BOOK REVIEWS

An Introduction to the International Criminal Court, by William A. Schabas, Cambridge University Press, Cambridge, 2001, ISBN 0-521-80457-4 (hardback), x + 406 pp., UK£ 55

William Schabas's book provides an easily digestible and elegantly written introduction to the International Criminal Court ('ICC') established under the Rome Statute of 17 July 1998. The reader gains much more than an overview of the Rome Statute. The Statute is placed squarely in its historical context and the negotiation story is told in such a way as to capture the elements of suspense, excitement, frustration and exhaustion that characterised the numerous meetings by different preparatory bodies. Schabas presents a critical commentary of the Statute, highlighting in particular potential problem areas for the future Court.

The main text consists of only 164 pages and yet the general reader can ignore the footnotes and still come away feeling that few questions are left unanswered. For the more specialized reader, carefully selected options for further reading are contained in the footnotes. Indeed, it is Schabas's stated aim in his Preface

> to provide a succinct and coherent introduction to the legal issues involved in the creation and operation of the ICC, and one that is accessible to non-specialists. References within the text signpost the way to rather more detailed sources where readers may find detailed analysis (p. viii).

The main text is divided into eight chapters. The first chapter traces events leading up to the adoption of the Rome Statute, moving swiftly through developments from the trial of Peter von Hagenbach in 1474 to the Nuremberg and Tokyo trials after the World War II. Schabas then turns to the establishment of the *Ad Hoc* International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR'), and the influence of these Tribunals on the debate concerning the creation of a permanent ICC. Chapter 1 also deals with the drafting and negotiation of the Statute for the ICC in the International Law Commission, the *Ad Hoc* Committee, and at the Rome Conference. Finally, the reader is introduced to the Preparatory Commission that was established at the Rome Conference to perform various tasks including the drafting of Rules of Procedure and Evidence governing procedural and evidentiary questions, and the formulation of the Elements of Crimes over which the Court has jurisdiction. The remaining chapters focus on the provisions of the Rome Statute itself, beginning with its subject matter jurisdiction and then going on to consider other jurisdictional issues together with admissibility of cases, general principles of criminal law, investigation and pre-trial procedure, trial and appeal, punishment and the rights of victims, and the structure and administration of the Court. The last four chapters contain a large

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amount of technical material but the analysis does not get lost in the technical detail. On the contrary, these chapters highlight the complexities and sophistication of the institution that is to be created.

The book contains as appendices the complete text of the Rome Statute, and the Elements of Crimes and Rules of Procedure and Evidence adopted in June 2000 by the Preparatory Commission. A useful bibliography is included after the appendices.

Schabas picks up on the most important themes underlying the creation of the ICC and returns to these where relevant throughout the text. For example, the principle of complementarity, according to which the ICC will only be able to exercise jurisdiction if national courts are unable or unwilling to prosecute, is introduced on page 13. The "complex relationship between national legal systems and the International Criminal Court" is then discussed in more detail on pages 66–70. This discussion includes alternative methods of accountability such as truth commissions and also deals with the principle of *ne bis in idem* or double jeopardy. Other themes include the definitions of crimes, the role of the Prosecutor and the unique mix of common law and civil law rules that are to govern proceedings before the Court. Often these themes have a political dimension that is brought out. The fifty-page document on Elements of Crimes resulted from a United States initiative that met with little opposition. Schabas comments cynically that "the Elements reflect the continuing suspicion among States of any degree of judicial discretion" (p. 29). Notably, the provisions on punishment provide a "dramatic exception" (p. 137) to this general policy. In the context of complementarity, Schabas points to "the danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries" (p. 68). As regards the controversial power of the Security Council to request a "deferral," thereby suspending prosecution, Schabas states

> there may be times when difficult decisions must be taken about the wisdom of criminal prosecution when sensitive political negotiations are underway. Should the Court be in a position to trump the Security Council and possibly sabotage measures aimed at promoting international peace and security? (p. 65).

The ICC will invariably face practical, legal, political and financial challenges, especially during the first phase of its operations. Potential problem areas raised by Schabas include, among others, the lack of guidance as to the rules of legal interpretation of the Rome Statute, difficulties associated with investigations on the territory of sovereign states, the different manifestations of the presumption of innocence, the refusal on the part of some states to extradite their nationals, ambiguities in the rules on "national security information" and practical obstacles to the compensation of victims.

Subtle references to the jurisprudence of the ICTY and ICTR are made frequently, particularly in the footnotes, but are intended to be simply illustrative. A more extensive analysis of the case law of these Tribunals would

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have been relevant if Schabas had adopted a broader scope for his work. The book would have benefited from a table of cases to direct the reader interested in the relationship between the *Ad Hoc* Tribunals and the ICC to the relevant jurisprudence. In any event, the message that comes across is that the ICC should be treated as a different animal from the *ad hoc* bodies.

The brevity of the text means that the discussion of key issues is in no way exhaustive, even though Schabas leaves no stone unturned in terms of raising these issues. Occasionally this results in the discussion being so brief as to be inaccessible. An example is the section on individual criminal responsibility (pp. 80–83) and the paragraphs on complicity in particular. Here Schabas jumps from presenting two possible ways in which the Court may treat the organizers and planners of crimes, namely as principal perpetrators or accomplices, to considering whether complicity that takes the form of a mere failure to act may result in criminal liability. The jurisprudence of the *Ad Hoc* Tribunals on the former question is not cited and this is an area where the all-important "signposts" are missing. Complicity tends to be considered as a form of secondary liability and it is therefore controversial to suggest without further explanation that those technically most responsible for international crimes, *i.e.*, the organizers and planners, could be described as accomplices.

