BOOK REVIEWS

Freedom of Religion Under the European Convention on Human Rights, by Carolyn Evans, Oxford University ECHR Series, Oxford University Press, Oxford, 2001, ISBN 0-19-924364-6, 222 pp., UK£ 40

Freedom of Religion under the European Convention on Human Rights undoubtedly represents an excellent start of the Oxford ECHR Series as the author offers a thorough, well structured, critical and well reasoned analysis of the freedom of religion under the European Convention on Human Rights ('ECHR').

The book reveals the results of a comprehensive study of the case law of the European Court on Human Rights and also of the work of the European Commission of Human Rights in the period before 1998. The latter's decisions on admissibility can be quite revealing and important for a study on the freedom of religion under the Convention. Still, and it is almost unavoidable, there is a bit of overlap in the discussion of cases in the respective chapters, especially concerning cases that are relevant from several of the investigated angles.

A positive point is that references to general international human rights law are included in the analysis. The relevant opinions of the Human Rights Committee supervising the International Covenant on Civil and Political Rights, and documents of other regional human rights systems provide useful comparative material to enhance the understanding of the specific approach taken in terms of the ECHR. Furthermore, Evans makes interesting deductions from certain cases decided by the Supreme Court of the United States, while putting the immediate relevance of these judgements in perspective in view of the background of the strict separation of church and state in that country. It is equally valuable that recent developments in standard setting, such as the Council of Europe Framework Convention on the Protection of National Minorities, are included in the evaluation.

The book demonstrates an incisive appreciation of theory against the background of which the jurisprudence is analysed. This results in a comprehensive analysis of the concept of freedom of religion, which also takes into account historical perspectives as revealed by the *travaux préparatoires* of the ECHR. This rich theoretical framework forms the basis for the author's subsequent critical analysis with respect to certain jurisprudential stances taken by the Court (and the Commission).

Throughout her work, the author reveals the conservative approach of the review bodies of the ECHR concerning the freedom of religion, the freedom to manifest religion, as well as the way in which they tend to avoid difficult and controversial questions.

A systematic and very convincing approach is followed in the analysis of this specific freedom under the ECHR. Prior to the elaboration of a theory of the freedom of religion or belief, the author sets out the proce-

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dure of bringing a case before the European Court on Human Rights (both old and new) as well as relevant admissibility considerations. The focus of this book is on Article 9 of the ECHR, while also including considerations pertaining to the article on the right to education in Article 2 of the First Additional Protocol. Evans evaluates various possible theoretical rationales for religious freedom in modern European states and favours the autonomy-based argument, which holds that the freedom of religion is an essential and independent component of treating human beings as autonomous persons, deserving of dignity and respect. This opinion influences her subsequent analysis of the case law with respect to Article 9 ECHR as she argues that the European Court should adopt this as the coherent philosophical justification underlying all cases on Article 9.

A short but incisive historical discussion of mainly Article 9 but also Article 2 of the First Additional Protocol is followed by a critical analysis of the freedom of religion, both in terms of the Convention text and the concomitant jurisprudence. This analysis is compelling and is broken down in the following steps.

First of all, the author focuses on the definition of religion or belief, which transpires in the case law of the supervisory bodies. The Court and the Commission take, in general, a generous approach to what they accept as religion or belief, as long as some basic level of intellectual or moral cohesion is present. The freedom of religion or belief independent from the right to manifest is non-derogable and should arguably go beyond the level of the internal, individual conscience, but the case law is not very sophisticated as to what it would entail. The theory of positive obligations is mostly used to defend majority religions, whereas minorities would not have a real right to invoke.

The chapter on limitations on manifestations of religion or belief has a very lucid structure and is nicely developed. However, the brief analysis of Article 15 and the derogations in times of public emergency is rather shallow and only refers to old case law. Some more recent case law could easily have been included, if only in footnote(s).

Article 9 distinguishes four types of manifestation with respect to the right to manifest a religion or belief. However, Evans underlines that these four types are interpreted very narrowly. Especially the interpretation of the term "practice" has been controversial. Evans criticises the so-called objective approach of the Court in this respect and argues that it should take the claims more seriously. Furthermore, with respect to the legitimate limitations that states can impose, the author identifies correctly a positive predisposition of the Court and the Commission towards the states. The states get a wide margin of appreciation, while the role of the proportionality principle in this respect remains obscure. In general, the Court seems to give more consideration to the concerns of states than to the rights of individuals.

Consequently, the author concludes that the Court and the Commission use a very liberal definition of the concepts religion and belief but at the

same time have a restrictive view of what that freedom entails and limit the right to manifest that religion or belief even further.

