BOOK REVIEWS

The International Court of Justice: Process, Practice and Procedure, by D.W. Bowett *et al.* (Eds.), London, British Institute of International and Comparative Law, 1997, ISBN 0-903067-60-9, 190 pp., US$ 70/ UK£ 35.

The British Institute of International and Comparative Law, as its contribution to the UN Decade of International Law, commissioned a study group composed of two former legal Advisors to the Foreign Ministry, Sir Ian Sinclair and Sir Arthur Watts, and two professors with experience with litigation before the International Court of Justice, Derek Bowett and James Crawford, to study on the procedures and working practice of the Court and to offer comments on their efficiency. Their report (pp. 27-84 of the present volume) was presented to a 1996 conference of Institute members and others and also some serving judges of the Court: the then President of the Court, Mohammed Bedjaoui, and the Court's longest serving judge, Shigeru Oda, and the recently elected judge from Great Britain, Rosalyn Higgins. The volume includes theirs and other brief comments by Professor Ian Brownlie and the present Foreign Ministry Legal Adviser, Sir Franklin Berman, plus short working essays by Professors Bowett and Crawford and Sir Ian Sinclair and Sir Arthur Watts, and a final essay by Professor Alan Boyle. The last 60 pages of the volume reproduce the Statute of the International Court, the Rules of the Court (as adopted on 14 April 1978),[1] and, finally, the Resolution Containing Revision of Internal Judicial Practice of the Court (adopted by the Court on 12 April 1976).[2]

The work as a whole, as one intended to mark the 50th anniversary of the 'new' Court, is very British in its resolutely technical, adjectival-law based approach, and its deliberate eschewing of policy in law and of the political factors that underlie and necessarily condition states' decisions to have or not to have recourse to the Court's jurisdiction, and then the decisions of the Court as a collegial body and even more of its individual judges as to how to dispose of the substantive problem coming before them. The volume has the strengths of that intellectual divorcement of the legal *stricto sensu* and the 'non-legal', of the technical and the substantive in dispute-settlement, that has characterized the judicial philosophies of a line of distinguished British judges on the Court over the post-war era, from Lord McNair on through Judges Lauterpacht and Fitzmaurice and Waldock and Jennings. Practical

1. Revised Rules of the Court, 14 April 1978, reproduced *in* 17 ILM 4286 (1978).
2. 15 ILM 950 (1976).

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limitations to that approach may become apparent when the former participants stray from the more technical analysis, as they must, for example, when canvassing explanations for the remarkable atrophy of the Courts business and work-load from the late 1960s onwards for almost two decades, and when speculating on the effect of the age factor on judicial performance and suggesting compulsory retirement for judges at the age of 75. The Court's politically contested, single-vote majority decision in *South West Africa* in 1966,[3] effectively reversing a single-vote-majority decision the other way given only four years earlier, is referred to; but the direct connection, thereafter, to the highly political act of election of the Courts judges by the UN General Assembly and Security Council is not explored, nor are the consequences in terms of the composition of the Court and the reigning Court majorities, which may have contributed to the later disengagement from the Court and its Compulsory Jurisdiction by states like France and the United States which (by custom, though not by law) retain permanent seats on the Court.

The increasingly representative character of the Court, in ethno-cultural as well as political-regional terms, brought about by the open, inherently democratic character of the processes for the election of its judges, gives the Court a constitutional legitimacy in terms of the progressive development of international law in accordance with the UN Charter, comparable to that enjoyed by the great Continental European Constitutional Courts of the post-World War II period. Appreciation of the challenge and the opportunity provided thereby seems behind the consciously activist judicial *rôle* essayed by judicial elder statesmen with extensive background in public affairs prior to their election to the Court, like Manfred Lachs, Nagendra Singh, and Taslim Elias. *South West Africa*,[4] is balanced, in this respect, by *Namibia*,[5] *Nuclear Tests*,[6] *Western Sahara*,[7] and *Nicaragua*.[8] If the Court majority has seemed hesitant and somewhat uncertain in now recent political *causes célèbres* like *Lockerbie*[9] or the Advisory Opinions on *Nuclear Weapons*,[10] it

3. South West Africa (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Second Phase, Judgment of 18 July 1966, 1966 ICJ Rep. 6.
4. *Id.*
5. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, 1971 ICJ Rep. 16.
6. Nuclear Tests (Australia *v.* France), Judgment of 20 December 1974, 1974 ICJ Rep. 253; and Nuclear Tests Case (New Zealand *v.* France), Judgment of 20 December 1974, 1974 ICJ Rep. 457.
7. Western Sahara, Advisory Opinion of 16 October 1975, 1975 ICJ Rep. 12.
8. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14.
9. Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Lybian Arab Jamahiriya *v.* United Kingdom), Interim Measures, Order of 14 April 1992, 1992 ICJ Rep. 3.

may be because the elder statesmen Court bench of the 1980s has now given way to a technocrat-functionary group, which does not yet have the full confidence or expertise in dealing with the constitutional separation-of-powers and UN inter-institutional relations questions inherent in decisions on those rather new categories of problem-situations. Issues raised by the British Institute's study group report (on which richly experienced members of the Court like President Bedjaoui and Judge Oda showed some obvious irritation), like the style of Court proceedings and the relevance of age to maturity and wisdom in judicial decision-making, and the contribution of judicial declarations and separate opinions and, even more, dissenting opinions to the dialectical unfolding of new international law, are more likely to be resolved pragmatically by the new judges on an experimental, case-by-case basis than by *a priori* prescriptions based on projections from earlier Court attitudes developed in earlier periods in the Courts history.

