BOOK REVIEWS

La Charte des Nations Unies - Commentaire Article par Article, 2e Édition, Revue et Augmentée - by J.-P. Cot & A. Pellet (Eds.). Economica, Paris & Bruylant, Bruxelles, 1991, ISBN 2-7178-1918, 1571 pp., FF 350.-.

Charta der Vereinten Nationen - Kommentar - by B. Simma (Ed.). Verlag C.H. Beck, München, 1991, ISBN 3-406-33836-4, 1218 pp., DM. 398.-.

The Charter of the United Nations - A Commentary - by B. Simma (Ed.). Oxford University Press, Oxford, 1994, ISBN 0-19-825703-1, 1258 pp., £ 148.40.

For a considerable period of time, students of the UN, international lawyers in particular, did not have any update commentary on the UN Charter at their disposal. The third and last edition of the classic commentary by Goodrich and Hambro (first edition published in 1946) was published in 1969 (Simons being the third co-author of this third edition).[1] Only in 1985 a new commentary was published: *La Charte des Nations Unies*, edited by Jean-Pierre Cot and Alain Pellet, of which the second edition has been published in 1991. This was followed by the commentary in German, edited by Bruno Simma (1991), which was translated and updated into an English language commentary (1994).

Not only French UN specialists have contributed to the Cot/Pellet commentary; the 82 authors include experts from 18 countries. According to the editors, "la tradition juridique française pouvait apporter une contribution utile à une meilleure connaissance de la vie des Nations Unies" (p. ix). *La Charte* comprises 1456 pages in which the Charter provisions and subsequent UN practice are analysed in detail. In addition, it contains a brief contribution by Guy de Lacharrière (former Vice-President of the International Court of Justice) entitled 'Lacunes ou cohérence de la Charte?', as well as a brief note concerning linguistic aspects of the Charter. The second edition of this commentary covers developments until 1989, and therefore could not include UN practice since the (Second) Gulf War. An 'Appendix' only reproduces an article by the editors originally contributed to *Le Monde Diplomatique* of November 1990 in which the authors warn against the euphoria resulting from the pro-active role played by the Security Council following the invasion of Kuwait ("La belle unanimité que

1. L.M. Goodrich, E. Hambro & A.P. Simons, Charter of the United Nations: Commentary and Documents (1969).

révèle la crise du Golfe ne doit pas faire illusion" (p. 1472)). Finally, this commentary contains a brief bibliography, a subject index, a chronological index of cited conventions and resolutions, and a table of cases.

The German and English commentaries edited by Simma basically have the same structure. Reference will be made below only to the more recent English version, except where the German edition is different. The Simma commentary was written by 60 German, Austrian, and Swiss experts. According to the editor, it demonstrates the particular interest which international lawyers from the German-speaking countries take in the world organization (p. vii). The preparation of the English version must have been extremely laborious since it is not only a translation, but also an updated version of the German text. In view of the rapid developments since the end of the Cold War, the editor compared "the elaboration of a Charter commentary in such a turbulent period to shooting at a moving target" (p. vii). The authors had the opportunity to update their contributions until 1993 and early 1994. This commentary starts by reproducing the text of the UN Charter and the Statute of the International Court of Justice (ICJ). Next, it contains contributions on the 'History of the UN' (by Grewe, pp. 1-23) and on 'The Interpretation of the Charter' (by Ress, pp. 25-44). The core of the book is the 1155-page detailed commentary on Charter provisions. In addition, the Rules of Procedure of the General Assembly are included in an annex (the German edition also reproduces the Provisional Rules of Procedure of the Security Council). Finally, there is a table of cases (not in the German edition) and a subject index.

Both commentaries, in particular the Simma work, contain helpful annexes, such as lists of the Presidents of the General Assembly (pp. 379-380 in Simma; pp. 419-420 in Cot/Pellet), detailed figures on the regular sessions of the Assembly (not in Cot/Pellet; pp. 354-356 in Simma), and on special and emergency special sessions (duration, number of plenary meetings etc.: pp. 357-359 in Simma, pp. 409-410 in Cot/Pellet). Only Cot/Pellet (p. 372) has a list of the main contributing member states as well as a list of the size of the ordinary budget. On the other hand, only Simma has an overview of the number of resolutions adopted and not adopted by the General Assembly, as well as the voting modalities, indicating how many resolutions have been adopted each session by a unanimous vote or without a vote, by two-thirds majority, and by simple majority (pp. 325-327). The French commentary provides figures on the use of the veto power in the Security Council (pp. 509-510). In the Simma study, such figures are

deliberately left out (p. 466).

One difficult problem to solve for any Charter commentary is how to deal with peace-keeping operations, which are not mentioned in the Charter but were created and developed in practice. Simma's study has a separate section on peace-keeping which is placed between the commentaries on Chapter VI and Chapter VII of the Charter, in line with the popular observation that these operations are based on 'Chapter VI½' of the Charter. This section - comprising almost 40 pages, 245 footnotes, and a six-page bibliography - contains a very concise but nevertheless complete overview of the legal aspects of peace-keeping operations. Such a separate section is unfortunately lacking in Cot/Pellet, which only incidentally refers to particular legal aspects of such operations.