Chapter eight deals with the interesting question about the extent to which the Court accepts that neutral and generally applicable laws, which have restrictive effects on certain religions, entail violations of the right to freedom of religion or belief. A long drawn out discussion of conscious objectors is followed by a more general discussion in this respect. The case law reveals that in general the *de facto* stance of both the Court and the Commission is that such neutral, generally applicable laws do not breach Article 9. According to the author, the summary treatment of this issue by the supervisory bodies demonstrates a serious case of avoidance behaviour, in the sense that they do not want to deal explicitly with the controversial issues concerned. Evans correctly notes that in order for Article 9 to be effective, it must sometimes prevail over the existing legal order. However, up until now the Court and the Commission have not accepted that reasoning. In the same vein, the criticism can be formulated that the Court refuses to acknowledge the problem of indirect discrimination in the sense that a general law places a heavier burden on a particular group of people to obey it than it places on the population as a whole and may interfere to a significant extent with their ability to manifest their religion or belief.

To promote religious freedom adequately, the author promotes the least restrictive law approach in the sense that laws should be drafted in a manner that is least restrictive of religious freedom, "while acknowledging that sometimes the best way to achieve this is to draft a general law with scope for exemptions" (p. 192).

Finally, the concluding chapter nicely draws together the various criticisms developed in the preceding chapters and formulates a set of recommendations for potential jurisprudential developments flowing from that. Evans concludes on a positive note by enumerating certain positive trends in recent case law on Article 9 ECHR. On balance, the book offers a rich analysis of the freedom of religion under the ECHR and represents a valuable contribution to human rights literature.

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The Responsibility of States for International Crimes, by Nina Jørgensen, Oxford University Press, Oxford, 2000, ISBN 0-19-829861-7, 360 pp., UK£ 50

In 2000, the International Law Commission ('ILC') dropped its controversial Article 19 of the 1996 Draft Articles on State Responsibility. Article 19 had distinguished between an international delict and an international crime, defining the latter as

> an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.

The omission of Article 19 was not unforeseen by Nina Jørgensen, who comments on p. 262 of *The Responsibility of States for International Crimes* that "the ILC is considering abandoning reference to state criminality altogether in order to produce a set of Draft Articles on State Responsibility which is acceptable to most states." Jørgensen makes it clear that her argument does not stand or fall by Article 19. Instead, she proposes to demonstrate that the concept of state criminality is already moving from *lex ferenda* to *lex lata* through an analysis of international practice and doctrine since the World War I.

This analysis begins in Part I with a description of the legal developments since World War I, in which Jørgensen sets out to show that the concept of state criminality is found in this interwar period and formed a significant element of the codification attempts relating to international crimes and state responsibility. In Part II, Jørgensen argues that the concept of state criminality is "juridically feasible," after which she attempts to define the content of state criminality more specifically in Part III. At this stage she claims to reveal a "general principle of international law." In Part IV, she looks more closely at the practical feasibility of this principle. In Part V, she returns once again to an analysis of history and recent state practice to show that state criminality is an "emerging category of customary international law."

Jørgensen describes this general structure only in her conclusion (p. 279 *et seq.*), at which stage it became clear to me what had been bothering me about Part I. From the general precís of the work, Parts I and V appear identical – both go to show that state criminality was present or nascent in international law from at least 1918. My impression of Part I had been that it had not dealt with state criminality as such; that instead it had demonstrated the emergence within customary international law of a new type of *crime* rather than a new type of *perpetrator*. The new crimes are admittedly vital to the enquiry because they are 'systematic.' They are crimes which, by definition, require the involvement either of a government or at least of an organised political body. The only 'systematic' crimes recognised before World War I – war crimes – might sometimes

occur only through the decision of a command hierarchy (*e.g.*, an attack on an undefended town) but many can be committed by an individual soldier without command authorisation or even knowledge (*e.g.*, pillage of civilians). The new crimes of aggression, genocide and crimes against humanity, on the other hand, are intrinsically systematic and logically connected to the possible criminality of the 'system' (or state) as a unit.

Jørgensen covers these systematic crimes in detail. She begins her book with a discussion of the crime of aggression, from the *bellum justum* of Grotius to the first (failed) attempt to prosecute Kaiser Wilhelm II after World War I, to the Nuremberg and Tokyo Trials to the adoption of the Nuremberg principles by the UN General Assembly. Her discussion is extremely detailed and thorough, examining background material, the opinions of the world leaders at the various stages, and the specific legal issues raised at Nuremberg and Tokyo. The second chapter of Part I goes on to examine the viewpoints of the various international legal bodies which attempted to codify international criminal law, set up international criminal courts, and produce conventions on specific crimes. The discussion includes the introduction and critique of Article 19.

