BOOK REVIEWS

A Systematic Guide to the Case-Law of the European Court of Human Rights, 1995-1996, Volume III, by Peter Kempees. Martinus Nijhoff Publishers, The Hague/London/Boston, 1998. ISBN 90-411-0398-8, 572 pp. NLG 335.00 / USD 191.00 / GBP 114.00.

A Systematic Guide to the Case-Law of the European Court of Human Rights, 1997-1998, Volume IV, by Peter Kempees. Martinus Nijhoff Publishers, The Hague/London/Boston, 2000. ISBN 90-411-1223-5, 996 pp. NLG 595.00 / USD 292.00 / GBP 184.00.

The first two volumes of the *Systematic Guide to the Case-Law of the European Court of Human Rights* were published in 1996 and covered the work of the tribunal in the period 1960-1994. Recently, the Guide has been updated for the years 1995-1996 (Volume III) and 1997-1998 (Volume IV). The person behind this impressive work is Peter Kempees, a Dutchman with a long career as a practising lawyer and at the Registry of the Court. Beautifully hardbound in red linnen with golden lettering, high quality paper and print, these books are obviously meant to last and look impressive on any bookshelf or desk. Like many other institutions that produce law, the European Court now has its official Guide, making its legal information accessible to the world, while irradiating authority and status. One review referred to the volumes as a work that "will surely become the quintessential guide for unravelling the ECHR's rich history", providing "the ideal reference tool for the work of this premiere international judicial institution."[1]

The structure of the Guide largely mirrors that of the European Convention of Human Rights. It offers a compilation of relevant passages of all the Court's judgments from 1960 up to and including 1998, arranged according to the articles of the Convention and its Protocols. When the amount of jurisprudence is too large, the articles are divided into their respective paragraphs. Furthermore, some important articles have been subdivided into elements. For example, Article 5§1 is subdivided into 'liberty and security of person', 'procedure prescribed by law', and 'lawful detention'. Each section reproduces all the relevant passages of the Court's case law, in chronological order, and with reference to the official publication of the judgment. At the end of the book, the same is done for four categories: 'estoppel', 'inherent limitations', 'subsequent developments', and 'waiver of a right'. Though interesting and useful, the justification for choosing this particular set of concepts is unclear.

1. ASIL Newsletter, June 1997.

At places, parts of the passages have been edited out, apparently to save space. A quick search indicates that these omitted passages mostly refer to the arguments of (one of) the parties. Even more space has been saved by omitting entire passages on the basis of their being identical or similar to earlier ones. In each of these cases there is a reference to the omitted excerpt. The passages quoted in the Guide are those of the Court, and of the Court alone. Not only the, now defunct, European Commission of Human Rights, with its thousands of reports, but also the separate, concurring and dissenting opinions of the Judges have been left out, for obvious reasons of space.

One year after the third volume was published, the Council of Europe launched the HUDOC human rights documentation system on the internet.[2] This system has received several awards, and rightly so. It contains the whole of Strasbourg's case law, including that of the Commission, in both French and English. It is continuously updated and has user-friendly search systems. Putting it to the test, I entered Article 5§4 for the years 1995-1996. This immediately showed me some of the drawbacks, as well as some of the advantages of Kempees' Guide. To my surprise, the Guide had one more entry than HUDOC, instead of the other way around. This was because the Court, in the *Amuur* case,[3] did not refer explicitly to that provision, but, in the course of applying Article 5§1 said something which the editor considered to be relevant for §4 of Article 5. Therefore, HUDOC did not pick it up.

However, this also exposes a disadvantage of the Guide. To understand why the Court had not referred to §4, I needed to see the context of the quoted passage; and for this I had to check the full text in HUDOC. This applies to all the passages: they have been taken out of their context. Sometimes, the editor has added a short remark to elucidate a particular point, but mostly one just needs to see the 'surrounding' paragraphs as well. For example, under the heading of 'estoppel' there is a reference to the *Tsomtsos a.o.* case, which reads: "33. (...) With regard to the third limb of the objection, the Court notes that it was not raised before the Commission and that there is therefore an estoppel."[4] There is no more information, which is a pity, since there are other quoted cases in which the fact that the objection was not raised before the Commission did not automatically lead to estoppel.[5] But, again, one needs to see the full text of the judgments to understand exactly why. Obviously, it is impossible to cover all the information which is 'relevant'. Besides, what can be considered to be 'relevant' expands as more information is given. Why, for example, not reproduce the arguments and counter-arguments presented before the Court? And how can one understand a judgment without at least a summary of the 'relevant' facts?

2. To be found at: http://www.dhcour.coe.fr/hudoc/
3. Amuur *v.* France, ECHR, 25 June 1996, Reports 1996-III. *See* the Guide, Vol. III, at 64.
4. *Id.*, at 520.
5. *Id.*, at 518-519. These other cases are *Acquaviva* and *Gustafsson.*

This leads to a general observation on the whole idea of a 'systematic' guide. It presents us with a seemingly decontextualized grid that projects the image of a system, or of an otherwise coherent group of interrelated elements. In his preface to the first volume of the Guide, the late President of the Court, Rolv Ryssdal uses the metaphor of a body: "The text [of the Convention] makes up the bones of the Convention law but it is the interpretational jurisprudence that provides the flesh." He also refers to an "in-built need for evolution in the Convention [that] makes continuous interpretation [by Judges] a necessary accompaniment of the text."[6] This idea of a system, however, can only exist if one ignores the differences between all the represented cases, or contexts. In other words, the grid can only give the appearance of being a system if one presumes a uniform context for all the excerpts. This 'uniform' context will, however, vary from user to user and from situation to situation, as the Guide is consulted to answer particular queries. The semantic meaning given by the Court to the text of the Convention cannot be grasped without the significance added to it by the consulting lawyer in a concrete case.[7] As illustrated by the few examples mentioned above, the use of the Guide requires knowledge about the difference in contexts between cases and an impression of the significance the Court accorded in each interpretation. This means that a need for more contextual information is always present. On one side, too much information renders meaningless the idea of a 'guide'. On the other, a mere 'table of references' forces the user to look up all the cases referred to – a chore that would take too much time. Kempees has provided us with a useful compromise between these two.