It is inevitable that extensive works like the ones reviewed contain omissions and mistakes. For example, the Simma book consistently refers to the right to self-determination in the UN Charter (as is done in the German edition), whilst the French commentary is right in drawing a distinction between the *principle* of self-determination and the *right* to self-determination. The Charter only refers to the principle of self-determination. The right to self-determination has only been accepted subsequently, for example in resolutions of the General Assembly, in particular those adopted in the context of sensitive discussions about the process of decolonization, in human rights conventions and in the case-law of the ICJ. Another example concerns the section devoted to the procedure for the examination of credentials by the Credentials Committee of the General Assembly. The English commentary extensively discusses this procedure as well as a number of controversial cases which occurred in practice. However, no reference is made to the fact that, for political reasons, the Credentials Committee of the Assembly was unable in 1991 and 1992 to adopt a report. Finally, a rather unfortunate mistake has been made in the English commentary on Article 25: "[b]y SC Res. 662 of August 2, 1990 the SC decided that, according to Art. 39 of the UN Charter, an act of aggression has been committed by the Iraqi government" (p. 416). The number of this Resolution is 660 and, more importantly, the Council did not qualify the Iraqi invasion as an act of aggression but as a breach of the peace. In the comments to Article 39, references to Resolution 660 are lacking.

These commentaries are of invaluable assistance to any student of the UN, in particular for international lawyers. Even though their general purpose is similar - to present an article-by-article analysis - the books are complementary in a number of respects. Apart from the

difference of language, the different dates of publication are important. Only the 1994 Simma commentary includes references to UN practice in a turbulent post-Cold War period. The emphasis in the French book is somewhat more on broad conceptions, ideas, perspectives, while the Simma works appear to be somewhat more *gründlich* in their extensive and detailed references to literature and practice. This difference in emphasis is seen very clearly in the additional contributions in both commentaries: thoughtful contributions in the French book, and extensive, richly documented articles about the history of the UN and the interpretation of the Charter in the German work (the contribution by Ress on interpretation - 20 pages, including a one-page bibliography, 175 footnotes - is excellent (pp. 25-44)). The difference in emphasis also comes forward in the fact that the comments on the necessarily vague and broad terms of the Charter's Preamble cover four pages in the Simma work (pp. 45-48) and 22 pages in the Cot/Pellet book (pp. 1-22). Likewise, the comments on the purposes of the UN laid down in Article 1 of the Charter are much more concise in Simma than those in Cot/Pellet, which includes fine essays by the current President of the ICJ Mohammed Bedjaoui, and the late Manfred Lachs, former President of the ICJ. The conclusion seems therefore warranted that these rich commentaries offer students of the UN different, complementary perspectives on the Charter as well as the opportunity to obtain an in-depth knowledge of the rules and practice of the Charter as a living instrument.

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Institutional Dynamics of European Integration - Essays in Honour of Henry G. Schermers, Volume II - by D. Curtin & T. Heukels (Eds.). Martinus Nijhoff Publishers, Dordrecht Boston /London, 1994, ISBN 0-7923-3160-5, 649 pp., Dfl. 295.-/£ 166.-.

This book consists of five Parts. They are: Part I 'Constitutional Issues': *The Dialectic Relationship Between Institutional and Substantive Tasks in and After the Treaty of Maastricht: Some Lessons From Henry G. Schermers and From Jean Monnet* (P. VerLoren van Themaat); Fin-de-Siècle *Europe: On Ideals and Ideology in Post-Maastricht* (J.H.H. Weiler); *The Quest for Subsidiarity* (T. Koopmans); *The Community's Constitution - Rigid or Flexible? The Contemporary Relevance of the Constitutional Thinking of James Bryce* (D.A.O. Edward); and

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Alternative Approaches to Constitution Building: The Judicial Committee of the Privy Council (R.C. Lane). Part II 'Institutional and Legislative Questions': *The European Council* (H.J. Glaesner); *The Role of the Council of the European Union* (A. Dashwood); *The Court of Justice of the European Communities After the Year 2000* (P.J.G. Kapteyn); *Democratic Decision-Making in the European Union and the Role of the European Parliament* (G. Ress); *The Court of Auditors* (D. O'Keeffe); *The Configuration of the European Union: Community Dimensions of Institutional Interaction* (T. Heukels & J.W. de Zwaan); *The Institutional Provisions of the EMU* (P.J. Slot); and *The Quality of Community Legislation Drafting* (A.E. Kellermann). Part III 'Judicial Protection and Enforcement': *Omnipotent Courts* (A. Barav); *Court of Justice: Judicial Protection and the Rule of Law* (G. Bebr); *The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords* (W. van Gerven); *Form and Substance of the Preliminary Rulings Procedure* (K. Lenaerts); *To Refer or not to Refer: About the Last Paragraph of Article 177 of the EC Treaty* (B.H. Ter Kuile); *Judicial Protection Against the Member States: Articles 169 and 177 Revisited* (G.W.A. Timmermans); *The Investigative and Supervisory Powers of the Commission* (T.P.J.N. van Rijn); *Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script* (D.M. Curtin & K.J.M. Mortelmans); and *Treaty Violations and Liability of Member States and the European Community: Convergence or Divergence?* (D.F. Waelbroeck). Part IV 'General Principles of Law and Human Rights': *The Procedural Guarantees in the Recent Case-Law of the European Court of Justice* (J. Schwarze); *Rights and Defence in Competition Cases* (R.H. Lauwaars); *Is There a General Principle of Abuse of Rights in European Community Law?* (L. Neville Brown); *The Significance of the Non-Discrimination Principle for the Common Agricultural Policy: Between Competition and Intervention* (R. Barents); *The Protection of Human Rights under the Maastricht Treaty* (G. Gaja); and *European Community Law and the European Convention on Human Rights* (F.G. Jacobs)". Part V 'International Developments': *Groping Towards Europe's Foreign Policy* (E. Denza); *Closing the Uruguay Round* (K.R. Simmonds); *The European Community at UNCED: Lessons to be Drawn for the Future* (L.J. Brinkhorst); *The Community and State Succession in Respect of Treaties* (P.J. Kuyper); and *Musings at the Grave of a Federation* (E. Stein).