There is a growing body of literature providing detailed analysis of all aspects of the ICC. Schabas lists some of the main texts on page viii, footnote 8. Most of these are collections of essays or commentaries and Schabas's book is therefore unique in offering a manageable run-through of the Rome Statute by a single author. His flowing writing style makes the task of achieving an overview of the ICC all the more manageable. *An Introduction to the International Criminal Court* is the ideal starting point whether the reader's main interest in terms of further reading is the negotiating history, the definitions of crimes or the structure of the Court. For the negotiating history, the reader could refer to R. Lee's *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, 1999). A new book edited by A. Cassese, *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002) devotes 1,600 pages to the same subject areas that are covered by Schabas.

Schabas's book does not contain a conclusion and the main text ends rather abruptly on the topic of authentic texts of the Rome Statute. This means that Schabas does not at any point reveal his own views as to the likely success of the ICC. However, the tone is generally optimistic. In the last paragraph of Chapter 1 Schabas states:

> From a hesitant commitment in 1945, to an ambitious Universal Declaration of Human Rights in 1948, we have now reached a point where individual criminal liability is established for those responsible for serious violations of human rights, and where an institution is created to see that this is more than just some pious wish (p. 20).

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Schabas tells the story of a Twentieth Century vision that finally turned into something tangible and plants the image of a living institution in the mind of the Twenty-first Century reader. His book will continue to provide points of reference when the ICC does indeed begin to breathe and tell its own story.

*Nina H.B. Jørgensen**

International Law, by Antonio Cassese, Oxford University Press, Oxford/New York, 2001, ISBN 0-19-829998-2, xviii + 469 pp., including Index, UK£ 21.99

During World War I, a lot of heavy fighting took place in the Argonne, the French region around Verdun. The final battle of September/October 1918 won by French and United States troops took an enormous toll. The endless stretches of white tombstones on the many military cemeteries in the deforested region are silent witnesses of the total devastation that took place at the *Bataille de l'Argonne*. With a fluffy cloud and a massive rock hovering over the Argonne, René Magritte has symbolized the absurdity of what took place in 1918. Antonio Cassese has used this image on the cover of his new textbook on international law to illustrate the tension between traditional international law, "firmly grounded on the *rock* of state sovereignty, and the new or nascent international law, soft and hazy as a *cloud* [...]" (p. v, emphasis in original). Although the quite literal illustration of Cassese's metaphor is not such a happy one, the author's message is clear: it is misleading to consider international law as a piece of reality cut off from its historical, political, sociological, and ideological context and to look at the international legal institutions as abstract entities 'petrified' in time and space (p. v). Unfortunately, this is exactly what most existing textbooks or treatises do. They take a strictly legal approach and thereby offer a somewhat static view of the discipline. Instead, Cassese has attempted to grasp international law in all its ramifications. With great mastery, Cassese the academic combines the legal method with the historical and sociological approach to expound the dynamic of international law. At the same time, Cassese the practitioner draws a rich experience and expertise into this study of international law. If it were not for the title of another textbook on international law, the reference 'How We Use It' would fit perfectly in the subtitle to this book.

It is not the reviewer's intention to claw pedantically through Cassese's text to see whether the author in fact places every issue of international

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law in its historical and political context. Cassese's approach to such legal institutions as the International Court of Justice and the Security Council is not iconoclastic, but surely not void of criticism.[1] Cassese, is inspired with what he calls "community" values: rights and obligations that belong to *c.q.* are incumbent upon each state in relation to all other states and which are in no way reciprocal. The way in which this modern writer deals with new developments in such classic domains as sanctions (p. 241), the use of force (p. 322), and international humanitarian law (p. 328) attests to this. Cassese's coverage of the recent developments in the areas of international criminal law (Chapter 12) and international environmental law (Chapter 17), and the more important issue of the legal attempts of international institutions at narrowing the gap between North and South (Chapter 18), are all welcome innovations in the world of textbooks and treatises on international law. In these separate chapters, Cassese gives a very immediate and informative idea of the attempts made to enable international law to deal with new and difficult issues. In doing this, he strongly advocates an international outlook in rule application.

It is possible, as always, to quibble with some of the author's choices and assessments. For example, while the book covers all the classic concerns of international law, such as sources, immunities, and treaties, it hardly addresses the law of the sea, nor does it pay a lot of attention to the issue of sovereign rights and international business. However, the absence of these matters does not detract from the great strengths of this book. Introductory works on international law face the formidable task of presenting a clear and understandable account of a complex and rapidly evolving subject matter, of simplifying without distorting, of being concise while sufficiently informative. This text achieves this task admirably.