There is another inherent limitation of what can be achieved with a systematic guide, even if it is combined with advanced internet-based searching systems: the Court cannot always be said to operate 'systematically'. This applies in two ways. First, much of the scholarly literature on the Convention deals with trying to (re)systematize the Court's jurisprudence in the light of some new case, or trend, which apparently disrupts some earlier 'system'.[8] Second, it is not as if the Court deals with cases in a 'systematic' way, by dealing with all the invoked provisions in a certain, *e.g.*, numerical, order. Sometimes, upon concluding that one particular article has been violated, the Court does not consider it necessary to examine the possible violation of another invoked article. It seems, sometimes, as if the Convention can only be violated once, independent of whether one or several articles have been breached. A systematic guide not only ignores this fact, but also the Court's strategy of constructing its analysis in a particular order. So, if the Guide quotes a Court's reference to a particular article, it does not indicate why the Court, for reasons which can sometimes become apparent

6. Guide, Vol. I, at viii.
7. *See* O. Korhonen, *New International Law: Silence, Defence or Deliverance*, 7 EJIL 1 (1996), at 1.
8. *See, e.g.*, recent writings on the margin of appreciation-doctrine, on the protection of children, on the expulsion of foreigners.

when reading the context or the separate opinions, does not want to refer to another article. An infamous example is the case of *X & Y* v. *The Netherlands*,[9] where the Court first applied Article 8. It concluded that an instance of rape amounted to the breach of the victim's right to privacy, but thereafter did not consider it necessary to see whether the rape also amounted to a breach of the right to physical integrity (Article 3). Again, the user of the Guide needs to do more research in order to find that the Court has not operated in a way which merits the name 'systematic'.

All this should be read as an observation on the inherent limitations of any 'systematic' guide, and not as diminishing the value of Kempees's work. As a starting point for lawyers unfamiliar with the Strasbourg jurisprudence, the Guide is an excellent resource, even though it may be unaffordable for thousands of lawyers and hundreds of libraries across Europe. There does not seem to be anything more than the intention "to allow the users [of the Guide] to determine which of the judgments of the European Court of Human Rights may be relevant for their research."[10] Moreover, Kempees notes that the excerpts in no way substitute the judgments of the Court. However, it seems to me that the illusion of a system is intrinsically linked to the idea of a systematic guide – an illusion that can obfuscate the complex history and background of the interpretation of the individual Convention articles. The implicit warning of Kempees not to take the Guide at face value is an important one.

Another limitation of the Guide is more difficult to overcome: the tremendous success of the Strasbourg Court. In the two years covered by Volume III, there were about 100 cases, while Volume IV already covers twice as much, or 211 cases. The first five months of the year 2000 alone have seen about 210 judgments. The rapidly growing list of applications and pending cases casts doubts on the future effectiveness of the Strasbourg system.[11] It is unclear whether the Guide's publisher intends to pursue the race to keep up with the Court. Upon release of the first two volumes in 1996, Kluwer Law International promised to publish the first supplement (Volume III) in the spring of 1997, with subsequent annual updates, stating that "the 1997 volume will appear in mid-1998, and so on."[12] At the time of writing this review (September 2000), Volume IV had just appeared. In the introduction, the editor refers to the growing interest in the Court's jurisprudence as well as to the rising case load, acknowl-

9. X & Y v. The Netherlands, ECHR 26 March 1985, Ser. A, No. 91.
10. Guide, Vol. I, at li.
11. According to the Registrar of the Court: "Currently [June 1999], the Court has before it a total of nearly 10,000 registered applications (9,979) and a further 47,186 provisional files, around one third of which would generally become registered applications." *See Steep rise in workload for European Court of Human Rights*, Press Release issued by the Registrar, 21 June 1999; at: http://www.dhcour.coe.int
12. Guide, Vol. I, at xi.

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edging that "[i]t would be unwise to close one's eyes to the possibility that the present series may be affected by these problems."[13]

To counter such problems, one suggestion would be to integrate Kempees' important work into the existing internet system. An example of how the benefits of the Guide could be made more accessible is provided by its equivalent on the work of the San José Inter-American Court of Human Rights. The latter follows the same 'systematic' approach, and also includes all the separate opinions of the Judges. Not only has this Guide been put on the internet,[14] it also has a direct link to the complete text of the judgment in each quoted passage. This makes it easier to satisfy the need for context and to keep the information up to date.

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The Role of Law in International Politics – Essays in International Relations and International Law, Michael Byers (Ed.), Oxford University Press, 2000. ISBN 0-19-826887-4 (HB), 370 pp; £50.00/ USD 80.

WHO'S AFRAID OF INTERNATIONAL RELATIONS?