Those who know the man to whom this immense book of essays is dedicated as their Professor of European law and International Institutional law, like I do, will

know that Professor Schermers is an extraordinary, inspiring teacher and a respectable person. For this reason and because the editors of *Institutional Dynamics of European Integration* succeeded to compile a tremendously interesting group of essays, it was a great pleasure to make a short review of this book. It forms part of a 'trilogy' of Essays in Honour of Henry G. Schermers, the other two being: *Towards More Effective Supervision by International Organizations*, edited by Niels Blokker and Sam Muller (Volume I) and *The Dynamics of the Protection of Human Rights in Europe*, edited by Rick Lawson and Matthijs de Blois (Volume III). These different series of works for the *Liber Amicorum* for Henry G. Schermers symbolize the broad expertise of Professor Schermers.

Institutional Dynamics of European Integration provides a complete overview of the legal institutional aspects in the intergovernmental period: between the Treaty of Maastricht and the Intergovernmental Conference of 1996. Because it is impossible to make a proper short review of all the 33 essays of this book of 649 pages, I will only highlight a very few of the remarkable essays which might give an impression of the character of the book.

Part I and Part II, 'Constitutional Issues' and 'Institutional and Legislative Questions', entail the changes in the constitutional and institutional structure of the European Union which resulted from the Treaty on European Union (TEU). Weiler argues that the problem of the European Union is a crisis of ideals. In his expressive saying: "[t]he Single European Act, with its Single Market back-to-the-future message, a latter-day facelift to the original objective of a Common Market, managed to claim a last twirl with yesteryear's ideal. But it was a dance with a cadaver. The reception by the public of the far more ambitious Maastricht Treaty is the writing on the wall - the 'Europe' of Maastricht is an ideal which has lost its mobilizing force, it is a force which has lost its mobilizing ideals" (p. 24). In his opinion, the three ideals for the European integration have been: peace, prosperity, and supra-nationality. On the basis of his analysis, Weiler concludes that there is a "loss of the deeper *raison d'etre* of the enterprise, the disconcerting realization that Europe has become an end in itself - no longer a means for higher human ends" (p. 38). Therefore he offers three alternative perspectives. One approach "reconceptualizes the Community not as a new polity for European citizens, but as a technological instrument, an agency, for the resolution of post-industrial problems such as environmental protection, transnational trade, transport and the like which transcend national boundaries. [...] A second approach,

deeply historical, would find a new politics of meaning for the Community in its putative responsibility towards the East. [...] A third and final approach would be one which would explore the communitarian, as opposed to liberal, strand in the European Community ethos" (pp. 39-40).

Part III provides for an examination of the case-law of the Court concerning 'Judicial Protection and Enforcement'. Curtin and Mortelmans, who look at the relationship between community law and the laws of the member states not from the 'top-down' view, relating to the constitutional and theoretical side of this relationship, but from the 'bottom-up' perspective, which concentrates on the application and enforcement of community law. Curtin and Mortelmans reveal three generations of judgments of the Court with regard to the application and enforcement of community law: "[d]uring the *first* phase of the case-law of the Court (*Van Gend en Loos*)[1] Community law affected - and indeed still affects, since the generations are non-linear - national economic law provisions, a logical consequence of the primarily economic goals and methods of the Treaty of Rome. A treaty provision with direct effect, a regulation with exhaustive rules or a total harmonization directive make national (further-going) measures inapplicable" (p. 432). "The *second* phase dealt - and still deals - with national non-economic provisions, such as remedies (*Rewe, Greek Fraud* case),[2] unjust enrichment (*Just*)[3] etc. This case-law did not modify the classical national playground, but by applying the non-discrimination and assimilation principle it made national laws applicable to Community law conflicts" (p. 432). The underlying approach to "what can tentatively be referred to as the *third generation* of the Court's case law" is "to achieve genuine solutions for the lack of 'effet utile de l'effet direct'" (p. 433). "Unlike the second generation case-law the answers to procedural questions are not limited to external elements (non-discrimination) but in these third generation cases the Court, motivated by the desire to ensure that national remedies are truly effective, breaks into the national rules of the Member States themselves. The logical culmination of this process entails the discovery of a *new* cause of action in *Community*

1. Case 26/62, Van Gend en Loos, ECR 1963, at 1-28 (footnote added).

2. Case 33/76, Rewe, ECR 1976, at 1989-2006; and case 68/88, Greek Fraud, ECR 1989, at 2965-2988 (footnote added).

3. Case 68/79, Just, ECR 1980, at 501-533 (footnote added).

law (*Frankovich*).[4]

By exercising its jurisdiction in such a fashion, the Court penetrates inevitably into the classical national law fields of *civil law, criminal law* and *constitutional and administrative law*" (p. 434).