To realize the above-mentioned goals, one compromise had to be reached: most references only indicate the source of documents or cases cited, and endnotes are used instead of foot- or side-notes. In addition, no bibliography is given. This book is essentially a narrative text, but a perfect companion to whatever syllabus or casebook is assigned to teach an introductory course in international law. To make up for what to some may be considered as a lack of detail, the publisher has introduced what it calls a 'key selling point': the book's companion web site http://www.oup.com/uk/best.textbooks/law/cassese, which lists documents, case material, principal treaties and agreements cited in the book, as well as a select bibliography, and links to web sites containing further sources. When kept

1. Compare the World Court's judgment of 14 February 2002 in the Congo *v.* Belgium case with the "better" view on the question of immunities enjoyed by ministers of foreign affairs (p. 96) when they are accused of international crimes (p. 260). *See also* the highly critical review of the Security Council's practice of establishing a direct link between humanitarian crises and threats to the peace when authorising operations to, *e.g.*, protect safe havens in Bosnia and Herzegovina (p. 297).

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up-to-date, the web site is able to sooth the curiosity of the more-than-interested reader and to sustain the shortcomings of the publication until a new edition appears. By including links to web sites of legal institutions in Asia and Africa, and by taking up references to international law works not solely originating in Europe and North America, this world-wide web application could already be used to promote the book to a more cosmopolitan readership.

Overall, Cassese has written an excellent introductory textbook, which achieves the rare combination of being extremely accessible, analytically rigorous, generous in its vision, and illuminating in its insights. Cassese's *International Law* will no doubt acquire the status of a classic over the years.

*Steven Blockmans**

Modern Treaty Law and Practice, by Anthony Aust, Cambridge University Press, Cambridge, 2000, ISBN 0-521-59846-X, 443 pp., UK£ 29.95

The law relating to treaties remains one of the traditional building blocks of international law. However, the rapid expansion of new branches of international law like human rights, the environment and international criminal law sometimes leaves one with the impression that treaty law is nowadays not always receiving the scholarly attention warranted by a subject that constitutes a central pillar in the conduct of relations between states. As Anthony Aust, a legal adviser to the British Foreign and Commonwealth Office, points out in his foreword to *Modern Treaty Law and Practice*, existing works in English on the law of treaties are either outdated, limited in scope or too theoretical. A search in the legal library of the South African Department of Foreign Affairs where the present reviewer earns his daily bread, supported this conclusion: A.D. McNair's seminal work *Law of Treaties* (1961) predates the Vienna Convention on the Law of Treaties of 1969. S. Rosenne's *The Law of Treaties* (1970), T.O. Elias' *The Modern Law of Treaties* (1974) and I.M. Sinclair's *The Vienna Convention on the Law of Treaties* (1984) focus strongly on the negotiations leading to the Vienna Convention. A more recent work, J.A.M. Klabbers' *The Concept of Treaty in International Law* (1996) has a strong theoretical orientation to the subject. H. Blix and J.H. Emerson's *The Treaty Maker's Handbook* (1973) is still consulted often, but is now on the brink of its third decade (the average age of a number of the law

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advisers in the South African Department of Foreign Affairs). On the other hand, general works on international law, as a result of constraints regarding space, by necessity only deal with the basic treaty principles.

Into this void steps Aust, aiming with his work to provide a practical and updated guide to the law of treaties, without scholarly pretensions, for the benefit of law advisers in foreign ministries, diplomats and teachers and students of international law and of international relations. With this target group in mind, the book also aims to enhance an understanding of the international legal framework within which international relations is functioning. It is therefore firmly set in the real world of international relations, foreign ministries and diplomacy, written mainly for the practitioner by a practitioner. Like previous works on the subject, it mainly follows the contours of the Vienna Convention, drawing on state practice as it evolved within the framework of the Convention.

The author draws strongly upon examples from his personal knowledge and experience, thereby enhancing the practical focus of the work, but as he admits, this approach results in the book having a somewhat British orientation. However, in the view of this reviewer, British precedents are valuable and informative for the large number of Commonwealth states that share the British legal tradition.

The short first chapter deals with the history of the Vienna Convention, the scope of its application and its relationship with customary international law.

Chapter 2 then analyses the definition of a treaty contained in Article 2(1)(a) of the Convention, drawing the conclusion that difficulties result not from the definition itself but from the question of whether a particular document falls within the ambit of the definition. The question of whether a document or instrument is legally binding or merely records non-binding understandings is one that confounds lawyers in foreign ministries as well as diplomats on a very regular basis, especially where relations with non-state entities in the international system have to be constructed and maintained. The designation of an international agreement and the relationship between such designation and its binding or non-binding nature is then dealt with. The author takes the position that non-legally binding instruments are most commonly designated memoranda of understanding, while acknowledging in the same breath that this designation does not in itself determine the nature of a document: binding treaties are in practice often called memoranda of understanding. An interesting development mentioned and which needs further exploration, is the status of treaties concluded in electronic form.

The memorandum of understanding is further explored in Chapter 3. As Aust readily admits, the real test of whether an instrument is intended to be binding or not lies in the text. Because of the confusion surrounding this issue, South African state practice has opted, in an approach to simplify matters, to focus on the question of whether the language used in an instrument is of a peremptory nature or not, leaving the designation

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out of the equation. This approach resulted in an interesting situation recently when the Southern African Development Community ('SADC') introduced the memorandum of understanding as a non-binding instrument aimed at by-passing time-consuming domestic approval procedures by the respective member states, with a view of speeding up the integration process of the region. The South African law advisors, when scrutinising the first SADC memorandum of understanding (on the co-ordination of the monetary policies of SADC member states) noted operative provisions in non-peremptory form but peremptory language in the final clauses. Conscious of the watchdog role of the South African Parliament's portfolio committees on financial matters, they concluded that the safest approach would be to refer the memorandum of understanding to the lengthy process of parliamentary ratification. (At the next round of negotiations the South African position prevailed and the peremptory terms were removed).