My problem with Part I was finding the connection between the descriptions of the various conceptions of systematic crimes and the concept of state criminality as such. While there is clearly an important connection between a crime of a nature requiring governmental/political complicity and the question whether responsibility for such a crime can attach to a state as an abstract entity, they are nonetheless two different things. Jørgensen does not tease out the connection between these two central concepts. She acknowledges that the existence of the crime is separate from the responsibility of the state clearly in Part V. Even in Part I, she discusses the responsibility of states for genocide as a separate issue connected to the crime of genocide (pp. 35–41). However, overall, she deals randomly with disparate legal issues connected to systematic crimes without drawing the various legal conclusions into a principled basis for state criminality. The thoroughness and detail of this section (and indeed of the entire work) is impressive, but I was still wondering at this stage what all the detail was for. It can, of course, be seen as a general, historical introduction to the types of crimes for which state criminality could come into play, but I doubt whether the existence of these crimes still need proving. They are already well acknowledged in the vast body of writing on international criminal law and reflected in the Statutes of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Court ('ICC'). To this extent, Part I does not add substantially to the already extant literature on international criminal law.

Parts II and III of the book set out to establish that state criminality is a legal possibility and to define its boundaries more clearly. Jørgensen starts by examining the already existing notions of communal responsibility – namely, criminal organisations as understood in the Nuremberg

Trials and the more recent development of the criminal responsibility of corporations. Under the Nuremberg Charter, once an organisation had been declared criminal by the Tribunal, individuals could be prosecuted for membership of that organisation. Jørgensen cites, but does not answer, the concerns of many states and lawyers about the nature of collective responsibility (pp. 64 and 68). She does, however, point out that, under the Nuremberg judgment, individuals could only be convicted of membership of a criminal organisation if they had some knowledge of the criminal purposes or acts of the organisation. She concedes that the concept of a criminal organisation remained controversial and its practical effect extremely limited, but nonetheless considers the Nuremberg experiment a "pragmatic and just" success (p. 68). She claims the Nuremberg model as proof that the "notion of group criminality is not necessarily a formula for injustice if the institutions are in place to enable it to operate effectively" (p. 69). But from Jørgensen's own description of the Nuremberg process (up to seven million individuals could theoretically have been prosecuted for membership of the organisations indicted at Nuremberg) the problem of institutional capacity seems insurmountable, and organisational criminality could not be applied unaltered to an entire state. Jørgensen herself seems to accommodate this criticism by suggesting that the principle of organisational criminality could be used against the members of a government once the government itself has been declared a criminal organisation.

Jørgensen's discussion of the criminal responsibilities of corporations covers the various models of corporate criminal responsibility already in use around the world, mentioning the advantages and problems of each model. She acknowledges that there is no universally accepted concept of corporate criminality and does not suggest which model should be used to impose criminal liability on the state. What she extracts from the state practice she has listed is instead that there is a "general principle" of law amongst states, which recognises the duality of corporate and individual criminal liability and can be used as a source of international law. As the criminal organisation model is no longer in use (and has not been proved to be practicable) and there is no uniform model of corporate criminality, we are still unsure what state criminality would entail and how it would be imposed.

In Part III, Jørgensen tackles this vacuum by turning to the concept of state criminality itself. She attempts first to identify legal indicia for a state crime, referring to the overlapping concepts of *jus cogens* and obligations *erga omnes*. As both concepts are still contested territory, she describes the different views advanced by writers and states of their scope, consequences and, indeed, existence. Her discussion is consistently detailed and thorough, although she often stops short of preferring one particular perspective over another, preferring to leave us with the various options. Her primary aim seems to be to establish through a compilation of the various viewpoints that a hierarchy of norms has been recognised in international law, of which international criminal law must form the apex.

Having posited a hierarchy of norms, Jørgensen evaluates various tests by which we can separate the more important from the less important norms. These include "seriousness," the "conscience of mankind," "elementary considerations of humanity" and "peace and security." Again, a pedigree is provided for each term and its various interpretations are discussed in detail. The vague and even ethereal nature of many of the terms is acknowledged. Nonetheless, Jørgensen concludes Part III with a suggested list of criteria and *indicia* for the differentiation of an international crime from an international delict (p. 161). It worried me that some elements, such as a "special effect on the conscience of mankind" are considered criteria, and not merely *indicia*, of a state crime, despite the acknowledged haziness of their definition (for example, Jørgensen acknowledges that there is "probably no 'universal' conscience of mankind, just as there is no 'universal international law'" – p. 122). A more in-depth consideration of the problem of assigning legal meaning to words on the fringe of law would have been useful. The dictum that 'hard cases make bad law' is relevant here. "The conscience of mankind" and "elementary considerations" both served to motivate for or carry out prosecutions after the two World Wars. There is clearly a sense that judges were forced in these cases to look beyond the law; to cover new terrain and import new terminology from the common language. They in effect took an arbitrary term from beyond the legal system in order to obey a deeper moral instinct. This may not be wrong in itself but is of doubtful value as a precedent because the term is not actually a legal one. Similarly, I doubt that much should be made of the use of the word "aggression" in the Allied conditions for the armistice after World War I (p. 10). Jørgensen herself notes that the Kaiser was ultimately not prosecuted, and that even the intended indictment did not aver that the Kaiser had committed a crime of aggression. The use of the term "aggression" by the Allies at this stage is more likely to be a rhetorical device, employed by governments to raise public support for a political rather than a legal process.

