowed the constructive and co-operative attitude.

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Fairness in International Law and Institutions by Th.M. Franck. Clarendon Press, Oxford, 1995, ISBN 0-19-825901-8, 500 pp., £ 30.- /Dfl. 107.-.

The humanist spirit of Veronese's 'Venice Enthroned between Justice and Peace' encounters the reader on the book cover. Franck's voluminous work is a tribute to 'Fairness Enthroned between Law and Morals'. He has

10. Incorporated as an annex in the Agreement on the Gaza Strip and the Jericho Area, Cairo, 4 May 1994, Ministry of Foreign Affairs, Jerusalem.

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many names for the duo: process and substance, legitimacy and justice, order and change, procedural due process and distribution. In this familiar language Franck rewrites Rawls' principles of fairness into international law, noting that the latter was wrong to challenge the existence of the necessary preconditions - global communitarian spirit and international applicability of the fairness rationales (pp. 18-19).

Though Franck embraces the recent trends of structural critique (e.g., Koskenniemi), discourse, and audience theories (e.g., Dworkin), and American liberal utilitarianism, this book is true to idealism. For Franck these elements lend "a critical analytical framework for a critique of international law" (title of Part I). We read that the time has come for 'post-ontological' international law: first because we now - thanks to the intitutional explosion - have a global community, and second because international law has reached both maturity and the same complexity level as national law, it no longer needs our protection. The legal profession has been empowered to be creative when it no longer needs to "defend the very existence of international law" (p. 6). For a philosopher, this seems to reaffirm an ontology (foundationalism and communitarianism) rather than liberate from it, which is more the objective of the critical new approaches to international law. However, for Franck the structural critique of the new approaches and the Third World perspective need alongside them a substantive critique from the point of view of communitarian idealism, targeted on the values and contents of the finally unquestionably existing international law.

Franck's book, based on the Hague Academy 1993 lectures, supports its thesis with the recent developments in global democratization, in post-colonial nationalism, and the UN administration, but also with the traditional discussions on just war, collective security, and the World Court. Most successful seems to be Part IV, which introduces the new triangle of the global legal discourse - environment/development/private investment - alongside the safe and solid traditional public international law topics. To leave this triangle out, however nebulous and covered with private business relations it may be, says Franck and I strongly agree, would no longer be fair.

Yet, the reviewer is hardly convinced that we are "witnessing the dawn of a new era" (p. 11), nor that the global problems now empower us to exercise legal fairness (p. 6), nor that "international law has entered its post-ontological era" (p. 6) of a real community despite the "post-modern neo-tribalist" outrages (pp. 140-143). We have heard the wishful declarations so

many times before. Perhaps these declarations work on students, who have not been exposed to political realism. Perhaps they derive their value from educating new generations of international lawyers to optimism and communitarianism.

However, Franck himself has been exposed to realism and the new approaches. This is apparent throughout. To make it explicit, the conclusive chapter title reads: 'Fairness about Fairness' (pp. 476-484). In Llewellyn's style under this rubric Franck announces his fairness program, which is marketed as equally "rigorous a discipline as any other part of the modern lawyer's and negotiator's craft" (p. 478). But first a few remarks before I can recommend it.

Franck uses utility as one of the strongest arguments for fairness, which makes him a moral utilitarian and pragmatist. He thus claims that the fairness program should be adopted, though subjective and western, because it is efficient in practice, it fits the existing institutional framework, and it enables us to deal with problems without a 'radical shock' to the system (p. 481). This sounds fair and liberal. It is in many respects 'liberalism without illusions' unlike many of the recent American neo-liberalist endeavours. Franck lays out the eternal dilemma of liberalism from the beginning: the dual objective of stability and change (p. 7). He maintains that a balance can be reached, but the problem not denied. What is more, Franck seems to think that the balance is necessary and inevitable. Replaying the old is/ought game, he persuades us, e.g., that the international environmental law discourse is based on communitarian values, because it ought to be, equity norms have a meaningful ascertainable content, because they are used as having such and the contrary result would lead to indeterminacy; democracy is working globally, because it ought to work; institutional administration is slowly grinding out more peace and human rights, because that is its fair purpose. Hence Franck "connects the dots of practice with lines of enunciated principle" (p. 119), but sometimes one wonders whether the lines are drawn too straight and the facts read with a little too much emphasis on what ought to be found to buttress the fairness program. Would that be fair?

Franck presumes and often presents "empirical evidence on structural impartiality", i.e., fairness (p. 324). However, such pieces of evidence as the liberal democracies never fighting each other (pp. 135-136) and judges of the International Court not always voting in favour of their homestate when they get a chance (p. 325) are statistically and contextually highly

contestable. Either there are too few cases or too few variables to form solid proof, which Franck from time to time admits. Of course, this is beside the point as far as idealism is concerned. Idealist law is a design based on 'dots of practice'. As Franck once says, law is a "stylized search" for social compromises (p. 144).

