BOOK REVIEWS

United Nations Convention on the Law of the Sea: A Commentary, edited by Alexander Proelss [C.H. Beck/Hart/Nomos, Munich, Oxford and Baden-Baden, 2017, 1800pp, ISBN 9781849461924, £495.00 (h/bk)]

What should a commentary on the 1982 UN Convention on the Law of the Sea contain and why do we need another one? Scholars and practitioners who specialize in law of the sea have long been familiar with the multi-volume Virginia commentary on the 1982 UN Convention published over 25 years ago. With most of the volumes appearing just before the Convention entered into force, that epic work concentrated on the negotiating texts elaborated over the ten years of the UNCLOS III conference. Their main focus was thus on the different drafts and proposals made during the conference; even when dealing with articles drawn directly from the earlier Geneva Conventions, references to pre-UNCLOS III material were few in number. In no sense was the Virginia commentary a comprehensive survey of case law, literature or State practice either before or after the 1982 Convention was adopted. Nor is the older commentary notably helpful in resolving the many ambiguities and uncertainties which resulted from a text negotiated by consensus rather than majority vote. Clarity is rarely the offspring of consensus negotiation, and the Virginia commentary does not answer such difficult questions as the meaning of 'rocks which cannot sustain human habitation or economic life of their own', to take just one example. All it can do is draw attention to the relevant *travaux préparatoires*.

Because of its limited focus the Virginia commentary will never go out of date; it is essentially a commentary on the legislative record rather than a commentary on the Convention. But, since entry into force, the Convention has evolved in various ways. There have been two implementing agreements, the first of which in effect amends Part XI of the Convention, while the second establishes a largely new regime for straddling and highly migratory fish stocks. Many related conventions, regional seas agreements, and regional fisheries agreements have also been adopted or revised since 1982, while IMO has continued to generate and revise generally accepted international rules and standards on pollution from ships. Over 30 cases in the ICJ, ITLOS and PCA have dealt with UNCLOS disputes, and produced a growing body of jurisprudence on a wide range of questions concerning its interpretation and application. International organizations such as the ISBA, FAO and IMO have also contributed to the interpretation and application of relevant sections of the Convention, while the wealth of State practice is well recorded in UN DOALOS publications. Last but not least there has been a wealth of literature on the Convention and the many problems its implementation has revealed.

Herein lies the main achievement of the new commentary, edited by Alexander Proelss but written by a team of over 60 authors, many of them well-known scholars, practitioners, judges or bureaucrats with expertise in law of the sea. The editor observes in his preface that one of the aims of the book is to show that the Convention is a 'living instrument'. The commentaries on each article and the very extensive footnotes make full use of the case law, UN and other materials, and the academic literature, to show how practice in the interpretation and application of the Convention has evolved since its entry into force. As a research resource for scholars and practitioners the Proelss Commentary should be invaluable. The reviewer cannot claim to have tested this proposition comprehensively but having made good use of the commentary over the past 18 months for professional and academic purposes it has more than proved its value. The commentaries appear authoritative and up to date; the case law, UN material and State practice are well covered, while the references alone will give the work a bibliographic value found nowhere else.

Does this Commentary answer any of the questions that the earlier Virginia work could not? Yes and no. Yes, insofar as case law and the practice of States and international organizations may have addressed some of these issues, including the notoriously problematic meaning of Articles 121(3)

[*ICLQ* vol 68, July 2019 pp 771–775] doi:10.1017/S0020589319000198

and 297(1). Part of the role of courts under UNCLOS is to answer these difficult questions and when they do so the Commentary reflects that jurisprudence admirably, even if the authors do not always agree with the decisions they are recording. No, insofar as many difficult questions have not yet been addressed by courts or in any other authoritative way. Here the best the Commentary can do is to reflect the range of views found in the literature, as for example in its treatment of prior notification by warships before entry into the territorial sea. In his foreword, Judge Golitsyn notes that the new Commentary will complement the earlier one rather than replace it. Necessarily there is some overlap, but the bulk of the new work takes this commentary well beyond anything attempted in the old. Yet there are gaps: nowhere in the discussion of Articles 194, 207 and 212 is there any mention of the Convention's relevance to the impact of climate change on the marine environment. This reflects most of the literature, but it is surely a glaring omission nevertheless.

Succinctly written, comprehensive in its coverage, and meticulously researched, this commentary does what its predecessor could not. Whether it lasts as well may be another question: the Achilles heel of a work of this kind is that it will be out of date ten years from now.

Alan Boyle*

Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis by Alan Greene [Hart Studies in Security and Justice, Hart Publishing, Oxford, 2018, 256pp, ISBN 9781509906154, £65.00 (h/bk)]

What is the right way to manage emergency situations in a democracy? The question has an old ring, taking us back to Bush, Blair and 11 September 2001, but the contagion of emergency the events of that day generated surely makes it as relevant as ever. Indeed the question might even be more pertinent now nearly two decades on, given the multiple ways in which special powers have come to proliferate around the world and how they may even, in combination, be ushering in a new way of understanding how the very idea of democracy works. Alan Greene wants to control emergency power in the name of old school democratic governance, and believes he has found a way, in this short, challenging but accessible book. First, things not to do—carry on as you always have may look good (defiantly civil libertarian and all that) but just ruins the ordinary law by planting within it seeds of destructive illiberalism. It is the same with special legislation—passed in a moment of anxiety, it hangs on far past its 'sell-by' date. Nor does David Dyzenhaus's 'argument in favour of robust judicial review … under common law constitutionalist orders' pass muster, 'highly persuasive' though it is (182). If we discount simple brazen illegality (once more popular than you might imagine), what is left? Greene argues for constitutions to provide for emergency powers, but to be so designed as not to give in to the first whiff of grapeshot as rival models of constraint so often do.

Pulling this off requires a bit of philosophical positioning, engaging great lives of the past (this was once a PhD after all). The big players here are that ubiquitous defender of brutal state power Carl Schmitt and the great proponent of law's foundational importance, Hans Kelsen. First Schmitt. Greene is very good at explaining how this compelling but disturbing thinker saw law as a creature of state power, flowing out of the exercise of that power and so subsidiary to it. What the constituent power can give it can also take away, and in the context of an emergency this inevitably means that the sovereign can both decide on an emergency's existence and on what it necessitates without any entanglement in law: the '[s]overeign is he who decides on the exception' in Schmitt's famous formulation. Kelsen in contrast saw the State as a legal order, rooted in norm after norm in an ascending hierarchy until you reached his famous 'grundnorm',

*Emeritus Professor, University of Edinburgh, alan.boyle@ed.ac.uk.

doi:10.1017/S0020589319000204