Before leaving Part III, Jørgensen devotes a chapter to the notion of Individual Criminal Responsibility, tabulating the various Draft Codes of Crimes produced since World War II and reporting on state and academic response to them. In this chapter she addresses fundamental objections to the whole concept of state criminality. She rejects the contention that, if states can only be held responsible in a civil sense, they cannot commit crimes. She contends that such an argument "finds the essence of the criminal law in a feature of its structure, rather than its function and intrinsic nature." (p. 153) While this is a valid and important argument, it also points to the need to define the "function and intrinsic nature" of criminal law clearly. As I have indicated above, I do not feel secure enough with the criteria for an international crime suggested by Jørgensen in Part III to have a firm sense of the "intrinsic nature" of this term. In addition, how can the "function" of criminal law be divorced from punishment? In the last two parts of the book, Jørgensen herself emphasises the connec-

tion between crime and punishment. Indeed, in Part IV, she sets out to prove that remedies directed at the state as such "can have the character of punishment" (p. 167) and details possible modalities for the punishment of a state, such as declaratory judgments and punitive damages. Jørgensen devotes a chapter (Chapter 14) to proving that "the idea that pecuniary reparation can exceed the limits of restitution, and in some instances go beyond even moral damages and amount to punishment, would seem to be a general principle of law […]" (p. 207) She appears to remain within her own theoretical framework (namely, that the principle that a state can commit a crime is independent from whether a state can be punished) by emphasising that Part IV is about the "practical implementation" of a principle she has already established in Part III. On the other hand, by assuming that punishment "should" follow on a state crime, and, indeed, that this is the only way to "bring practice in line with principle" (p. 207), she is assuming that crime and punishment are inextricably linked. This is sleight of hand. Either crime and punishment are independent concepts, in which case Jørgensen must establish through a separate argument that punishment *should* follow on a state crime, or the two concepts are inextricably intertwined and the impossibility of punishing a state would imply that state criminality is an impossibility as well. Jørgensen touches on theories of punishment only briefly, and passes fairly lightly over two serious problems connected to punishing a state: first, that collective punishment is inherently unjust (p. 171); and second, that the domestic model of criminal law cannot be transposed into international law (pp. 256–257). A related problem, which Jørgensen seems to assume can be avoided, is that pariah states will be created once they are condemned as criminal, states which will then experience very little sense of obligation to live by the rules of the community which has spurned them (pp. 185–186).

This last issue raises the spectre of who may have the authority to make a decision that a state has committed a crime. Jørgensen discusses the various options in Chapter 15 where she seems to accept, slightly naively, the beneficence of the world order. For example, she suggests that state crimes should probably not be punished in domestic courts because of the political nature of the trial (p. 229), thereby implying that the issue will become depoliticised in an international forum. But the political stakes will be higher in an international forum and the political element inescapable. For state criminality to be a workable notion, all states will have to accept that the forum which will determine the presence or absence of a state crime can rise above political prejudices and attain a possibly mythical objectivity. The still energetic claim by states to their sovereignty indicates that this trust is not yet there.

In Part V, as mentioned above, Jørgensen returns to recent state history and practice to identify the emergence of a new category of international crime, concentrating this time on the "state responsibility" element. Part V contains a readable and informative analysis of how the international community has held particular states responsible for international crimes

such as apartheid and state-sponsored terrorism, followed by an in-depth analysis of the *Application of the Genocide Convention Case* and a final chapter on the Genocide Convention itself.

Jørgensen's book is detailed, thorough, extremely well-researched and densely written. I did on occasions struggle to find the central argument amidst the reams of differing opinions on points for which the connection to state criminality was not immediately apparent. I was reminded of Jørgensen's own citation of Fitzmaurice's suggestion (p. 162) that "[a] rule answers the question 'what': a principle answers the question 'why'. This book suggests a plethora of 'what's'," but I am not sure it answers the question 'why.' To some extent, Jørgensen seems to work on an unstated assumption that the punishment of state criminality is a good thing. The book deals fairly superficially with some of the principled objections to state criminality, a superficiality which perhaps corresponds to the uncertainties in the principles which Jørgensen is attempting to shape. However, Jørgensen makes it clear that the principles she sets out can only really take shape through custom or judicial application (p. 162). Her extensive discussion has certainly prepared the ground for the latter.