International lawyers have been a notoriously insecure bunch. As evident in the pages of this strong collection of essays edited by Michael Byers, international lawyers are not always sure about what, why or how they do whatever it is that they do. All this angst seems misplaced in the wake of assertion of international human rights claims against General Augusto Pinochet, the unprecedentedly close legal scrutiny of the NATO campaign in Kosovo (including a post-hoc investigation by an international tribunal), and the unexpectedly high level of public interest in the arcana of international trade and investment rules (not to mention that bellwether of popular culture, Bridget Jones, who when looking for her ideal partner could do no better than an international lawyer). Although predating most of these momentous events, the essays collected here present strong evidence that international law has finally come of age, that it has a prominent role in international politics. The book shows international law as vibrant as any branch of law, and, perhaps more significant, the book succeeds in casting even the boring aspects of international law as evidence of the field's strength and maturity.

13. Guide, Vol. IV, at ix.
14. *See* http://www.wcl.american.edu/pub/humright/Repertorio/. Currently, only the Spanish version has been finalized. A similar guide to the reports of the Inter-American Commission is being prepared.

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That is not to say that this book is boring. Quite the opposite – to the extent that material gathered at a conference can recreate the event's flavor, this book marks the 1998 meeting of the British Branch of the International Law Association as an exciting blend (sometimes clash) of intellects and personalities. In fact, if we may view conference compilations as the academic equivalents of musical revues (also impossible to review, as Kenneth Tynan pointed out), this particular show and its impresario are to be commended for gathering such a stellar cast and eliciting such strong performances from them. Cumulatively, the authors here help international lawyers accept instead of fear what Byers refers to as the field's central preoccupation, namely, "the tensions between law, politics and morality." One glimpses here the development of a theoretical basis for responding to the two tired criticisms that are usually trotted out (usually by our colleagues across the hall in international relations departments) to attack international law: first, that international law is not a proper legal system because its norms cannot and do not 'really' affect how the world conducts its affairs, and second, that international law is 'really' just the pleasant cloak over the naked force of mighty States. Unfortunately, this book does not manage to develop this theoretical approach fully, and the strongest complaint about the book is that it lacks a strong synthesis of the material presented here, either as an introduction or concluding chapter.

The closest thing to a general theoretical framework comes from Friedrich Kratochwil, who emerges as the real star of this volume. His discussion of *How Do Norms Matter?* is closest to a unifying theme for most of the authors here. As the title indicates, this piece takes on the criticism that international legal norms do not play a strong role in international affairs. Like several other authors here, he views this criticism as a result of the academic myopia tolerated for too long in the fields of international law and international relations. He describes this divide succinctly: "As realism tried to cleanse itself of all normatice conceptions (save power), so law largely attempted to free itself from all social and moral contingencies." In response, he suggests international lawyers adopt a 'practical philosophy' that casts law as an irreducible 'third thing' (the phrase is Stephen Toope's) between power and ethics. Kratochwil himself does not pursue the practical side of this new philosophy, although several of the stronger essays in this book, which analyze international law in concrete contexts, do provide the material necessary to initiate such an undertaking. Kratochwil instead advances a strong philosophical statement that the inability to nail down exactly how and why legal norms affect politics is not evidence that these norms are ineffectual. Within the confines of a single article, he addresses the two lines of attack on the role of international law in international politics: the extreme rule skepticism that follows analyses of legal indeterminacy, and second, the unsuccessful search for a causal mechanism that explains how legal norms shape the behavior of actors. As indicated above, his approach is based on praxis and the improper fit between legal and social events and scientific logical epistemology,

which requires unique and predictable causation. Mercifully, this is not a rehash of the 'contextual' view of international law, which simply retreats (as Koskenniemi has eloquently suggested and Kratochwil cites) toward either a value-free notion of normativity or a contextual description of outcomes. The law is itself a context, and though formed in part by ethical values and in part by power, it imposes on both a particular range of outcomes. More than anything, it is Kratochwil's confidence about the law's special characteristics that empowers nervous lawyers to go head to head with political scientists and ethicists without being afraid of losing professional ground or merely becoming facilitators for the mighty.

Obviously, this approach, which Kratochwil believes is a paradigm shift away from the *cul de sac* of the current CLS debates, requires further elaboration. Fortunately, evidence necessary for comprehending a new paradigm is well presented in the work of other authors in this volume who show that international lawyers can influence political processes by establishing a legal range of outcomes for international actors. And mercifully, here the use of the plural 'actors' refers not just to different States, but to actors within, around and outside the classic State structure. Lowe, in a piece entitled *The Politics of Law-Making*, provides a model for the context-creating effects of law on international politics through the action of interstitial norms. As he views them, these norms are not the traditional products of treaty or customary international law, but are concepts without normative value of their own that, once articulated, help resolve conflicts between the primary norms around them. For instance, Lowe cites reasonability and sustainable development as interstitial norms. This definition suffers a certain fuzziness; the notion of the value neutrality of reasonability (not to mention sustainable development) is sure to drive CLS scholars into fits of frenzy. But Lowe's approach is right on target for describing the interactive relationship between legal norms and political processes. The concept of interstitial norms is especially useful for understanding the impact of actors other than States, and helps explain the ability of NGOs and bureaucracies to generate legal norms affecting international politics. Examples include the work of organizations like Greenpeace and Amnesty International in interpreting international legal standards and helping set the agenda for discussions despite a lack of formal status. However, the concept is too weak to justify Lowe's claim that the existence of interstitial norms indicates that international law is 'complete' in the sense of supporting "the present international society of States and State laws." Curiously, Lowe himself uses the existence of a concept of corporate personality as a test for judging the completeness of a legal system; contrary to his assertion, international law, three decades after *Barcelona Traction*, is still unable to recognize, much less address, multinational corporations.