Part IV, 'General Principles of Law and Human Rights', covers constitutional and institutional aspects in the context of this specific topic and it also encompasses related issues to judicial protection. Gaja focuses on the meaning of Article F(2), of the TEU, which lays down, *inter alia*, that the Union shall respect fundamental human rights. He quotes Professor Schermers, who has noted that "[t]he incorporation of the provision in the TEU makes it a constitutional provision which can be amended only by a further treaty. Thus, the Human Rights Convention has obtained a higher status in European Community law" (p. 552).

Part V, 'International Developments', is probably the most interesting part for the international lawyers who read this *Journal*, but it covers only the smallest part of the book. Brinkhorst describes that there is a problem with the Community's position at the UN, which "does not correspond to the reality of the Community being an organization in its own right with distinctive characteristics of a supranational nature" (p. 611). However, Brinkhorst uses the experience of the European Community at the UN Conference on Environment and Development (UNCED) to illuminate a development and to conclude that "[i]f an overriding lesson is to be drawn from the UNCED process, it is that ultimately the substantive contribution of the Community to the 'sustainable development' process will carry the day" (p. 617). He even foresees a possible international leadership for the European Community in this respect (p. 617).

The editors of *Institutional Dynamics of European Integration* are to be congratulated for compiling this respectable part of the *Liber Amicorum* for Henry G. Schermers.

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4. Joined cases C-6/90 and C-9/90, Francovich and Bonifaci, ECR 1991, at I-5357-5418 (footnote added).

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The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal by A. Mouri. Martinus Nijhoff Publishers, Dordrecht, 1994, ISBN 0-7923-2654, 567 pp., £ 140.-/Dfl. 350.-.

The present thesis certainly offers the most informative insight yet into the work of the Iran-US Claims Tribunal on expropriation. Its author is an insider who has worked at the National Iranian Oil Company (NIOC) during the nationalization of the Iranian oil industry. He is now a legal assistant to the Tribunal. The thesis was written under the supervision of Professor (now Judge) Rosalyn Higgins, who is a leading authority on the topic of expropriation. Under her guidance, the author approaches his subject also from comparative aspects. He discusses thoroughly the jurisprudence of the International Centre for the Settlement of Investment Disputes (ICSID) tribunal and *ad hoc* Committees, pertinent International Chamber of Commerce cases as well as the *Chorzów Factory* case[1] before the Permanent Court of International Justice (PCIJ), the *ELSI*[2] and *Barcelona Traction* cases (p. 235)[3] before the International Court of Justice (ICJ), and the relevant decisions of the European Court of Human Rights. Even the work of lesser known instances like that of the various Conciliation Commissions established by the 1947 Peace Treaty[4] with Italy are thoroughly discussed. Moreover, the author makes ample reference to decisions of national Courts on expropriation issues, also outside the Iranian context (p. 379).

The main problem before the Iran-US Claims Tribunal is that of the responsibility of Iran and the US, respectively, for interventions with property rights and their consequences. The author also discusses the work of the International Law Commission (ILC) on state responsibilty (p. 196), the various UN General Assembly resolutions on state sovereignty over national resources (p. 360-363) and the 'Charter' on the Economic Rights and Duties of States (pp. 297, 360).[5]

The work of the tribunal is thus placed in its social, political, and ideological context, ably and often critically commented by the author defending the interests of his country. His book is a very welcome contribution to the relatively small

1. Factory at Chorzów (Germany *v.* Poland), 1928 PCIJ (Ser. A) No. 17, at 28.
2. Elettronica Sicula S.p.A. (United States of America *v.* Italy), 1989 ICJ Rep. 15.
3. Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain), 1970 ICJ Rep. 3.
4. For the text of the Treaty, *see* 12 UNTS 194, at 377 (1948).
5. *See* UN Doc. A/RES/3281, at 50 (1974).

number of books dealing with the work of the Iran-US Claims Tribunal. Moreover, the case-law of the Tribunal, so well presented by the author, has hitherto not been quoted as often as its well-reasoned awards would deserve. This regrettable fact is due only in part to the extraordinarily high price of the Reports of the Tribunal. What may be more important is the disharmony, even the contradictions between its awards. Antagonism between the arbitrators appointed respectively by the claimant and the respondent side usually ran so high that most awards are more or less the lone work of the chairman. These 'neutral' chairmen came from Western European Countries, except Judge Ruda, who came from Argentina. The votes of these chairmen were decisive. The author therefore often - but not always - indicates the name of the chairman concerned. However, he refrains from trying to trace certain lines in the work of these chairmen or to find reasons for the divergence of their views. The decisions bear the marks of the different personalities of their authors and of the sociological and psychological nuances of their Western background. The author rightly pays tribute to the efforts made by the chairmen to remain impartial. The success of these efforts is shown by the many instances where the opinion of a party-appointed arbitrator was partly concurring and partly dissenting.

The author begins by presenting the history of the tribunal and the origin of the Escrow Fund (p. 21). This unique feature ensures the payment of the Tribunal's awards. The author regrets that the Algerian Government does not use the right to release monies for this fund in a way which would authorize the Government to exercise the relatively small right of control which national courts exercise over awards rendered in the state concerned. Yet, when The Netherlands planned to enact a law to give Dutch nationality to the awards of the Tribunal, which would have rendered them subject to a certain control by the Netherlands courts, Iran threatened to remove the seat of the Tribunal outside The Netherlands. Any Algerian control would have been just as unacceptable to the US.