The existence of such "mixed" instruments of indeterminate status operating in a grey area appears to be a regular feature of international life. In his discussion on whether memoranda of understanding are really treaties, Aust refers to the view of Klabbers (*The Concept of Treaty*) that such a distinction is not valid. Klabbers argues that any "agreement" between states which is of a normative nature and is not made subject to another system of law (like domestic law) should be considered as a treaty. From a practitioner's point of view, one cannot but agree with Aust's assertion that this is a highly academic approach to the matter: in the practical conduct of international relations, states often need to act by means of instruments that are limited to the expression of political commitments, rather than to use instruments containing binding obligations. The chapter is concluded by briefly exploring the question of the possible legal consequences of memoranda of understanding as possibly constituting soft law or by means of estoppel. These constitute real and problematical issues for the practitioner, which need further exploration. The chapter is enhanced by a useful annexure that compares treaty and memoranda of understanding ('MOU') terminology.

Chapter 4 deals in a short and concise way with the treaty making capacity of federal states, overseas territories and international organisations. The relationship between parent states and dependent territories abroad is sometimes confounding to the uninitiated. An interesting list of such territories is included in the work as an appendix.

The next two chapters deal respectively with full powers and the adoption and authentication of treaties. The chapter on full powers is enhanced by appendices containing examples of an instrument of full powers and an instrument of general full powers for a permanent representative to the UN. The chapter on adoption and authentication discusses in some detail the difficult question how to define consensus, a concept which is still sometimes a matter for discussion during international conferences.

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Chapter 7 explains the various ways by which states can express consent to be bound by a treaty, while reservations to treaties is the subject of Chapter 8. Reservations remains a subject clouded in juristic obscurity, mainly due to the intricate relationship between reserving and objecting parties when multilateral treaties become widely ratified. For a general work on treaties, this chapter adequately interprets the relevant articles of the Convention, and also addresses the remaining problem with regard to reservations and the interrelated issues of reservations to human rights treaties and reservations made by a state on constitutional grounds.

Chapter 9, on the entry into force of treaties, discusses the different options available for entry into force clauses and contains valuable examples of such clauses. This relationship between treaties and domestic law is then addressed in Chapter 10. This is where foreign ministry lawyers have to enter the field of domestic law, as they are often obliged to draft legislation intended to give effect to treaty obligations in the domestic jurisdiction of a state. The question of incorporation of treaty obligations into domestic law, and the complications and uncertainties associated with this delicate relationship, often loom large during treaty negotiations. The practical functioning of the systems of monism and dualism is explored by reference to the practice of a number of states. In this regard Aust refers to a provision in the South African Constitution that allows for self-executing treaties that have been approved by Parliament to become automatically part of South African law (unless inconsistent with the Constitution or an act of Parliament), without the need for incorporating legislation. For the past number of years, this reviewer and his colleagues have been at pains to interpret this and other provisions of the new South African Constitution with regard to the domestic application of treaties. This provision illustrates the difficulties that sometimes exist in the relationship between treaties and domestic law: as yet no clarity exists as to the nature and definition of a self-executing treaty in South African law and the meaning of this provision remains shrouded in mystery. Aust deals with self-executing treaties only in a short paragraph, focusing on practice in its country of origin, the United States of America.

Chapter 11 progresses to the topic of the territorial application of treaties. The reader is given insight into the distinction between metropolitan and overseas territories and the complications that may arise with regard to the application of a treaty in federal states.

The relationship between successive treaties dealing with the same subject is addressed in Chapter 12. Apart from the discussion of the basic principles, practical examples taken from existing treaties once again add value to the academic discussion.

The next two chapters analyse the relevant articles of the Vienna Convention with regard to the interpretation of treaties and the position of third states. In considering the amendment of treaties in Chapter 15, the author interprets the general rule laid down in Article 39 of the Vienna Convention, namely that a treaty might be amended by "agreement"

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between parties, to include informal and oral agreements. He proposes that this grey area of treaty law be addressed by confirming such informal amendments by means of exchanges of notes between the parties. From practical experience one knows that this kind of follow-up is often neglected in practice, as is the case with exchanges of notes required by entry into force clauses, tendencies which illustrate the important role of diligent treaty sections in foreign ministries to ensure certainty in treaty law.

Although the author states in Chapter 17 that the invalidity of treaties is not a matter of importance in the day-to-day work of foreign ministries, he devotes considerable space to this topic. It does happen in practice that treaties are sometimes signed without the required authority, or that complicated domestic procedures for approval in some states result in uncertainty regarding the validity of treaties.

Chapters 16 (duration and termination), 20 (settlement of disputes), 21 (remedies for breach) and 22 (succession) complete the substantive analysis of treaty law. The remaining chapters focus on practical matters: the depositing, registration and publication of treaties, matters that are of special value to the treaty sections of foreign ministries, while the last chapter deals with drafting and final clauses in treaties.