Other authors also discuss the ability of international lawyers to create a context that proscribes the range of options available in international politics, outside the formal constraints of the international legal system. Anne-Marie

Slaughter is perhaps the leading proponent of breaking open the black box of the State to focus on the work of networks of bureaucrats and scholars who conduct a great deal of transboundary legal operations underneath the radar of traditional international law. Her piece *Governing the Global Economy Through Government Networks*, follows her well-established agenda of applying political science methods to clarify how legal norms operate at the international level. This is a modest piece that focuses on global economic relations.[1] The complicated needs of global financial markets allows Slaughter to demonstrate her thesis that the "primary State actors in the international realm are no longer foreign ministries and heads of state, but the same government institutions that dominate domestic politics: administrative agencies, courts, and legislatures." For instance, she identifies organizations such as the Basle Committee on Banking Supervision (a standing group of the governors of the central banks of major financial centers) and the International Organization of Securities Commissioners (a network of national and regional securities commissions and private stock exchanges) that promulgate and harmonize effectively binding rules of market operation without relying on the familiar mechanics of formal international law. The development of such an opaque, bureaucratic view of international legal action may be criticized as undemocratic and as unduly benefiting the stronger States (as Koskeniemmi does vehemently). Slaughter's responses to these criticisms are somewhat unconvincing and, in some instances, unfortunately counterproductive. She does not successfully address the problem of lack of accountability of governmental networks, instead stating that the members of such networks are subject to scrutiny at the domestic level and that, at any rate, such networks are no less accountable than international organizations. Similarly, she brushes away important questions regarding the threat posed by government networks to the internationalist agenda, a distinctly international approach to common issues like poverty, human rights, and also, financial transactions. Her riposte – that government networks are only products of the shift away from an internationalist agenda – only begs questions regarding the value of such a shift. Slaughter's promotion of these networks should not diminish her truly significant contribution to international law, which is the awareness of the existence of government networks, and the realization that such networks, even though initially created to service the transboundary needs of powerful States, also lend themselves to lawyers protecting the rights of the weak. Regardless, Slaughter is convincing in her conclusion that the efficiency and flexibility of government networks will make them the preferred models for international interaction in the future.

The same insight appears in the contributions of Stephen Toope and Eyal Benvenisti, who address the efforts of international lawyers – working at differ-

1. Readers seeking the theoretical background to this approach should turn to Slaughter's other work, specially her article, *International Law and International Relations: A Dual Agenda*, 87 American Journal of International Law 236 (1993).

ent levels in the international system – to impose a legal context for international politics, as Kratochwil posited. Toope examines the development of this new international legal context (which he refers to as the "common thread of concern to promote greater accountability of international actors") within the work of regimes governing shared freshwater resources and concludes that "regimes are not static structures, but [...] they can evolve along a continuum from dialogue and sharing of information, to more defined frameworks for co-operation, to binding rules in a precise, legal sense. Although the professional instinct of lawyers is to negotiate seemingly 'binding' agreements as soon as possible, the pre-legal or 'contextual' regime may actually be more effective in guiding the relations of international actors." Benvenisti's brilliant empirical analysis of the interaction between domestic political forces and international law, like Slaughter's piece, examines the heterogeneous State and concludes that domestic, sub-State actors play (and should play) an increasingly important role in creating and enforcing international law. Benvenisti suggests that international law can create a context for regional co-operation by increasing information flow between actors, increasing transparency, and providing assurances for domestic actors afraid of losing out to other interests. In other words, international law, while clearly influenced by the needs of domestic actors, opens to them a range of mutually beneficial options otherwise unavailable to them.

Of course, different actors with different values will have different views of what is mutually beneficial. It is in deciphering who determines benefits, and how, that international relations can most help international lawyers. Brigitte Stern encapsulates the possibilities in the "dialectical relationship between law and society." In her essay, *How to Regulate Globalization?*, she points out that political science is necessary to identify the balance of social forces – the reality – with which the law must interact. Law may reinforce, ignore or modify social realities, so that given the dominance (by definition) of more powerful actors, the law may formally reinforce existing inequalities, formally (but not truly) empower the weak, or truly empower the weak. Thus she points out again that non-State actors, such as corporations and NGOs, do not so much purport to create a new system of international law as much as "to modify existing rules of international law so that those rules take better account of some of the values for which they fight." (The role of NGOs, specially human rights NGOs, in doing precisely that is set out clearly by Christine Chinkin in this volume.) Nevertheless, Stern betrays a stereotypically Statist (some would say French) trust in the State's role as guardian of the weak in the face of a dominant capitalist model of international interactions. This unsupported faith in the State's ability ultimately undermines Stern's otherwise strong discussion. The same conclusion, though with a very different slant, appears in the essay by Edward Kwakwa, *Regulating the International Economy: What Role for the State?* Examining the World Trade Organization, Kwakwa discerns two types of States, paradigm-setting and paradigm-receiving, based on their economic capability. Like Stern, Kwakwa

believes that international law can empower weaker States to participate in the international economic system and to use the law to press for their own benefits. But also like Stern, Kwakwa does not address the common problem of paradigm-receiving States that are unwilling or incapable of protecting their citizens' needs. The inequalities of international law do not stop at the borders of the State, but rather reproduce existing domestic inequalities. The call for the expanded role of paradigm-receiving States does not necessarily help the victims of inequality within those States, it merely transfers the problem from the international level to the domestic and in the process loses whatever salutary effect international law could have. Kwakwa focuses on the international legal system's potential to provide weaker States with a shield against the vagaries of international affairs, but does not adequately address the threat that international law could serve as a sword in the hands of the mightier States.