*Cathy Powell**

Human Rights Fifty Years On – A Reappraisal, edited by Tony Evans, Manchester University Press, Manchester, 1998, ISBN 0-7190-5103-7, 237 pp., UK£ 14.99

Human Rights Fifty Years On is a collection of essays published on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights. The editor, Tony Evans, makes it quite clear from the outset that the authors take a less sanguine view than that taken by other mainstream writers on human rights. He asserts that unlike other publications, this particular book is not meant to celebrate the occasion of the fiftieth anniversary. Much rather Evans and the other authors seek to rethink the rights and duties of the state in the context of safeguarding human rights in an age of globalisation. Furthermore one of the recurring themes of the book is that of the stark divergence between legal theory and the actual practice of safeguarding and enforcing human rights. In what for the most part represents a radical critique of the present system, human rights are said to represent western ideals which are being driven by western hegemony and advantage those already privileged economically and otherwise. Evans sets the aim of his book as the interrogation of the modern manifestation of human rights which must include "an analysis of interests, power and hegemony" (p. 1).

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The book contains nine essays which have been grouped into four sections. Part One deals with state power and hegemony and the effect this has on human rights policy and enforcement. Part Two examines the limitations of legal theory in practice, while Part Three focuses on how human rights can be used as an exclusionary tool, especially where women are concerned. Part Four concentrates on the future of human rights in a globalising world.

Each of the nine chapters shall now be briefly reviewed.

The editor, Tony Evans, authors the first chapter, serving both as an introduction to the following chapters and a critique in its own right. The purpose of human rights is defined as the creation of conditions for individuals and peoples to lead a dignified life. Fifty years after the Universal Declaration of Human Rights, Evans warns of a static view on human rights, where the human rights debate is reduced to legal technicalities and modes of implementation. But human rights are not static, they are not achieved on any given day, much rather they have to be created by people. Evans names the American and French Revolutions as the first modern human rights movements and as examples of creating such rights by a shift in the power structure.

Evans then moves on to discuss human rights in a post World War II hegemony. The United States is said to have been the post war hegemon, with an interest in expanding its sphere of influence, economic and otherwise. Now, in the post Cold War era, Evans fears that the powers of states are diminishing to a purely reactionary role with international businesses assuming the lead role in defining policy. Globalisation is being prioritised over human rights, as is economical development. Evans also feels that a group of international organisations and institutions such as the World Bank, World Trade Organization ('WTO') and G8 are setting out the global rules of conduct without proper democratic legitimisation. However, the growing acceptance of the proposal that human rights can be secured through free markets, makes it harder for those opposed to globalisation and rapid economic growth and development to be heard – in itself a human rights violation.

Overall Evans' view is that human rights are only supported in so far as they promote the aims of the governments involved. Toward the end of the article he goes on to make some far reaching claims, such as "the structures and practices of globalisation are the cause of most violations of human rights" (p. 17), as is nationalism, which has been rising since the collapse of the USSR. However, in bringing the term 'ethnic cleansing' into connection with present day Germany and Austria (p. 19), the author seems to have ventured into a sensationalist realm.

In his contribution, Noam Chomsky examines the United States' role during the fifty years since the Universal Declaration. He contends that American aid to Europe after World War II and to other parts of the world since then was and is meant to improve the investment climate for US direct investment – quite significantly Chomsky alleges a "secondary cor-

relation between aid and egregious violation of human rights" (p. 27). Sanctions as a means to counter human rights abuses are said to be applied very selectively and often with loopholes deliberately attached. Similar to Evans, Chomsky feels that economic arguments are given precedence over human rights. The Boeing company is accused of utilising prison labour and the Organization for Economic Cooperation and Development ('OECD') and WTO agreements are said to undermine human rights. And even though China's human rights abuses are regularly criticised by the US, China is not called into account, except in the case of prison labour exports – and according to Chomsky these are only contested due to economic considerations. Finally attention is turned to the domestic US where practices on crime and punishment, as well as the fight against drugs are heavily criticised. In conclusion Chomsky finds that the US' past human rights record at home, as well as the current record abroad are scandalous. The US is condemned for its relativism in picking and choosing 'convenient' human rights and for its hypocrisy in criticising others who do the same.

In her excellent essay entitled "The Limits to a Rights Based Approach in International Ethics" Fiona Robinson examines the moral and political philosophy of rights in an environment of globalisation. With the spread of capitalism and liberal democratic institutions, values such as individualism, autonomy and liberty have gained a moral high ground in the human rights debate. However, these are essentially negative rights, providing individuals with a right not to be interfered with. Robinson criticises the fact that this negative rights based approach ignores the interdependent nature of human life which often precludes people from being truly free. Furthermore simply stating that individuals have a right to food and shelter does not establish who is to provide all these things. In conclusion Robinson argues that the concept of right can only support a negative, non-interference approach as it holds no moral value, simply put, it is just a rule, a procedure. She appeals for care based ethics and in order to achieve what rights alone can not achieve.