This last chapter succinctly guides the reader with regard to the drafting of the main parts of a treaty. Drafting is probably the most important skill a lawyer-diplomat should possess, needing constant polishing as perfection always seems to be elusive. The author applies his considerable experience in and practical approach to drafting in his discussion of the major parts of a treaty (title, preamble, main text, final clauses, testimonial, signature, and annexes). The focus is on the different drafting options with a view to distinguishing good practice from bad. The chapter is concluded with a short section on drafting techniques, containing some basic but very useful drafting rules. This problem-solving approach may well result in this chapter becoming the part of the book most often referred to by practitioners.

Aust writes in clear and concise English, occasionally spiced with grains of humour. A large number of appendices containing examples of *inter alia* agreements, memoranda of understanding, exchanges of notes, credentials, full powers, an instrument of ratification as well as the text of the Vienna Convention, are included. The book is well rounded off by a detailed index, tables of the treaties and memoranda of understanding cited, a table of cases, a glossary of legal terms and a list of abbreviations.

The author admirably achieved his aim of writing a modern, focused and practical guide to treaty law and treaty making. Any work of this nature is of necessity written within the constraints of the fact that treaty making and state practice are not exact sciences, being dependent upon negotiations and often unpredictable decisions. *Modern Treaty Law and Practice* is a valuable contribution to the literature on the subject of treaties. The book will be a quiet companion to many treaty negotiators

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in years to come, and will equally keep researchers and scholars company in law libraries all over the world.

*Andre Stemmet**

The Empowered Self: Law and Society in the Age of Individualism, by Thomas M. Franck, Oxford University Press, Oxford, 2000, ISBN 0-19-829841-2 (hardback), 312 pp., £ 35

In his third most recent book, which was written still just in the old millennium, but clearly sets out to usher in the new, Thomas Franck invites us to join him on what he himself calls an 'adventuresome journey' (p. 278) to the land of the Unchained Prometheus. After an occasionally bumpy, but certainly very enlightening trip, that essentially takes us from the Roman Empire to 'post-post-modernism', we arrive at this brave new world and stand back in awe; for its people, who, in fact, are no longer called 'people' but Selfs, live the most fulfilled and unalienated life imaginable. Indeed, all oppressive structures have withered away in this promised land and the Selfs spend their lives exclusively expressing their very self-ness at any particular moment. They choose their daily names in the morning, have a gender change in the afternoon, and freely associate with other Selfs – preferably via the Internet – for any transitory ideals they may have, in the evening; and on weekends they travel to one of the many administrative units – formerly called states – in which they enjoy membership rights. In sum, their lives are, as an old prophet of this land put it, "the true solution of the conflict between [...] freedom and necessity [and] between individual and species. It is the solution of the riddle of history and knows itself to be this solution."[1] It is nearly paradise, and yet we cannot help having an uncomfortable feeling of *déja-vu*, a hazy vision of a distant dream that was, long ago, cut short by an all too sober awakening.

Though this is, perhaps, an unfair caricature of Franck's vision of life in the new millennium, *The Empowered Self* stands out for its thoroughly optimistic, even celebratory discourse, its "rhetoric of inevitability"[2] which does, indeed, have the familiar ring of Marx' communist utopia and which does make the book a formidable case of what Susan Marks has called

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1. K. Marx, Private Property and Communism, cited *in* S. Lukes, *Five Fables about Human Rights*, *in* S. Shute & S. Hurley (Eds.), On Human Rights: The Oxford Amnesty Lectures 1993, at 20 (New York: Basic Books, 1993).
2. For both characterisations *see* the excellent review by A. Cole *in* 99 Mich. L. R. 1409–1418 (2001).

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'liberal millenarianism.'[3] This is insofar ironic as Franck ostensibly tries to avoid an offensive and easily discreditable Fukuyama-type liberal triumphalism and instead attempts to offer a more balanced, empirically better informed and, allegedly, more realistic interpretation of life and law in a globalised world. Yet it is precisely his undoubtedly good-faith effort to forge an all-encompassing unity out of the many (dis-)contents of globalisation and to disprove any form of Huntingtonian manicheanism that gives this book, perhaps inadvertently, the somewhat totalising undertone characteristic for liberal millenarian manifestos. Although its publication now lies a good three years in the past,[4] the 'globalisation and its (dis-)contents' debate is by no means over, and there does seem to be a case for re-examining Franck's liberal manifesto two years into the 'new time.' That case has, indeed, become acute in light of what is fast proving to be a major watershed in world politics, namely the ongoing aftermath of the terrorist attacks of 11 September 2001. Both *The Empowered Self*, and Franck stand exposed to a critical questioning of what happened to Promethea since the fall of the Twin Towers.

First, however, it is worth re-visiting Franck's 'adventuresome journey.' It is designed to be a deeply interdisciplinary work, taking in, besides law, aspects of "history, philosophy, psychology, sociology, and anthropology" (as explained in his Acknowledgements), all brought together in order to demonstrate, from as many sides as possible, one central thesis: that the future not just of domestic, but, indeed, of international society belongs to individuals. He accordingly begins by drawing a gloomy picture of the old world where identity was imposed on individuals by autocratic groups, namely tribes, nations, and states. This anachronistic 'triad' he sets out to deconstruct, which he does stringently, and over long tracts, convincingly: he shows the largely imaginary character of an image of states based on clearly identifiable nations which, in turn, are mythologically underwritten by notions of tribal homogeneity. He identifies such notions as 'post-Hegelian romanticism' which, in his eyes, has not only led to such events as the Holocaust, but which, in tarnished and rhetorically polished versions, still informs especially what he conceives as the post-modern critique of liberalism and its (alleged) romaticisation of the 'authentic group' against the individual (p. 24). In a similar vein, he shows the old Vattelian structure of international society which – much like Locke in the domestic context, as he rightly points out – conceives of 'international' society as exclusively made up of states who consciously and self-interestedly contract into it, to be an increasingly inadequate and, if elevated to the level of ideology, potentially self-destructive description

3. S. Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EJIL 449, at 449–477 (1997).
4. And there has, consequently, already been some comment; *see especially* two longer reviews, Alyson Cole's already mentioned one (*supra* note 2), and another by A. Etzioni *in* 28(4) J. of Law and Society 606–609 (2001).