Or worse. The call for strengthening the role of States, driven by the rigors of the global economy, could also provide easy justification for the dominance of stronger States by providing a veneer of formal equality for their behavior. This critique forms the second major line of attack against interdisciplinary work between international relations and law, namely, that work that begins as merely describing what does happen in existing (and unequal) relationships metamorphoses into prescriptions for what should happen. The ineluctable problem with this critique is that it is guilty itself of transforming a descriptive statement (previous explanations of international law's function have ended up as justifications for the rule of powerful States) into a predictive statement (all explanations of international law's function will justify hegemonistic tendencies). Martti Koskenniemi and Makua wa Mutua advance this argument in this volume, articulating the same fear of a global 'liberal' hegemony facilitated by the expansion of international law. Koskenniemi wants to protect the formal, 'valid' nature of international law from collaboration with the hegemonistic, US-centered agenda of the international relations academy. Mutua, on the other hand, wants to reformulate international law by subjecting it to a broader political analysis that accounts for non-Western views. These authors sound an important cautionary note against blithely accepting discussions of power and ethics into the field of international law. Furthermore, they alert readers not to equate the current vitality of the rule of law regime fostered by global mercantilism with an inevitable advent of an age of justice. But their dire warnings about the onset of an aggressive liberal hegemony ultimately outstrip their evidence – fortunately. Koskenniemi and Mutua write to expose the invisibility of the liberal emperor's new clothes, but they come close to crying wolf.

Koskenniemi's argument is the more systematic though less focused. His essay, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, offers exactly what it promises: a critique of the generally poor treatment of international law in international relations theory. From this premise, Koskenniemi states that interaction between international relations and interna-

tional law will inevitably lead to the latter's colonization by the former. However, Koskenniemi's passage from premise to conclusion betrays an unjustified fear of international relations theory and an inflated sense of the field's theoretical and practical position regarding international law. "Behind the call for 'collaboration' is a strategy to use the international lawyer's 'Weimerian' insecurity in order to tempt him or her to accept the self-image of an underlabourer to the policy agendas of international relations orthodoxy", he ominously intones. Unfortunately, Koskenniemi's strategy for resolving this insecurity is to advocate a quarantine of international law from political science methodology – something like curing fearful swimmers by banishing them to the desert.

The 'Weimerian' insecurity to which Koskenniemi refers is the desire of jurists to bolster their theoretical and practical positions by relying solely on explanations of power and ethics and thus abandoning the formality of law – a development Koskenniemi traces in the work of Hans Morgenthau. Koskenniemi expresses a sense of *déjà vu*: "The particular combination of a call to increase 'collaboration' between international lawyers and international relations theorists", he says, "together with the sociology of the end-of-State (as we know it) and the political enthusiasm about the spread of 'liberalism', constitutes an academic project that cannot but buttress the justification of American hegemony in the world." As Koskenniemi sees it, "interdisciplinarity does away with the image of valid law and thus leads lawyers to contemplate an agenda that is posed to them by an academic intelligentsia that has been thoroughly committed to smoothening the paths of the hegemon."

While this historic description of what happened during Morgenthau's drift away from law toward political science may hold, Koskenniemi has a difficult time explaining why interdisciplinarity must do away with the notion of valid law, or why interdisciplinary academics are committed to labor for the hegemon. Regarding the first accusation, he initially states that most international relations theory has emanated from scholars working in the United States, a hegemonistic country for whom "any conception of law as fixed 'rules' seems irrelevant to the extent that it is not backed by sanction and counterproductive inasmuch as it limits the choices available to those who do not have the means to enforce them." Although he then (a page later) denies that the US origin of this scholarship somehow indelibly taints it, he has to return to that notion (two pages later) to explain that after all, the "absence of this image [of law as a separate, valid entity] is a product of the Weimar heritage in American international relations theory." What has happened here is that Koskenniemi has confused the realms of international relations with the legal world in the United States. American international lawyers are not products of schools of international relations, but rather law schools where they are just as likely to study Koskenniemi's work as Morgenthau's. The insecurity of American international lawyers is less a product of the Weimar Republic's trauma than of their unfavorable self-comparison with their domestic colleagues. Their scoffing at Teutonic notions of law as only

that which is formally valid is not a repudiation of valid law, but rather a lesson from a powerful legal system encompassing not just the most formal of laws (the nearly sacrosanct Constitution) but also the decisions of politically elected judges and myriads of opaque administrative tribunals. The work of Slaughter and other 'collaborationists' (as Koskenniemi would refer to them) aims to extend the same respect to international law by using political science techniques to prove that international law does have an independent value and a valid existence in the international arena. While we await the development of a theory of international law as a 'third thing' between power and ethics (a development hastened by this volume), international lawyers perforce have to rely on empirical analyses (using political science methodology) as evidence, for instance, by describing the ability of international law to impose limitations based on notions of validity on actors in government networks. One may question the weight of such evidence, but not the need for gathering it. If, in fact, government networks are gaining power, then it would be of tremendous importance to all those international legal actors kept out of such networks to discover their existence and adopt means of affecting them. Recognizing power is not the same as accepting its dictates.