Norman Lewis feels that human rights have gained a new importance in "a more dispirited and fragmented" (p. 77) post Cold War world as the existence of such rights in general can guard against a breakdown of law and order. However, in his well-refined essay Lewis leads the reader through history and legal philosophy in order to suggest a more sinister outcome. Paradoxically as it may sound, Lewis asserts that the ascendancy of the human rights discourse threatens these rights themselves. He puts his theory to the test by examining the United Nations Convention of the Right of the Child. Central to all aspects of the law is the legal or the right-bearing subject, however children's rights are meaningless unless they can be exercised which is quite a different matter, not least because children are not socially constituted legal subjects. The second fallacy to which Lewis points is that there is no universal childhood, especially not one that is based on 'generous' western models. By codifying individual autonomy,

and even supposedly conferring rights to non-legal subjects, human rights are leading to a new kind of individualism, characterised by social and political non-participation, with the legitimacy of states being eroded. Unfortunately, and by his own admission, space constraints preclude a full discussion of some of the issues raised by Lewis; certainly the issue of causality between the human rights ascendancy and the erosion of democratic rights warrants a more comprehensive account.

Christine Chinkin argues that human rights are regularly and routinely infringed and that the current individualistic rights do not lend themselves to improving the situation. The formal bestowal of rights creates an illusion of equality that disregards other prevalent circumstances which prevent these rights from having their desired impact. Chinkin criticises the doctrine of state sovereignty as a source of conflict where individual rights are breached. The question of humanitarian intervention by outside forces poses a similar conflict and can be open to manipulation or selective intervention. Specifically, Chinkin also criticises conflicting rights, such as the non-discrimination of women and the right to religious freedom – these situation can only be solved by subjective value choices and therefore the law is inadequate. However, subjective value choices tend to favour those already in positions of power which precludes equality. While she makes it clear that more fundamental changes are necessary to restructure the allocation of power necessary to make human rights more of a practical reality, concrete proposals only include an appeal for legal and other education programmes to advance the proper application of human rights laws.

In their feminist essay "Are woman human? Its not an academic question" V. Spike Peterson and Laura Parisi examine the role of gender within the human rights context. This is not a standard feminist critique in that human rights are not seen simply as male rights, even though the outcome is arguably similar. The analysis focuses very much on the term heterosexism which means the institutionalisation of heterosexuality and how historically heterosexism has become a main characteristic of human rights. Consequently human rights within a heterosexist frame are said to marginalise woman in three generation of rights. The first generation is that of civil and political liberties, the second are economic, social and cultural rights and thirdly woman are marginalised in the context of collective or group rights. The main recurring argument is that woman are naturally subordinate in a heterosexist environment. The authors make it very clear that they do not wish to dismiss the progressive possibilities of human rights but merely point out their limitations within a heterosexist system.

In her essay "International financial institutions and social and economic human rights: an exploration" Caroline Thomas seeks to examine the effectiveness of social and economic rights in the current liberal economic structure. Both globalisation in general and the international financial institutions in particular are placed under close scrutiny. Globalisation is said to have ramifications well beyond the economic sphere with neoliberalism

causing ever greater inequality. Similarly the international financial institutions are said to "understand the world through neoliberal tinted glasses" (p. 166). In an extensive study, Thomas investigates aspects ranging from the legitimacy of the International Monetary Fund and the World Bank to the failure of their structural adjustment programmes. In particular she criticises the fact that globalisation is undermining a state's ability to apply social and economic rights, the neoliberalist and laissez-faire attitude of the international financial institutions only further diminishes the role of the state. Structural adjustment policies, opening markets to foreign and private investment, have lead to a weakening of the state, particularly in what she calls "the South" and former Eastern-bloc countries. Consequentially entitlement to economic and social rights is no longer determined by governments but rather by economic factors, determined by "transnational capitalist actors" (p. 181).

Anthony McGrew comes to a similar conclusion, however he confines his attention to the implications of globalisation which he describes as the stretching and deepening of global interconnectedness with direct effects on power relationships. He perceives the intensification of globalisation as a threat to the states' ability to promote and protect human rights, or, in his own words: "For, under conditions of intensifying globalisation, the capacity of states and the global human rights regime to ensure compliance with established norms of social, economic, civil, political and cultural rights is significantly eroded." (p. 194.) Apart from states' growing incapacity to safeguard human rights, McGrew also suggests that governments are losing their autonomy to pursue economy strategies which in turn has specific repercussions on social and economic rights in particular. Power relations are also stretched to the extent that decisions tend to be made at a greater distance from the subjects that experience their consequences and decisions in one country or continent can produce profound effects on other countries often in other continents. He feels that the forces of globalisation need to be marshalled but also acknowledges that the appearance of such forces has stimulated debate on the nature of rights and democracy.

John Galtung sets out a very ambitious, some might say idealistic, course towards globalised human rights and global citizenship, including democratic institutions and elected representatives. The themes and arguments found in Galtung's essay are along similar lines as those found in the other essays, singling out globalisation – or privatisation as he sometimes calls it – as a major cause for the erosion of state sovereignty. Galtung arrives at his conclusions by examining the three relationships between the concepts of 'Third World,' 'human rights' and 'post-1989.' As some of the other authors, he isolates the individual and western nature of rights as a serious predicament. Firstly, satisfying individuals may not change the class structure of the system and secondly, the western nature of human rights underlines a general power asymmetry. However, unlike other contributors, Galtung holds out a much more positive view as to

the final outcome. He feels that in spite of globalisation or perhaps because of it – in a strangely unforeseen way – forces which are being suppressed on the state level, such as organised labour, women and consumer organisations may reappear as a potent force on the international level with a wide debate on globalised human rights and global citizenship ensuing.