The author, himself having knowledge of both the English and the Persian language, understandably resents the neglect shown by Western arbitrators to translations from Farsi. These arbitrators, more often than not, seek corroboration for their views from outside arguments rather than from the English translation of the Farsi texts. This, however, will be the natural reaction of any arbitrator ignorant of one of the official languages of the Tribunal.

The author deals with Iran's responsibility for acts having arisen during the period of unrest which led to the overthrow of the Shah up

to the deadline of 19 January 1981 (p. 185). He adduces a wealth of arguments to reduce Iran's responsibility to the utmost. Thus, encouraged by paragraph 11 of the General Declaration which includes Iran's responsibility "for injuries as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran",[6] he claims that Iran as a state is not responsible for any exaction of antiUS mobs, revolutionary guards, workers councils, blackmailing airport officials *etcetera*, unless it is proved that they acted under Government orders (pp. 92 and 190-193). Iran should be responsible for individual acts of such persons only if the victim had explicitly asked for protection by state authorities but would such a request not have been futile? Moreover, according to the author, the appointment of state administrators to relace the management of US subsidiaries in Iran might not amount to unreasonable government influence. Furthermore, to a wide extent Iranian state agencies, according to the author, would have been able to rely on the excuse of *force majeure* in respect of acts by Iranian authorities (pp. 231-232). The author praises the awards upholding his restrictive views and criticizes those rejecting them (pp. 236-237, 318 and 371). Similar problems had been raised in the course of the many waves of nationalization of private property in 20th century Europe. The US and neutral members of the Tribunal strove hard to be impartial to the point of having been accused to have sometimes approved arguments based on the legal forms used rather than on the revolutionary will behind these measures, such will blurring the distinction between acts of the state authorities and those emanating from parties and persons engaged in the revolutionary movement.

In the main part of his work, the author gives a complete survey of all the aspects of substantive and procedural law (e.g. burden of proof) of expropriation and related phenomena in the light of the far from uniform case-law of the Tribunal. For reasons of space we can only single out some of his views. We disagree with the author on the question of semantics. Prior to the wave of nationalizations after World War I, 'expropriation' was the generic term for all inroads into private property. Expropriation of foreign-owned property was said to entitle the owner to full compensation. Writers favourable to the cause of nationalization tried to restrict the term expropriation to small-scale takings, called 'discrete' expropriations by the author (p. 349). According to these writers the full compensation rule should be restricted to these small-scale takings. The author contrasts exprop-

6. 1 Iran-US Claims Tribunal Rep. 3 (1983).

riations and deprivations (p. 65). The latter are said to see the taking from the point of view of the owner, the former from that of the taking state. We are not convinced by this alleged distinction. At least etymologically the term 'expropriation' also indicates that something is taken away from the owner.

The Tribunal also has jurisdiction over other interferences with property rights short of expropriation, e.g. a breach of contract. Here the author could have referred to the fact that the rules of the US state-controlled Overseas Privat Investment Corporation (OPIC) and of other government-controlled insurances against political risk, as a rule, do not assimilate a breach of contract to a nationalization.

The author opposes the idea that full compensation or *restitutio in integrum* could be granted even for lawful expropriations. How could they then be distinguished from unlawful ones? In the latter case the author, too, deems full compensation to be due. We admit that we too consider it strange that the same consequence, e.g. full compensation (pp. 371-374), should result from lawful as well as from unlawful expropriations. However, it would amount to an injustice against the person affected by a lawful expropriation to grant him less than full compensation. The author discusses at length the drafting history of UN General Assembly Resolution 1803 (XVII)[7] to prove that 'appropriate' may be less than 'full' (pp. 363-365). The same may be said of 'just' compensation (p. 379). However, what is 'just'? The author relies on the *Lithgow* decision by the European Court of Human Rights[8] to prove that less than full compensation may be just in case of large-scale nationalizations. However, this decision dealt only with the human rights aspects of British nationalizations affecting British subjects, and deliberately avoided the international law problem. The author further refers to the fact that most lump sum settlement treaties provide less than full compensation (p. 357). However, this cannot prove the birth of a new rule of international law - or else, a conclusion in favour of full compensations ought to be drawn from the relevant rules in most investment protection treaties. The author quotes me as rejecting this conclusion. However, I likewise rejected the rule allegedly to be gathered from lump sum compensation treaties.

Before the Tribunal this issue was largely moot. The Tribunal, in the great majority of cases, applied the US-Iran Treaty of Amity, Economic Relation and Consular

7. *See* UN Doc. A/RES/1803, at 15 (1962).
8. 102 Publications of the European Court of Human Rights, Ser. A, at 47 (1987).

Rights of 1955.[9] The latter provided for full compensation. The author finds it ironic to apply a Treaty of Amity in the face of the bitter controversies between the two countries since 1979 (pp. 300 and 378-380). The Tribunal nonetheless relied on the Treaty, as neither side had denounced it.