Franck's style is mostly coherent and refreshingly optimistic. It greatly inspires a humanist by tracing the Anglo-American legal thought back to the Greeks and employing their mythical nomenclature as metaphorical vocabulary on the tour. It lifts the spirits by saying: Yes the global problems can be solved and life is on the verge of becoming fair.

Yet, there are dissonant chords. First, Franck engages in a surprisingly strong attack on contemporary nationalism, though he mentions such healthy examples as the Baltic States. The fifth chapter, however, seems insatiable with derogatory terms calling nationalist passions everything from "postmodern tribal backlash", "retrogression to tribal consciousness", to "reflexive spasms". For Franck, the battle of good and evil seems to rage here. As in Veronese's painting, the beast down in the dark is rearing its ugly head within sight of the sword, the scales and the olive leaf. The unquestionable evil is nationalism. This is surprising because Franck seems so well versed in recent American scholarship including, e.g., Professor Nathiel Berman's work on nationalism, which is dedicated to setting the stage for nationalism quite different from the classic Veronese-setting. Yet Franck treats the evil's new "tribalist" manifestation as something "sickening" (p. 143), which should be "deconstructed" (p. 144).

A second dischord for an European ear is the praise of the communitarianism of the European Union. The use of EC/EU as a token of community spirit, direct popular suffrage, and democratic supranational governance never ceases to amaze a native European, however many times the Americans say it.

Thirdly, Franck seems to disregard his "critical analytical framework for critique" when it comes to international institutions. His calls for more institutions, more jobs in them, and the general praise of regimes (pp. 138-39, 173, 347, 355) makes one wonder why Franck practically sways under the problem of "faceless institutionalization" (p. 141). Why does over-bureaucratization not merit a fairness critique?

Finally there are a few things like using the female and male pronouns when talking about judges, but using only 'he' when talking about the UN Secretary-General; is the chance of ever having a female Secretary-General

really so non-existent that even an American optimist-idealist overlooks it? Another question is raised by the enthusiasm about economics as the fact-explaining, concretising, and sometimes predicting constituent of the fairness discourse (pp. 364-367). Contemporary American legal scholarship has turned to economics when social sciences have failed to provide it with scientificity, determinacy, and closure. Yet simultaneously everything indicates that economics will not decipher the fabric of human life into determinate patterns any better than general social sciences. Why emphasize it while admitting its "speculativeness and controversiality" (p. 367)? Why also regret that "unfortunately, not all [...] questions of moral choice can be dissolved by redefinition of economic costs and by reference to the unseen hand of market" (p. 367)? Does Franck mean that we would be "fortunate", if the substance of fairness would be the moral of the market?

An idealist fairness program based on utilitarian morality is an easy target for a critic, but Franck is very aware of this. His writing is modest, learned, supported with detailed research, and splendid literature. Although it might seem that the only water-tight justification for discussing the contents of international law (as if there was such a thing stable enough not to fall prey to structural or situational criticism instantly) is pedagogical, Franck's fairness program is far from being just another basic course.

Franck calls the fairness program a "journey", but it seems more like a circle. Reading the book I jotted down the recurring key words and drew an arrow from one to another every time they were used in causal argument: it seems that legitimacy and moral value create validation for rules; validation solidifies modes of legitimation and morals; validation, morals and legitimacy induce compliance with the norm, but compliance is used to back up the validation, legitimacy and morals used. It is a circle which one can travel in any direction or across the middle. Therefore, although circular and zig-zag, it is a journey not unlike life itself. True to its humanist spirit, learnedness, width, and courage to talk about everything under the sun, it cannot but inspire colleagues and students alike.

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International Institutions and Their Host States - Aspects of Their Legal Relationship by A.S. Muller. Kluwer Law International, The Hague, London, Boston, 1995, ISBN 9-8411-0080-6, XVII, 317 pp., £76.-/Dfl. 206.-.

This important contribution to the law of international organizations has the following general structure: Part I contains an introduction and definitions (pp. 1-66); Part II deals with the concepts of legal personality (pp. 67-118); Part III addresses practical issues such as the seat, privileges and immunities (pp. 119-262); Part IV contains the conclusions.

In reviewing the substance of this book, I wish to emphasize that the research and analysis are based upon the most comprehensive survey of the literature (in English, French, German, and Dutch), the case law (of the International Court of Justice, international, regional, and national tribunals), and the practice of the widest possible variety of universal and regional intergovernmental organizations, and of the major host countries. The author has left no stone unturned in order to reach his conclusions. In the following paragraphs I wish to make a few remarks which are partly based on my own expertise as Director-General of the United Nations Office at Geneva (1983-1987); often dealing with issues concerning relations with the host countries.

To my recollection the first and last major monograph on the legal relationship between international organizations and their host states was the doctoral thesis by Philippe Cahier.[1] Ever since the law and the practice of the relations between international organizations and their host countries have developed considerably, and although several articles on this subject were published, there was a need for a new comprehensive study. Dr. Muller has now filled the gap and it is to be expected that the book under review will form the authority on the subject-matter for another generation.