This publication certainly offers a welcome alternative to other, more congenial and celebratory volumes and serves as a good introduction to the complex and often problematic world of human rights law. However, while reading this book it also becomes plainly clear that it is much easier to describe shortcomings than make viable proposals for improvement. It also seems somewhat strange that much emphasis is placed on the ill-effects of globalisation and the emergence of non-state actors, while in reality the causes for most abuses lie with repressive governments. This apparent conflict can – at least in part – be traced back to a lack of consensus as to what globalisation actually means – certainly no clear definition emerges from the book. There are quite a number of further contradictions between the views of the various authors which leaves the reader with a somewhat discordant impression of the book. Similarly some authors, such as Chomsky descend into digressive denouncements while others like Robinson present a much more objective and well reasoned perspective, clearly adding to the book's contradictions. It may be surmised that the discernible confusion emanates from the fact that the contributors have widely varying views on how to improve the current system which in turn suggests that the problems with the current system have themselves not yet been adequately expounded.

Apart from the problems of theory and practice, the one issue that emerges consistently is that of the hegemony and the substantive influence such hegemony has on how human rights have evolved and are still developing. Not withstanding this review's criticism above, it may still well be that globalisation – or at least one particular definition of it – becomes the new hegemon and will have a fundamental impact on human rights – or – as most of the contributors suggest – that it already has had such an impact. Ultimately, just as one would agree or disagree with specific views portrayed in this book, only time will tell how much foresight these authors have shown. In the meantime *Human Rights Fifty Years On* serves as a critical and thought-provoking starting point in any study of the future of human rights.

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A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission, by Alex Boraine, Oxford University Press, Oxford, 2001, ISBN 0-19-571805-4, 484 pp., UK£ 20

This book belongs on the shelves of those interested in issues of accountability, truth-telling and reconciliation in societies emerging from pasts characterised by human rights violations. It comes from the pen of Alex Boraine, deputy chairperson of the now suspended South African Truth and Reconciliation Commission ('TRC') (http://www.truth.org.za/). Boraine, church, business, political and civil society leader, tells his, an insider's, story of the genesis, establishment and life of the TRC, and offers his views on frequently problematic issues in such transitions, including amnesties, truth-telling, reconciliation and the debate on restorative versus retributive justice.

Boraine did not write the book to tickle the fancy of international lawyers. Some questions interesting and dear to international lawyers are touched upon, of which some are highlighted below when briefly providing a chapters' over-view of the book, but no in-depth account and legal analysis of these are offered.

The book is divided into an introduction, eleven chapters, and a conclusion; useful endnotes, a select bibliography and a fairly complete index are also provided for. In Chapter 1 Boraine tells of the conception from within the African National Congress ('ANC') of the idea of a truth commission, the role played by individuals and civil society in giving flesh to it, and its adoption by the first democratically elected government. Reference is also made to efforts involving some senior ANC members to set up an equivalent of the Nuremberg trials, and how these were overtaken by political negotiations (pp. 13–14). Chapter 2 tells of the difficult drafting process of what became the bedrock Promotion of National Unity and Reconciliation Act of 1995 (the 'Act'), including the successful efforts to democratise the drafting process and to ensure that the amnesty committee would conduct its work in public.

Chapter 3 describes the tremendous effort required to get the TRC off the ground. Chapter 4 describes the victim hearings before the human rights violations committee, with Boraine highlighting the distress that the narrow definition of "gross violations of human rights" in the Act caused (p. 107). The amnesty committee and its hearings, and the Constitutional Court's ruling that the amnesty provision is consistent with international law (*Azanian Peoples Organization (AZAPO) and others* v. *President of the Republic of South Africa and others* (CCT17/96 (25 July 1996)) are also dealt with. In Chapter 5 Boraine discusses the TRC's institutional and special hearings, aimed at addressing the broad responsibility of institutions for the climate in which individuals committed violations, which *inter alia* involved the former ruling National Party, the ANC, the armed forces, and the business, legal and health communities. Chapters 6 and 7 tell how the TRC dealt with the challenges posed to the integrity of the

TRC by the former state President, P.W. Botha and Winnie Madikizela-Mandela.

In Chapter 8 Boraine sets out a number of favourable conditions which helped the TRC to achieve a degree of success in relation to its stated objectives, and the unique features which distinguish the TRC from other similar processes. Those features include that amnesty formed part of the TRC's proceedings and did not follow or lead to general amnesty, the public nature of the proceedings and the public naming of the alleged perpetrators (pp. 269–275).