Koskenniemi's efforts to explain why interaction with international relations theory inevitably undermines international law require better development, especially as regarding his assertion that such interaction will inevitably have a pro-American liberal bias (at times he seems to be airing personal grievances, for instance, when he likens Slaughter to Carl Schmitt, whom Koskenniemi describes as "the crown jurist of the Third Reich"). It is a problem shared by Mutua, who also invokes the bogeyman of liberal hegemony, but in his case to justify a call for even greater political analysis of international law. Mutua sets out to show that "the human rights corpus is a political ideology, although its major authors present is as non-ideological." And that ideology is Western liberal democracy (it is interesting to note that Koskenniemi, a European, points his finger at the US, while Mutua, an African, lumps Europe together with the US in the camp of liberal hegemonists). Mutua locates liberal millerianism in the work of 'doctrinalists', who explicitly rely on positive laws and the dominance of civil and political rights in the Western liberal model, and 'constitutionalists', who view the human rights corpus as a political and ideological model to be emulated everywhere in the form of a liberal democratic State. There is no question that Mutua correctly identifies the two dominant approaches to international human rights laws. But simply pointing out the arrogance or thoughtlessness of Western lawyers does not suffice to condemn the substance of the law they espouse. Like Koskenniemi, Mutua confuses historical contingency (the undoubted Western slant among the primary authors of the paramount international human rights instruments) with doctrinal necessity (the presumed inability to apply human rights law in non-Western societies). Mutua's proposes that international law should give up its arrogant certitude and allow its norms to develop

in different cultural settings. This is a call for more liberalism, more freedom of speech and thought, greater protection of the rights of individuals and people to conduct their affairs – not less. Mutua's greatest success here is demonstrating how 'outsider insiders', as he refers to scholars like himself who originate from outside the West but are familiar with Western ideas, can use the methods and terminology of liberalism to create "norms and political models whose experimental purpose is the reduction – if not the elimination – of conditions which foster human indignity, violence, poverty, and powerlessness."

Why then do Mutua and Koskenniemi join the voices full of passionate intensity against liberalism? Although they both refer to liberal hegemony, their pieces betray that they actually have something different in mind – in Koskenniemi's case, resentment of US dominance; in Mutua's case, irritation at Western triumphalism in the process of capitalist globalization. There is no question that their resentment is justifiable. But one can no more blame liberalism for the successes and excess of the so-called free market economies than one can blame Islam for the terror unleashed by the Taliban. The broad, loose talk of liberal hegemony ignores the sorry state of most of the world's States: Where is the hegemony of fair elections? What speaker is suffering from a surfeit of free speech? Which worker demands fewer protections? For authors as obsessed by the political agendas of their opponents, Koskenniemi and Mutua cannot be unaware that their attacks on liberalism and its crowning achievement, the protection of human rights, lends succor to the worst abusers. One can imagine the bullies of Yugoslavia or China or Sierra Leone justifying their intransigence by quoting Mutua's assertion that "human rights and Western liberal democracy are close to a tautology." The world may be accepting (or acquiescing to) a capitalist economic model (and that is questionable), but it is far from embracing the notion of respect for the well-being and dignity of all human beings. Reports regarding the birth of a liberal hegemon are grossly exaggerated.

But the temptation remains for lawyers to throw in their lot with the mighty. To some extent, it is inevitable that all legal systems will benefit the powerful (as Diderot pointed out, the law in its majesty protects the rich as well as the poor from sleeping under bridges). Criticism is necessary for keeping international lawyers honest, and to save them from the normative bankruptcy of their international relations colleagues. But encouragement is also necessary to propel international lawyers ahead in assuming greater importance in the conduct of global affairs. The overall achievement of this dense volume is that it shows that international law's role in global politics supersedes that of international relations, both theoretically and practically. The international relations faculty failed utterly to account for, much less predict, the end of the Cold War or, more particularly, the events of 1999 such as the Kosovo campaign and the Pinochet prosecution. The repeated invocation of international legal standards in the campaign in Kosovo or the case against Pinochet show international lawyers directly engaging (even if as junior partners) with politicians without the intermediary of

power politics. This is law as a third thing, a context within which questions of power and ethics can be analyzed and answered. As Sir Arthur Watts points out in his opening essay, "[f]or the most part, the day-to-day affairs of international intercourse run smoothly, and international law – which underpins them – plays its essential role without fanfare. The world gets on with its life safe in the (unstated) assumption that order exists in the international community." Michael Byers should be commended for helping to highlight that assumption a little more clearly and dispelling the unnecessary insecurity of international lawyers.

Sam Zia-Zarifi[*]

Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article, O. Triffterer (Ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1999. ISBN 3-7890-6173-5, 1295 pp + xxviii; DM 348

In the 1950s a well-known scholar could still ask whether there was such a thing as International Criminal Law (ICL), and answer that question by stating that: "in the present state of world society, international criminal law in any true sense does not exist."[1] Since that time ICL as a legal discipline has undergone momentous changes. Few commentators, if any, would today contest its existence. This shift is reflective of a number of important developments that have taken place in the intervening years with regard to ICL. Particularly in the last decade this discipline has come of age. In 1993 the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY), followed in 1994 by the establishment of the International Criminal Tribunal for Rwanda (ICTR).

The latest major development was undoubtedly the adoption of the Statute of the International Criminal Court (ICC) by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome on 17 July 1998. In this light the publication of the *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* edited by Professor Otto Triffterer is very welcome. An instrument as pivotal as the Rome Statute is certainly deserving of comment. In a sense the length of the book – an impressive 1295 pages – mirrors the significance of its subject matter.

As the title indicates the book is structured article by article of the ICC Statute. These articles are grouped under the 13 different Parts that divide the ICC

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[*] Human Rights Watch.