The case-law of the Tribunal is most useful when it deals with methods of valuation, with the conversion of claims from ryals to US dollars and with interests. The author argues convincingly that the 'profitability' taken into account in establishing the value of a going concern is different from the profit established in accordance with the discounting cash-flow (DCF) method (p. 436). This latter method is summarily rejected by the author. We share some of his misgivings. The discount rates for e.g. fluctuations in the price of oil, are highly speculative. Resourse to DCF may, in many cases, only be a thin disguise for the natural tendency of any tribunal to decide the case *ex aequo et bono*. It is significant that the Tribunal often did not follow the DCF experts but resorted to 'approximation'.

The marked preference of the author for the book value is based on the example of lump sum settlements. However, the latter do not constitute precedents. Moreover, it is well-known that the book values are often kept artificially low for tax purposes. Value should be established as of the date when the intention of taking became known. In this respect, the author could have referred to the precedent of the French nationalizations of 1982.

The Tribunal and the author agree that interest should be paid. Interest does not constitute usury (*ryba*), forbidden by Islamic law. Compound interest, however, should not be granted. Where a certain rate of interest was provided in the contract, the Tribunal respected that rate. The author criticizes the effort of the *Sylvania* decision,[10] which tried to lay down a uniform rate applicable to all cases where the contract did not establish the rate of interest. Yet both governments had asked the Tribunal to establish such a uniform rate. The author interprets this request merely as an order to the Tribunal to develop uniform criteria to determine the rate of interest appropriate under the circumstances of the individual case. Interest, in general, should run from the date of the interference until payment out of the escrow account. Sums expressed in ryal should be converted to US dollar at the date the sum became due.

Reasons of space exclude giving

9. For the text of the Treaty, *see* 284 UNTS 93 (1957).

10. 8 Iran-US Claims Tribunal Rep. 308 (1987).

further details of this remarkable work and to engage in debates with the views the author so ably expounds. His book is a very precious source of information, not only on the case-law of the Tribunal, but on the state of the case-law and scientific discussion on expropriation in general.

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Justice in International Law - Selected Writings of Stephen M. Schwebel, Judge of the International Court of Justice. Grotius Publications, Cambridge University Press, Cambridge, 1994, ISBN 0-521-46284-3, xiii and 630 pp., £ 80.-.

The publication of selected writings of Judge Schwebel is to be most welcomed. It facilitates the access to the works of an author with enormous and long experience, both as a scholar and as a practitioner - works which otherwise, at least in part, may not be easily available everywhere. But it is not a simple task to review a selection of 36 publications covering a great variety of subjects - a list of titles alone occupies more than one page. It does not seem appropriate to withhold from the readers of this review full information about the structure and contents of the volume; but it is at the expense of the presentation, and - especially - the discussion of the substance, unless a book review is to develop into a review article.

The collection, comprising works originally published in many countries, is focused - no wonder - on the UN in general, and the International Court of Justice (ICJ) in particular (over 60% of the total volume); but otherwise it covers many other areas of public international law, and also relations between states and aliens. The volume is divided into five parts: 'I. International Court of Justice', 'II. International Arbitration', 'III. United Nations', 'IV. International Contracts and Expropriation', and 'V. Aggression Under, Compliance With, and Development of International Law'. The volume is supplied with a list of publications of Judge Schwebel (pp. 618-625) and a subject index (pp. 626-630). Judicial opinions of Judge Schwebel and papers written in his earlier official capacities are not included, all except one. In the author's own words, he has chosen "a third of legal articles and commentaries written since 1947 which may have a measure of continuing interest" (p. xiii). Emphasis is, probably for that reason, on the more recent works. But Judge Schwebel's writings do have continuing interest (not only

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"a measure" thereof), even if they deal with matters not presently on the international agenda. Be that as it may, while in the complete list of Judge Schwebel's writings those published during the 10 years immediately preceding publication of the book amount to 34% of all titles, they amount to 53% in the collection under review. But different periods are unevenly represented in various parts of the selection, apparently reflecting shifting professional interests and engagement of the author. Thus, in Part I, no title is more than 10 years old, and the same is true (with one exception) of Part II. On the other hand, in Part III all the writings, except one, are more than 10 years old - indeed. Half of them are about or over 40 years old.

Part I comprises nine titles: *Reflections on the Role of the International Court of Justice* (1985, pp. 3-13); *Relations Between the International Court of Justice and the United Nations* (1991, pp. 14-26); *Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?* (1991, pp. 27-71); *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice* (1984, pp. 72-83); *Preliminary Rulings by the International Court of Justice at the Instance of National Courts* (1988, pp. 84-92); *Chambers of the International Court of Justice Formed for Particular Cases* (1989, pp. 93-124); *Three Cases of Fact-Finding by the International Court of Justice* (1991, pp. 125-139); *Indirect Aggression in the International Court* (1991, pp. 140-145); and *Human Rights in the World Court* (1992, pp. 146-168).