From an international lawyer's point of view, the remainder of the same chapter is quite interesting. As Boraine succinctly puts it: amnesty was made possible in exchange for truth (p. 275). Amnesty was granted on an individual basis only, following a full disclosure and giving of very detailed information relating to the specific human rights violations committed during a fixed period, with applicants in most instances having to appear before the amnesty committee. Only those acts that were demonstrably political according to strict criteria qualified (pp. 275–277). He notes that those international human rights lawyers who support the TRC's approach to the granting of amnesty, do so reluctantly, strongly emphasising South Africa's unique circumstances for fear that other transitional societies may want to follow suit (pp. 277–279). Having discussed a number of advantages to prosecution over granting amnesty, he deals with its downsides, referring, *inter alia*, to the arbitrariness that inevitably characterises selective prosecutions (pp. 280–283). It is with reference to the situation of tens of thousands of Rwandese awaiting trial in crude and inadequate conditions that he remarks: "Thus, ironically, the search for justice is shot through with injustice." (p. 282; reference is later briefly made to the Rwandan local community justice (*gacaca*) process to bring most of those incarcerated more quickly to justice: pp. 407–409).

He then sets out to explain why South Africa chose to opt for the approach of making the granting of individual amnesty part of its truth commission process (pp. 283–286). Boraine identifies as one of the advantages that the TRC model offers over the benefits of prosecutions that it has been able to secure both qualitatively and quantitatively information far beyond what any trial could have elicited (p. 286). In discussing differences between trials and truth commissions, he expresses a clear general preference for the latter, or in cases of "genocide or 'ethnic cleansing'" like the former Yugoslavia and Rwanda, for providing additional mechanisms to bring about a measure of healing and unity (pp. 292–297). In his view the TRC with its amnesty provisions, "meets international obligations in a number of important respects": truth has consistently been sought not only about victims but also about perpetrators; the need for the development of a human rights culture has been stressed; a comprehensive policy of reparation is before parliament and awaits implementation; full disclosure in the amnesty process has been emphasised; further violence may have been prevented; the decision against amnesia and trials was

democratic; the 1949 Geneva Conventions apply only to international armed conflicts, not to conflicts such as South Africa's; and "any technical obligation" upon South Africa to prosecute those guilty of gross human rights violations on the basis of the First Additional Protocol to the Geneva Conventions falls away as far as the period of the TRC is concerned, because South Africa signed it only in 1995 (pp. 297–298).

Chapter 9 deals with responses to the interim TRC report, including the challenges to it by former President F.W. de Klerk, the ANC itself and from many victims' organisations. In Chapter 10 Boraine discusses questions relating to reconciliation, including whether the TRC succeeded in this aspect of its work. In Chapter 11 the role that the South African model may play in other conflict-ridden societies, in particular in the Balkans, Rwanda and Northern Ireland, is considered. It is in this context that Boraine notes that despite the "heavy emphasis on the duty to punish, the fact of the matter is that, in the majority of transitions, the deciding factor has not been international law. Many scholars and commentators argue that, in practice, decisions made by transitional governments around issues of retroactive justice are not choices at all and are little affected by moral or legal considerations." (pp. 381–382.) In the conclusion, when cautioning that consideration must be given to the question whether the approaches to retributive and restorative justice are complementary or contradictory, he expresses the hope that when the International Criminal Court comes into being, "it will not, either by definition or approach, discourage attempts by national states to come to terms with their past […]. It would be regrettable if the only approach to gross human rights violations came in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights." (p. 433; *also see* p. 400).

One is left with a sense that as an insider, Boraine could have told so much more about the important debates and issues that shaped how the TRC came into being and how it functioned. Perhaps because he does not offer much new in the stories he tells or in his insights into transitional issue in general, the impression is formed that many problematic aspects of the TRC and other transitional issues are dealt with in a simplistic and superficial way. The book also appears to have been written in some haste, or that its chapters, perhaps written over some time, were compiled without ensuring that it presents well as a whole. One irritating feature of the book is often unnecessary and long quotes, including from Boraine's previous writings and speeches; Oxford University Press could have edited the book better. Another irritating feature is that many instances where international law is touched upon contain either inaccuracies or bespeak a basic lack of understanding of even its basic concepts. Boraine, who is not a lawyer by training, perhaps could have asked a friend in the legal community to consider these parts.

Notwithstanding these criticisms, from an international lawyer's point

of view, in particular two impressions from the book remain. The first is that international law did not really feature in guiding him, and the others intimately involved with him, in the TRC process. The second is that international law, in order to be just and to establish a role and legitimacy in such transitions, must allow for approaches other than prosecutions. Boraine succeeds in making the point that justice, and not only negotiation politics, would often steer leaders in such transitions away from prosecutions.

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The views expressed herein are those of the author and not of the ICTY or the UN.