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of reality. For as long as statehood is the *telos* of nationalism, there will be a tendency of aggressive self-assertion and fragmentation which would ultimately lead to a world of up to 2000 mutually hostile states. Franck, who at this point displays almost realist sensitivities, then goes on to persuasively argue how the present system, based, as it is, on the sovereign equality of states, would be incapable of managing such a plurality of sovereigns, and how it would be bound to re-introduce new hierarchies at the apex of which would be a few states who, on account of their power and influence, would consider themselves more equal than all the others. This simultaneous encouragement and rejection of statehood he identifies as a clear paradox in the operation of the international system as it stands. Yet he subsequently relativises this – in itself plausible – argument by pointing out the rapidly diminishing relevance of states as the fora of global – rather than international – politics. While the Vattelian system only accords states a voice in international relations, Franck sets out to show that already now many non-state actors, be they sub- or supranational, are making their voice heard and are effectively sharing in 'global governance'; indeed, he goes as far as to imply that it is now these actors – who, in his view, seem invariably to be made up of individuals who freely opted into them – rather than artificially constructed states that should increasingly be considered as the bearers of international legitimacy. Though this third line of argument is clearly meant to trump any defence of the old-style state structure, there is a definite tinge of normativism here, an informed wishful thinking that hopes to turn into a self-fulfilling prophecy.

And Franck immediately sets out to sketch this project: it essentially involves a complete shift away from states and towards individuals; if the former were the building blocks of Vattelian international society, the latter are, or, at least, should be, the building blocks of a new global world order. Having set out to show that the old state-nation-tribe triad probably never has been, and certainly no longer is, the main determinant of an individual's identity, he consequently shifts attention away from national self-determination and towards personal self-determination. The latter essentially consists of the claim that "each individual is entitled to choose an identity reflecting personal preference" (p. 39). To Franck's mind, this assertion implies, among others, that the individual's association with groups must be voluntary and is likely to involve multiple allegiances and loyalties, which, in turn, flies in the face of the prevalent tradition that holds that personal identity is, in fact, determined by socio-historical context. Franck, not surprisingly for an Anglo-American liberal scholar, identifies Hegel as the ultimate mastermind of the latter tradition, and he lines up in rapid succession Ernest Gellner, Immanuel Kant, and Thomas Jefferson to argue that, from an anthropological, philosophical, and political perspective, the nation-state should never have been regarded as the great independent variable determining individual identity. He then proceeds to a rather fascinating dissection of multicultural experiences the

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world over in order to show that transnational and multiple loyalties have not only always existed parallel to the nation-state, but that they are now in plain ascendancy. Indeed, he is moved to formulate a visionary question, notably whether we are "on the verge of a new stage of human evolution in which loyalty to the state is transformed into a higher loyalty to humanity, symbolised by global (or regional) institutions of government, commerce, education, and communications," only to immediately and, somewhat nonchalantly, answer that "there is some evidence that we are" (p. 59).

Given this fundamental critique of the nation state, Franck takes as one of the most crucial indicators of this emerging postnational epoch the changing nature of citizenship. If previously it was precisely through citizenship that nation states controlled 'their' individuals, Franck sees a clear trend towards the inverse position, where multiple citizenship, *intercitoyenneté* and polypatrism become the norm, and in his by now familiar manner, he goes through a large number of citizenship laws, domestic and international judicial decisions, and other significant incidents to demonstrate his point. What this means, for Franck, is, of course, once again that individuals are ever more able to define their identities in "the liberated pursuit of personal interests and preferences" (p. 68). If the excessive pursuit of self-determination by groups is both oppressive *vis-à-vis* the individuals comprising them and leads to the potentially violent implosion of the Vattelian state structure, the personal self determination of individuals, the foundational act of which is the free choice of their loyalties and affiliations, at once resolves, in Franck's eyes, all the tensions underlying the state-nation-tribe triad. Misguided are, hence, communitarian worries about the atomisation of society and the general loss of community values, since fully autonomous individuals are, in Franck's eyes, "less likely to be anarchists than new communitarians" (p. 87), freely choosing which identity groups to associate with and which values to espouse. He, at this stage, widens his focus from nation and state to cultural and linguistic communities, and sets out to show that, like the former, culture, too, is increasingly 'designable' by individuals themselves. Indeed, his freed Selfs are fortunately happy to re-associate themselves into 'new communities,' evidence for which he sees in a general social convergence of values, a spontaneous bonding of "kinsfolk of the mind" (p. 91) facilitated by the Internet and other new means of communication. With a typical, if inadvertent, totalising gesture, he even concedes the basic dictum of post-Freudian psychology, namely that, in a fundamental sense, individuals cannot consciously control their lives, only to immediately relativise that unexpected concession by announcing that the dawning age will precisely make substantive personal autonomy both possible and feasible (p. 94). We are thus bound, in Franck's vision, towards what he calls 'post post-modernity,' or as one might also refer to it, the happy-end of the post-modern critique, which, peculiarly resembling the pre-modern 'West' with its "layered loyalties and identities" (p. 98), will reveal itself to be a

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"liberal neo-community, a civil society based on socially and legally protected individualism" (p. 100).