Much attention in Part I is devoted to the advisory jurisdiction of the Court. Referring to Article 96 of the UN Charter as "central to relations between the Court and the United Nations" (p. 18), the author reminds one that organs of the UN request advisory opinions in more contentious conditions than those of the League of Nations, since then the requests were subject to the unanimity rule, while now they are addressed to the Court by a majority vote, against an opposition (p. 19). Readers will be amused by some paradoxes. Thus, while in the period of the League, the International Labour Organization (ILO) unsuccessfully fought for its right to request advisory opinions directly, but still made six requests in 18 years, it made only one request in 44 years, when that right eventually had been acquired (p. 32); according to the initial US proposal for revision of the Statute of the Permanent Court of International Justice (PCIJ), only the - Security - Council would have been authorized to request advisory opinions (p. 55) - in reality, the Security Council requested an advisory opinion only once. The question of judicial review of the constitutionality of decisions of

UN organs is closely but concisely approached in Part I (e.g., at p. 23). The author appears to be, in principle, positive towards various proposals for the extension of the Court's jurisdiction - be it through authorizing the UN Secretary-General to request advisory opinions of the Court, or by admitting its preliminary rulings at the instance of national courts. He joins the long list of authorities praising the institution of *ad hoc* chambers of the Court (the present reviewer belongs to exceptions in this respect)[1] - yet, on the moderate premise that "the best should not be allowed to become the enemy of the good" (p. 124). On several occasions (pp. 21-22, 24, 134-139, 142-144, and 166-168) the author refers to the *Nicaragua* case, in which he appended a magistral dissenting opinion (269 pages)[2] to the Court's judgement on the merits which obviously worried him many years later. While from a certain point of view, the judgment has had some positive effect, much in Judge Schwebel's criticism of that judgment is very pertinent and persuasive.

Part II includes the following five articles: *Arbitration and Exhaustion of Local Remedies* (1966, with J. Gillis Wetter, pp. 171-190); *Arbitration and Exhaustion of Local Remedies Revisited* (1989, pp. 191-195); *Some Aspects of International Law in Arbitration Between States and Aliens* (1993, pp. 196-212); *The Majority Vote of an International Arbitral Tribunal* (1993, pp. 213-222); and *The Prospects for International Arbitration: Inter-State Disputes* (1990 pp. 223-229).

The first of the above-listed publications was prompted by Article 26 of the International Centre for the Settlement of Investment Diputes (ICSID) Convention of 1965,[3] according to which the exhaustion of local remedies may not be required, unless a reservation to this effect is included in an arbitration clause. The author regards the presumption of the said article as essentially well-founded "in terms both of principle and precedent" (p. 172). This basic proposition, with the indication of some additional factors of key importance, is further corroborated in the next item on the list, written more than 20 years later, with references to more recent jurisprudence and practice. The question is also taken up briefly in the third article which, otherwise, covers a

1. J. Sztucki, The Ad Hoc Chambers of the International Court of Justice - A Dissenting Opinion in Process and Execution 333-346 (1990).
2. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America) (Merits), 1986 ICJ Rep. 14, at 259-527.
3. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 8359 (1966).

wide range of problems: the authority of an arbitral tribunal to decide upon its jurisdiction, the severability of arbitration clauses, inadmissibility of a plea of sovereign immunity, refusal to arbitrate as amounting to denial of justice, the authority of a truncated arbitral tribunal to render a binding award, and a plea of international law in arbitral proceedings between states and aliens. In the article on majority vote in arbitral tribunals, the author welcomes the practice recognizing the existence of a regular majority, even if an arbitrator comprised in that majority and one on whom that majority depends, expresses in a formal declaration views differing from the reasoning in the award. And finally, in the last paper in Part II, Judge Schwebel *inter alia* argues against a proposition that, as a consequence of a trend towards 'judicial arbitration', the relationship between arbitration and adjudication tends to become "a distinction without a difference" (p. 228). This position of Judge Schwebel is consistent with that expressed a year earlier in his article on *ad hoc* chambers of the Court (here at pp. 93-124). However, a reader may reflect on whether the practice of constituting those chambers is, indeed, not somewhat blurring the difference between arbitration and adjudication.

Eight works form Part III of the volume. *The Origins and Development of Article 99 of the Charter* (1952, pp. 233-247); *The International Character of the Secretariat of the United Nations* (1954, pp. 248-296); *Secretary-General and Secretariat* (1955, pp. 297-307); *A United Nations 'Guard' and a United Nations 'Legion'* (1957, pp. 308-325); *Mini-States and a More Effective United Nations* (1973, pp. 326-336); *Article 19 of the Charter of the United Nations: Memorandum of Law* (1964, pp. 337-363); *The United States Assaults the ILO* (1971, pp. 364-371); and *Goldberg Variations* (1994, pp. 372-382).

The first three publications can be considered as partly by-products, partly continuation of Judge Schwebel's engagement in the subject during the 1950s - as the author of the book *The Secretary-General of the United Nations: His Political Powers and Practice* (1952), and as the principal draftsman of the memoirs of Trygve Lie, *In the Cause of Peace: Seven Years with the United Nations* (1954). Much has changed during the four decades which have elapsed since the publication of the three articles - perhaps other problems in the functioning of the UN Secretariat have come to the foreground - but much of the basics discussed by the author from the legal point of view, including the various aspects of independence of international civil servants and of the conditions of their service, has retained its full validity.