1. G. Schwarzenberger, *The Problem of an International Criminal Law*, 3 Current Legal Problems 263, at 295 (1950).

Statute. It also includes Preliminary remarks on Parts 1 (Establishment of the Court), 9 (International Cooperation and Judicial Assistance) and 13 (Final Clauses) of the Statute. There is a preface by Professor Bassiouni and an introduction by Philippe Kirsch, Chairmen of respectively the Drafting Committee and the Committee of the Whole of the Rome Conference. The choice of structuring the book by article was a fortuitous one. It allows the reader to turn directly to a particular article that is of interest to him. If, in turn, the particular commentary places the articles in the context of relevant international criminal law instruments, case law and literature, it can serve as a good launching pad for further reading. This style also ensures that all articles are discussed. The same cannot be said for the two other works that have appeared on the ICC Statute, one edited by Von Hebel, Lammers and Schukking, and the other by Roy S. Lee. These two books are structured by themes, such as "international criminal cooperation" and "crimes under the jurisdiction of the Court". The disadvantage of this approach is that certain articles are left undiscussed because they cannot be fitted neatly into one theme are another. The fact that certain articles are closely linked to others is not overlooked in Professor Triffterer's book. Where relevant, the reader is referred to the analysis of other articles.

Fifty-two authors have contributed to the book. Although the quality of the contributions is generally quite consistent, an overview reveals that there are some differences in the depth of legal analysis, the knowledge of the negotiating background of the Statute, and the extent to which an article is placed in its context in ICL. For example, in the discussion of Article 8 of Part 2 of the Statute (Jurisdiction, Admissibility and Applicable Law), there is a difference between the analysis of Article 8 (2) (a) and certain other parts of that Article. The discussion of the former, concerning grave breaches, is somewhat limited. There is little reference to the development of the concept of grave breaches. The analysis in the *Čelebići* case[2] by the ICTY's Trial Chamber II of the grave breaches of wilful killing, torture and wilfully causing great suffering, or serious injury to body or health, would have been a useful reference that the ICC might look to but that is not mentioned here. Also in Part 2, there is a painful mistake in the discussion of Article 18. The author states that the article does not apply where the Prosecutor is acting in response to a referral by the Security Council under Chapter VI of the United Nations Charter. Obviously, the relevant Chapter is Chapter VII.

In addition, in the commentaries on Article 53 (Initiation of an investigation) and Article 54 (Duties and powers of the Prosecutor) two critical aspects of the Statute, one might have hoped for greater reference and comparison to the Statute, rules and practice of the ICTY/ICTR Prosecutor. Further it might also have been interesting to the reader if the commentary had included more information

2. Prosecutor *v.* Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-T, Judgment, Tr. Ch. II, 16 November 1998.

about the interesting debates and decisions that led to the final drafts of these Articles.

On the other hand, many Articles are very well 'situated' in the broader framework of international humanitarian and international criminal law by the authors. They give the reader a useful overview of the developments leading up to and shaping the formulation of a particular rule or principle in the Statute. They also refer to the legal instruments and judicial decisions that the ICC's judges might look to in interpreting the Statute. Notably, these are decisions by the ICTY and ICTR. One example of a useful section of the book is the discussion of the principle of *ne bis in idem*, a principle laid down in Article 20 in Part 2 of the Statute. This discussion introduces the principle, explains how it was dealt with in the preparatory development for the ICC Statute and finally places it in the framework of the Statute. Other examples of such sections are the commentaries on Article 60 (Initial Proceedings before the Court), Article 67 (Rights of the Accused) and Part 8 on Appeal and Revision which provide useful references to relevant legal instruments and judicial decisions. Other sections are valuable in that they provide, among other things, an insight into the history and intention behind the articles. These include Article 62 (the Place of Trial), Article 65 (Proceedings on Admission of Guilt) and Article 73 (Third-party Information or Documents).

Another limitation of the book arises from the timing of its publication. The analysis of Article 20 ends with a paragraph entitled "open questions". In the particular context of this article, this refers to the question whether Article 20 extends to the enforcement stage of sentences and the relation of *ne bis in idem* to the definition of crimes. The inclusion of the paragraph is also indicative of a more general problem, however. This problem is that at the time of writing of the book, the "Elements of Crimes" (Elements) and "Rules of Procedure and Evidence of the Court" (Rules) remained to be drafted by the Preparatory Commission and to be adopted by the Assembly of States Parties. The Elements and Rules, which have since been adopted on second reading by the Preparatory Commission but not yet by the Assembly of States Parties, will be important instruments in interpreting the provisions of the Statute. Indeed, the book frequently makes references such as "the Preparatory Commission might usefully address the issue of", or "[i]t remains to be seen what the Rules, when adopted, will provide." The fact that the relevant Elements and Rules are not included in the analysis detracts to a certain extent from the 'shelf life' of the book, since readers will be interested in what the Elements and Rules add to the provisions of the Statute. The authors nor the editor can be blamed for not discussing the Rules and Elements that were simply not there at the time of writing, of course.

Partly due to the impossibility to refer to the Elements and Rules, the book is speculative to a certain extent. This is revealed by the inclusion of proposed rules and different interpretations of similar provisions by different authors. An example of this is the commentary on Article 68 (Protection of Victims and

Witnesses) where the author devotes one out of three segments on rule proposals and commentaries to those proposals. Whilst many of the concepts contained in the proposals were subsequently captured in the Rules they are not reproduced in those Rules, thus rendering that section of the commentary outdated.