Having laid the groundwork for his liberal utopia, Franck then goes on to sketch what life in this neo-community means. He first identifies the freedom of conscience as the quintessential *conditio sine qua non* of choice and autonomous conscientious self-definition, and he ambitiously sets out to refute the argument of its allegedly 'Western' provenience, and thereby Huntington's 'wars of civilisation' thesis. He does so by elaborating what amounts to a pathology of toleration, and, to that end, he adduces extensive, and in itself rather interesting, historical evidence on toleration debates the world over. Next he sketches different aspects of personal self-determination, as they have already been emerging in fact; his four well-chosen examples of areas where it is increasingly the individual which chooses her/his identity are *names*, *gender*, *career* and *privacy*. In his treatment of these, he again employs his by now familiar method of giving hard empirical evidence from today's 'real world' a radically teleological interpretation, thus subtly merging the real with the utopian. He then turns to the individual's emerging position in global society; if her/his rights were originally derivative from the state, and she/he thus essentially a "state-ward" (p. 196), she/he is now evolving into a "shareholder in a global system," who is increasingly accepted as a legitimate claimant independent of the state. This then provides Franck with the, evidently sought after, opportunity to delve into the current state-of-the-art of international human rights law and bring together recent developments in the treaty- and charter-based mechanisms, including an all too brief mention of social and economic rights, as well as the International Criminal Court, and the World Bank in order to show how already the current human rights regime has shifted (some) of its focus away from the state. He does, however, acknowledge the need to disperse this 'good news' to those unenlightened masses that may never even have heard of it.[5]

Franck, finally, turns to the two related, though tricky, subjects of how individuals, groups and the state relate to each other in his new paradigm, and whether individual rights ought to be matched by individual responsibilities. As to the former, his central thesis, again backed up by ample historical evidence, is that there has been a progressive development in which groups challenged the exclusivity of states as rights-holders in international society, followed by a challenge from individuals against both state- and group-determined identity, thereby creating a rights triad which, in his words, is now "tautly balanced in vigorously adversary rival self-assertions" (p. 243). This "dynamic tension," which, for Franck, leads to

5. The same applies for the advertisement of class action settlements or, to take another striking example, the German Foundation to compensate former Forced and Slave Laborers: *see* L. Adler & P. Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 Harvard Journal of Legislation 1 (2002).

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"discourse and mutual accommodation" (p. 251) may nonetheless occasionally crystallise into diametrically opposed positions, such as with regard to survival, where state, group, and individual interests may fundamentally clash. In such hard cases, Franck argues somewhat disingenuously that individual rights ultimately enjoy a moral priority, since only they are genuinely unacquired, first and truly essential, whereas group and state rights are always acquired, secondary rights. As for the second tricky issue, namely whether, as Franck himself puts it, "personal freedom [...] may actually have exacerbated inequalities and disadvantages" (p. 255), he turns this question into one about the necessity of individual responsibilities alongside individual rights. He rejects the rights-critical 'human responsibilities' approach advocated, for example, by the 1997 'Universal Declaration of Human Responsibilities,'[6] but co-opts its basic *problematique*, namely the potential of fundamental conflicts of interest between different individuals' self-determination, into a general call for global democratic legitimacy. This introduces, of course, Franck's project of old, notably to show that a right to democratic governance is gradually emerging,[7] in support of which he again musters an impressive amount of detailed evidence on a world-wide emerging consensus on a "morally pluralistic constitutional democracy" (p. 276).

In all, *The Empowered Self* goes to great lengths to present its liberal utopia precisely not as an exultation in "smug satisfaction at the 'end of history'"[8] but as a plausible, if occasionally stylised, interpretation of the world at the turn of the millennium. Though rhetorically convincing, it is precisely this style which attracts immediate critical attention. After all, this is an international lawyer who, by his own admission, ventures into conceptual *terrae incognitae* in order to draw up as holistic a picture of the globalising world as possible. As such his approach duly conforms with that generally adopted by 'liberal internationalist' scholars who, in an attempt to escape the confines of pure normativism, have opened a dual agenda of the complementary pursuit of (realist) international relations and (normativist) international law.[9] Indeed, *The Empowered Self* does not only pursue a dual, but generally a multiple agenda, as if to proclaim that mainstream international law is simply incapable of dealing with a post-Vattelian world and still retain at least a minimal relevance. Such critical notions would certainly be welcome, if Franck had only taken them to their methodological conclusion. Yet, instead, he retains the deep structure of

6. Proposed, for example, by the InterAction Council of former 'world leaders,' at http://www.asiawide.or.jp/iac/UDHR/EngDecl1.htm.
7. *See*, among others, T.M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992); T.M. Franck, *Democracy as a Human Right*, *in* L. Henkin & J.L.H. Hargrove (Eds.), Human Rights: An Agenda for the next Century 73 (1994); and T.M. Franck, Fairness in International Law and Institutions (Oxford: Oxford University Press, 1995).
8. Franck, Fairness in International Law and Institutions, *id.*, at 301.
9. The best known article here is, of course, A.M. Slaughter's, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205 (1993).