In the first, introductory chapter, the author proceeds with a delimitation of the topic, and he announces that the following will be excluded from the study: the Conference Agreements, the problems concerning the status of individuals (delegates, diplomats, experts on mission, staff members), and the Status of Forces Agreements or SOFAs. It is of course the

1. P. Cahier, Étude des Accords de Siège Conclus Entre les Organisations Internationales et les États où Elles Resident (1959).

prerogative of the scholar, but I cannot share the view "that the relationship between an international organization and its host state is also determined by the legal position of the persons through which the organization performs its task" (p. 9). The host country agreements contain very important provisions on the status of the staff members and this is part of the legal position of the organization itself. Incidentally, I do not see the reason why it was necessary to mention the exclusion from the scope of this study of the bilateral investment agreements (p. 7) which are anyway not related to the subject-matter.

In chapter 2, the author deals with the sources of this relationship with the host countries under the general heading of 'Host Arrangements' which mean "the *ensemble* of instruments of law that regulate matters concerning the relationship between international organizations and their host states" (p. 27). I fully share the view that this relationship goes far beyond the host country agreements. The author then deals with the problem of the hierarchy of norms and mentions the hypothesis of a conflict between a multilateral agreement (such as the 1946 Convention on Privileges and Immunities of the United Nations) and a host country agreement. Both being "equal and complementary to each other" (p. 39), it is only in the case of absolute conflict that the bilateral host agreement prevails (pp. 39, 64). This reflects Section 26 of the UN-US Agreement.[2] The idea of an absolute conflict is a curious phenomenon as compared to the *lex specialis* rule and to the relevant provisions of the Vienna Convention on the Law of Treaties.[3]

Part II of the book covers the whole of chapter 3 on the legal personality of international organizations. The author rightly distinguishes between the international legal personality of an international organization in the internal law of the Member States and even of the non-Member States (the United Nations in Switzerland). According to the author, an international organization has an international personality if it meets three requirements: it must be established by international law, by an agreement, and it must possess its own separate organs (pp. 4, and 75-76). The specific capacities of an organization are based, explicitly or implicitly, on the constitution of the organization and the practice that has developed (p. 86). There are however a few peculiar situations. The Benelux and the European Union

2. 2 UNTS 11 (1947).
3. UN Doc. A/CONF.39/27 (1969).

have no international legal personality, a reservation to this effect having been made by the Member States. GATT and OSCE[4] have grown into "some sort of international legal personality" (p. 80). GATT has now been transformed into the WTO which, no doubt, is an international legal person. The situation of the OSCE is somewhat more complex. On the one hand, the participating states did transform the conference into an organization; they established a variety of organs, including a secretariat headed by a Secretary, while at the same time stating that this did not change the previously existing situation. On the other hand, the OSCE applied for and was granted observer status with the General Assembly of the United Nations because it was considered to be an international organization. The author then goes on to mention two other entities, the International Committee of the Red Cross (ICRC) and the Joint Vienna Institute,[5] which he tends to associate with international organizations having an international legal personality. But the ICRC was not established by a treaty, nor has it any separate organs. It is true that it functions within the framework of the Geneva Conventions of 1949 and their Additional Protocols, that it has entered into agreements with states and even with Switzerland, and that it was also granted observer status with the United Nations General Assembly. But the same goes for the Federation of Red Cross and Red Crescent societies. And what about entities such as Eurofima, the Interparliamentary Union, Interpol, etcetera.? This demonstrates how difficult and delicate things may become if one does not stick to the criteria which have been adopted and repeatedly emphasized (pp. 4, 75, 77, 86, and 116).

Chapter 9 (pp. 265-288) is headed 'Final Conclusion'. It is a rather general summary, whereas the conclusion starts at p. 283. I fully subscribe to the author's view that "Despite the availability of multiple sources of written law to protect the special status of international organizations in their host states, the duty to cooperate in good faith and to consult regularly is indispensable for the proper functioning of the organization" (p. 285). Why then did the author fail to consult the annual reports of the (General Assembly) Committee on relations with the host country? In the very last paragraph of this book, the author suggests that the unification of the international privileges and immunities of international organizations

4. Organization for Security and Cooperation in Europe, Europe Documents No. 6371 (1994).
5. UN Doc. E/1994/115 (1994).

should be undertaken in the form of a model convention for the holding of international conferences (p. 288). This very valuable suggestion could have been underpinned by referring to the draft model convention for the holding of international conferences[6] and to the model Status of Forces Agreement.[7]

These few critical remarks detract nothing from the exceptional merits of the author in tackling this important topic. At one point in this book Dr. Muller rightly states that "national courts do not always interpret the international rules in a generally accepted manner" (p. 62). Henceforth lawyers, judges, and diplomats will have at their disposal an updated and most reliable guide.

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6. *See* P.H.F. Bekker, *The Work of the International Law Commission on 'Relations Between States and International Organizations' Discontinued: An Assessment*, 6 LJIL 3-16 (1993).
7. Draft Model Status-of-Forces Agreement between the United Nations and the Host Countries, International Peacekeeping 105-106 (1994).

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