A case in point illustrating differing interpretations of similar provisions is the interpretation given of Article 8 (2) (b) (xxii) and 8 (2) (e) (vi), respectively. The former provision, in bringing rape and other forms of sexual violence in international armed conflicts under the jurisdiction of the Court, contains the phrase "also constituting a grave breach of the Geneva Conventions." The latter provision, in bringing similar crimes committed in non-international armed conflicts under the Court's jurisdiction, contains a phrase of a similar character worded "also constituting a serious violation of Article 3 common to the four Geneva Conventions." These phrases can be interpreted as requiring that a particular crime must also satisfy the technical elements of a grave breach of the Geneva Conventions respectively of common Article 3. Another interpretation could be that it is recognized that the crime concerned might in the future, as international law further develops, be recognized as constituting a grave breach or a violation of common Article 3 without fulfilling its technical requirements. Whatever the interpretation, it appears that the same should apply for both provisions. Yet the authors discussing these articles give opposite interpretations (on pages 252 and 279, respectively). This is not to say that any Statute is not and will not remain open to interpretation. However, the Elements and Rules clarify certain points that are ambiguous in the Statute. In the case just discussed of Article 8 (2) (b) (xxii) and 8 (2) (e) (vi), for example, the correct interpretation is given in the Finalized Draft Text of the Elements of Crimes. This provides for Article 8 (2) (b) (xxii) that "the conduct must be of a gravity comparable to that of a grave breach of the Geneva Conventions", and for Article 8 (2) (e) (vi) that "the conduct was of a gravity comparable to that of a serious violation of Article 3 common to the four Geneva Conventions." The Preparatory Committee thus opted for not requiring the fulfilment of the technical elements of the grave breaches provisions of the Geneva Conventions and common Article 3.

In spite of not including a discussion of the Elements and Rules, the book provides important guidance on the direction that the interpretation of the Statute will probably take. Many of the authors were involved in the negotiation of the Statute as government representatives. Others influenced the Statute indirectly as advisors to major Non-Governmental Organizations or in another capacity. They are therefore exceptionally well qualified to comment on the final product of their efforts. As Professor Bassiouni states in his preface: "[o]nly those who had worked on specific provisions of the Statute could draft a legislative history to interpret those provisions." The commentary of these authors can thus shed some light on the intentions of the drafters on particular topics included in the ICC Statute. This purpose of the book is confirmed by Professor

Triffterer himself in the Editor's Note. He writes that "it appeared desirable to present information from participants at the Preparatory Committee and the Rome Conference to all interested persons in order to inform them about this process of international "legal codification" and supply them with an interpretation of the Statute which takes into account the history of its evolution."

The value of the book goes beyond its interpretation of the ICC Statute, however. Many of its parts also provide a useful overview of the development and current state of issues of ICL. As noted, many contributions situate the provisions of the Statute in the larger framework of ICL by referring to the way the Nuremberg and Tokyo Tribunals, the ICTY and ICTR as well as the International Law Commission have framed these issues. Their approach reflects the fact that the ICC Statute cannot be seen in isolation. Other developments in ICL have greatly influenced the ICC Statute. Of particular importance is the jurisprudence of the ICTY and the ICTR. Many of the definitions of crimes in Articles 6 to 8 repeat, or build on definitions that have been developed by the *ad hoc* Tribunals, for example. Conversely, the wording of the ICC Statute will undoubtedly be looked at for guidance by other national or international criminal courts. This is the result of the current primitive state of ICL in which many concepts have not yet crystallized. Under these circumstances, what has been called "informal relationships"[3] have developed between different systems of criminal justice.

In this context Article 10 of the ICC Statute is of particular relevance. The Article states that: "nothing in this Part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." This article at first sight appears to limit the impact of the norms laid down in the ICC Statute by denying them a role in ascertaining customary norms outside of the Statute. Article 10 underlines the close link between the substantive norms and the adjudicative mechanism by which they are to be implemented. The way to "informal relationships" between the ICC and other international and national criminal courts seems to be cut off. However, as Professor Sadat has submitted,[4] Article 10 has only a limited role to play. She explains that Article 10 leaves to lawmakers and to States the task of further developing the law outside the Statute. The function of Article 10 is to act as the floor of that law. Where the ICC Statute retreats from existing law, it cannot be invoked as evidence of international customary law. That this is indeed the function of Article 10 is illustrated by the practice of other courts since the adoption of the Statute. In the *Blaškić* case, for example, Trial Chamber I of the ICTY in discussing the elements of the crimes against humanity stated that: "The texts of the Statute of the International Criminal Court adopted by 120

3. L.N. Sadat, *Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute*, 49 DePaul Law Review 909, at 921 (2000).
4. *Id.*

States of the international community confirm this interpretation. They hold that criminal acts must be committed "pursuant to or in furtherance of a State or organizational policy."[5] Reference was also made to the Statute in other cases before the ICTY. It is similarly to be expected that national courts will look to the ICC Statute for guidance. This is particularly so since many states are introducing new legislation modelled on the Statute as part of their ratification process of that instrument. A glance of reference being made to the ICC Statute could already be seen in the House of Lords' judgment in the *Pinochet* case, even though the Statute's provisions did not play any role of importance in that case and taking into account that the references made did not relate to the definitions of crimes. It can be concluded that as a practical matter the effect of Article 10 is likely to be limited.

The "ripple effect" of the Rome Statute discussed above makes that Professor Triffterer's book will be a useful source of information for a large audience of international and national academics, lawmakers, prosecutors, defence counsel as well as judges. They will certainly appreciate the structure of the book and the high quality of most of the analysis. Particularly if they are seeking to ascertain the customary status of a particular norm, they will appreciate the fact that many of the contributions situate the provision concerned within internatonal humanitarian and international criminal law. Readers will hopefully not be deterred by the large number of mistakes in spelling and grammar. This is unfortunate for a book of this quality. It could be that saying that an armoured car gets a "flat tie" instead of a "flat tire" is an attempt to introduce some humor into the book, but this was probably not the intention. The only real substantive criticism of the book is that it does not, and admittedly could not, take into account the Elements and Rules drafted by the Preparatory Commission in 1999-2000. It is hoped that a second volume will be added to this book discussing these important instruments.

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5. Prosecutor *v.* Tihomir Blaškić, Case No. IT-95-14, Judgment, Tr. Ch. I, 3 March 2000, para. 205.

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