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international legal argument, which Martti Koskenniemi has so aptly described as lying between apology and utopia.[10] His regular turn to descriptions of the actually existing practice of states and international organisations testifies to the apology side, while his interpretation of these facts is radically utopian. He adopts a rhetorical mode typical for international legal discourse, consisting of both a statement of what the law is, and an underlying plea to recognise it as such. Indeed, over long tracts, *The Empowered Self* reads like an attempt to prove something akin to the *opinio juris* of globalisation. Though Franck compellingly argues that, in order to ascertain that *opinio*, he no longer needs to exclusively look to state practice, but also to a host of now relevant non-state actors, the persuasive force of this – in itself good – argument comes ultimately from the unacknowledged appeal to auto-suggestion which is typical for this type of argument: 'believe you me, this is what you should be thinking the international law of the globalisation era is.' In social theory terms, Franck could be charged with what Hans Joas has aptly called the 'unhappy marriage of hermeneutics and functionalism,'[11] *i.e.*, the argumentative 'backing up' of what essentially is a normative re-interpretation of international law with a functional analysis of globalisation. That way, critique of his normative theory can easily be deflected with reference to its functional inevitability, since all it purports to do is to re-state what is actually happening.

It would be mistaken, however, to belittle Franck's awareness of what his methodological choices mean. Indeed, method has been part of the substance of all of Franck's work, and *The Empowered Self* is just the most recent and, perhaps, strongest instantiation of his long-standing thesis that we have now reached a 'post-ontological' age in which we no longer need to assert the existence of international law, but can finally turn to its evaluation and perfection.[12] And this perfection evidently lies for Franck in the completion of a genuinely Promethean world. Regardless of whether Franck is considered a transnational legal process scholar, a rationalist, an international society theorist, a constructivist,[13] or a neo-Kantian liberal positivist,[14] *The Empowered Self* unequivocally reveals him as a liberal millenarian who fulfills all the criteria set out by Susan Marks: an often counterfactually teleological interpretation of social reality, a seemingly unshakable belief that the *telos* is some form of global liberal democracy,

10. M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Helsinki: Finnish Lawyers' Publishing Company, 1989).
11. *See* H. Joas, *The Unhappy Marriage of Hermeneutics and Functionalism*, *in* A. Honneth & H. Joas (Eds.), Communicative Action: Essays on Habermas' Theory of Communicative Action (J. Gains & D. Jones, translation) (Cambridge (MA): MIT Press, 1991).
12. As already explored in Franck, Fairness in International Law and Institutions, *supra* note 7.
13. Harold Koh identifies all of these in Franck, *in Why do Nations Obey International Law*, 106 Yale L. J. 2598, at 2642 (1997).
14. *See*, *inter alia*, M. Koskenniemi, *Book Review*, 86 AJIL 175, at 177 (1992); and *generally*, D. Kennedy, *A New Stream of International Law Scholarship*, 7 Wisc. Int'l L. J. 1 (1988).

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coupled with a resolutely post-historical standpoint, and a generally optimistic or even enthusiastic tone. To be fair, one should concede that his vision is a fairly accurate description of the lives of the 'global cosmocrats' who are most likely to read the book – and this review –, and who may, even against their own volition, recognise themselves in Franck's Promethean individuals. Yet with respect to all others, the shortcomings of the liberal millennium are more than evident: the all too easy painting over of the many discontents of globalisation, its asymmetries, its conflicts, and its silent exclusion of a great number of people. Though his robust dislike of the old Vattelian system certainly contributes to push international legal discourse towards a long-overdue recognition of the new reality of its subject matter – and as such it is most welcome -, his re-application of the structure of that system to a global society made up of individuals[15] equally actively contributes to sideline debates on the underlying values and the hidden agendas of international actors,[16] and it lacks the critical distance which is, more than anything else, called for in the wake of the many transformations of today's world.

By way of epilogue, the, perhaps, most radical, if unexpected, of these transformations should he mentioned, namely the 'war on terrorism.' For, if anything, it has, so far, consisted of the large-scale and violent re-imposition of precisely the old Vattelian state structure over the (potentially) emerging 'global civil society,' with all the international power politics and domestic oppressions of individual liberties that Franck had already seen waning away. Yet, instead of being up on the – currently all too tiny – barricades of sensible critique against this indiscriminate onslaught on all that seems 'other,' Franck seems to have fallen prey to the very thesis he wishes to reject in the book, namely that this is, indeed, a 'war of civilisations'; and, indeed, by defending much of the US' response to the 11 September attacks, he does apply his 'survival principle' in the same state-nation-tribe-biased way that he goes to great length to refute.[17] The big question that remains after 11 September is, thus, whether *The Empowered Self* will have been anything more than a 'good weather' report that crumbles as soon as the first clouds appear.

*Florian Hoffmann**

15. An excellent point made in the earlier review by Alyson Cole (*supra* note 2).
16. *See* P. Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EJIL 435, at 447 *et seq.* (1997).
17. *See especially* his short Editorial Comment *Terrorism and the Right of Self-Defence*, 95 AJIL 839 (2001).

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