In our times, when the UN

peace-keeping operations acquired enormous dimensions, and when also peace-making (or, peace-enforcing) is on the agenda, readers will enjoy being reminded of early proposals, advanced by the then UN Secretary-General, Trygve Lie, for a UN 'Guard' (1948),[4] different in character from combat forces envisaged in Articles 42 and 43 of the UN Charter, which was prompted by the Palestine experience, and a later one (1952) - for the UN 'Legion' (UN Volunteer Reserve), prompted by the experience of the Korean war.[5] The article on mini-states, written in 1973, when some such states had already become members of the UN, can give rise to nostalgic reflections now, when mini-states constitute *circa* 15% of the total membership of the UN. Much attention in the article is devoted to the proposals, advanced in this connection by the US and Great Britain in 1969-1970 for associate membership, or voluntary renunciation of certain rights, and Judge Schwebel argues for their compatibility with the UN Charter. Two works - one written in 1964, the other one 30 years later - deal with the financial obligations of member states towards the UN, and with the consequences of non-compliance. In the former article, Judge Schwebel expresses the opinion that the sanction under Article 19 of the UN Charter is mandatory. In the latter one, he represents the view that Article 19 of the UN Charter has not fallen into desuetude, in spite of the practice of widespread arrears in the payment of assessed contributions. Questions of financial obligations (as well as the recruitment of personnel of international secretariats) are also discussed in the article on the ILO.

Part IV consists of six works: *Report of the Committee on Nationalization of Property of the American Branch of the International Law Association* (1958, pp. 385-400); *The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources* (1963, pp. 401-415); *Speculations on Specific Performance of a Contract Between a State and a Foreign National* (1965, pp. 416-424); *On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law* (1987, pp. 425-435); *Some Little-Known Cases of Concessions* (1966, with J. Gillis Wetter, pp. 436-488); and *Commentary on 'Social Discipline and the Multinational Enterprise' and 'Security of Investments Abroad'* (1991, pp. 489-495).

In this part, the articles on the

4. Annual Report of the Secretary-General, 1947-1948, UN Doc A/565, at xvii-xviii (1948).
5. A.G. Katzin, *Collective Security: The Work of the Collective Measures Committee*, 1953 Annual Review of United Nations Affairs 212.

Declaration on Permanent Sovereignty over Natural Resources[6] and on little-known cases of concessions deserve perhaps special attention as extremely informative and elucidating. In the article on the breach of contracts between states and aliens Judge Schwebel reiterates and develops the proposition that such a breach involves state responsibility under international law, regardless of whether this is motivated by governmental or commercial reasons - a proposition which he advanced already 30 years earlier, as the author of the above-mentioned *Report of the Committee on Nationalization*. This *Report* is also remarkable for its idea to establish a new arbitral tribunal for the settlement of disputes between states and aliens - an idea which has materialized in the Washington Convention of 1965 (ICSID).[7] In the *Commentary* at the end of Part IV, Judge Schwebel dis-cusses the standing of bilateral investment treaties and of certain resolutions of the UN General Assembly admitting rather arbitrary nationalizations as possibly reflecting customary international law. His position on the first question is that that standing is uncertain, and on the second one - that these resolutions are *contra legem* (cf. pp. 494 and 492, respectively).

6. *See* UN Doc. A/RES/1803, at 15 (1962).
7. *See* ICSID Convention, *supra* note 3.

And finally, Part V comprises the following publications: *The Legal Effects of Resolutions and Codes of Conduct of the United Nations* (1985, pp. 499-513); *The United Nations and the Challenge of a Changing International Law* (1963, pp. 514-520); *What Weight to Conquest?* (1970, pp. 521-525); *The Brezhnev Doctrine Repealed and Peaceful Coexistence Enacted* (1972, pp. 526-529); *Aggression, Intervention and Self-Defence in Modern International Law* (1972, pp. 530-592); *Address and Commentary [at a Colloquium commemorating the 400th birthday of Grotius - J.S.]* (1985, pp. 593-597); *The Compliance Process and the Future of International Law* (1981, pp. 598-607); and *Government Legal Advising in the Field of Foreign Affairs* (1967, pp. 608-617).

In the first paper in this part, of importance both from doctrinal and practical point of view, the author, consistently with the above-mentioned *Commentary*, represents the position that "[t]he General Assembly [...] cannot make or unmake the law simply by saying so" (p. 511), and that a resolution by the General Assembly, in order to be regarded as declaratory of the existing law, must be in accordance with state practice. The lectures by Judge Schwebel on aggression, intervention, and self-defence at the Hague Academy are the weighty item in Part V. In *circa* 85% they are focused on aggression and on

the question of definition of aggression, which was under elaboration at the time of the lectures. The author analyses in depth the problems involved, but the main gist seems to be that such a definition is of lesser importance in the context of the UN Charter than it was in the League of Nations. Insofar as a definition of aggression was eventually adopted by the UN General Assembly, in 1974, history perhaps disavowed that position of Judge Schwebel; but still it gave him right insofar as the definition, open-ended from both sides as it is, is as good as none. Thematically connected with the question of aggression is a somewhat earlier, brief but thought-provoking article on conquest, where a distinction is drawn between aggressive and defensive conquest, and between taking of territory previously held lawfully or unlawfully. The address on compliance with international law, written 15 years ago, reveals the broad philosophical approach of the author to one of the central issues of the discipline. He seems to be, in principle, optimistic ("States [...] generally observe international law" (p. 603)), but he also admits that "the dangers of riskless violation of international law" are great (p. 605), as dramatically demonstrated by some recent developments.

As a whole, the volume adequately reflects the broad range of expertise of the author. Many a reader will be impressed by Judge Schwebel's balanced argumentation - he does not dismiss opposite views or pass over them in silence, but carefully weighs arguments '*pro*' and '*contra*'. He does not refrain from criticism of his own government, when he sees reasons therefor. He scrupulously inquires into the historical background of the subject-matters of his analyses. In sum, the collection offers international lawyers an inspiring reading in a broad time perspective.

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