*Edward McWhinney**

The United Nations: Past, Present and Future, by M. Bertrand, Nijhoff Law Specials, Vol. 25, Kluwer Law International, The Hague/London/Boston, 1997, ISBN 90-411-03376, 190 pp., US$ 88/UK£ 60/Dfl. 135.

The magic term 'United Nations' has from its very inception induced many authors, including former Secretaries-General, to dwell on one or another aspect of the organization's activities.[1] However, fundamental criticism from inside the system was still considered 'taboo' by the first generation international civil servants of the organization.

Almost 25 years ago, Shirley Hazzard published her book with the revolutionary title *Defeat of an Ideal: A Study of the Self-Destruction of the United Nations*.[2] Following the commemoration of the 40th anniversary of the United Nations, Dr Ramcharan approached the reader in a more positive spirit.[3] The book currently under review at least has a neutral title, although its contents shows a very critical, at some instances even hostile, attitude towards the work of the organization.

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10. Legality of the Threat or Use of Nuclear Weapons (General Assembly), Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 95; and Legality of the Use by a State of Nuclear Weapons in Armed Conflict (World Health Organization), Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 66

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1. A selected bibliography is appended to the book, at 155-160.
2. S. Hazzard, Defeat of an Ideal: A Study of the Self-Destruction of the United Nations (1973).
3. B. Ramcharan, Keeping Faith With the United Nations (1987).

Nevertheless, this reviewer nurtures sympathy for the basic, well-founded criticism of the author. Mrs. Hazzard wrote in 1973 "that the leaders of the organization have declared that it will be defunct in a decade if it is not radically reformed".[4]

Sir Brian Urquahart, a former Under-Secretary-General, in a foreword to Dr Ramcharan's book, states that "[t]here is an immense task ahead if governments seriously wish to strengthen the international system they created with such pride and hope forty years ago".[5] Mr Bertrand in his book clearly wants to demonstrate to the reader that governments just do not want to strengthen it. A clear example can be found at the end of Chapter III, where the author states: "[o]ne has to wonder for how long the UN, living in its own little world, to a large extent feeding on itself, playing games it has itself made up, curiously withdrawn from the real world which is [sic] supposed to represent, can go on maintaining its illusions" (p. 116).

The reader should therefore in addition consult the recent study *The United Nations: The Policies of Members States*,[6] a case study of member states orientation towards the organization, in order to evaluate Mr Bertrand's criticism on its merits. Mr. Bertrand, after all, was an inspector at the Joint Inspection Unit (JIU)[7] from January 1968 to December 1985 and authored approximately ten percent of all JIU reports: 27 individual reports and 4 individual notes and 3 joint reports,[8] including the one on *Some Reflections on Reform of the United Nations*.[9]

In this report, he foreshadowed the creeping financial and moral crisis of the United Nations, which led the current Secretary-General, Mr Kofi Annan, to propose a reform package aimed at a "significant reconfiguration of the organization in order to do better what the international community requires it to do".[10] After having put the book in its context, the review now turns to a perusal of the issues discussed in the book.

Following the sub-title of the book, Chapter I on *The Development of World Organization* concerns the past, Chapters II and IV on the UN and problems of security together with Chapter III on *The UN – Economic and Social* concern the present, and the last chapter on *The UN – Reform or Reconstruction* concerns the future. It seems illogical however that Chapter IV

4. *See* Hazzard, *supra* note 2, at 247.
5. *See* Ramcharan, *supra* note 3.
6. The United Nations. The Policies of Members States (1997).
7. As instituted by UN Doc. A/RES/2150 (XXI).
8. As of 31 July 1997 the JIU has issued 287 reports. Mr. Bertrand critically discussed the personnel policy in three reports: JIU/REP./76/8; JIU/REP./78/4; and JIU/REP./80/9. Figures provided by the JIU Secretariat.
9. JIU/REP./85/9.
10. Renewing the United Nations: A Programme for Reform; Report of the Secretary-General, UN Doc. A/51/950 (1997), at 2.

on the security situation since the end of the Cold War does not immediately follow Chapter II on the situation during the Cold War.

The last chapter is a rather short theoretical reflection of possible views on reform. By stating, in his final conclusion on page 154, that the book hopes to contribute to the clarification of the debate on two opposing philosophies of the international world, the author leaves the reader in doubt about the real purpose of the book. In any case, the author exposes a much more dynamic and pragmatic vision on the future of the organization in his two other books.[11]

The author's assessment in Chapter I, that the founders of the United Nations, instead of analyzing the political failures of the League of Nations in depth, proceeded with a legal and procedural *critique* of the text of the Covenant and consequently once more centered the new organization on the major powers, is correct (p. 29). The current request for an enlargement and more equal redistribution of the power in the Security Council is a *post factum* attempt to strike a better balance. Moreover, the separation of the Bretton Woods institutions from the rest of the system resulted indeed in depriving the United Nations of any serious activities in the economic field, despite the establishment of the Economic Social Council (p. 31). The current reform proposal by the Secretary-General with respect to economic and social affairs and development cooperation may be seen as recognition of this mistake.[12]

Chapter II leaves the reader with a justified, but nevertheless helpless impression of the role of the United Nations in peacemaking during the cold war period. Indeed, the UN was often deliberately left out of the peace process, forced to withdraw its forces or confined to play a role only after the use of force had imposed a certain order of the victors (p. 62). The author, however, credits the UN with the establishment of the Blue Helmets as the only creation of the UN with any real claim to originality (p. 63).

Mr Bertrand, in Chapter IV, discusses the proposal by former president Gorbatchov for a post-Cold War world order which unfortunately was rejected: "[o]nce again the so called 'realism' of the West triumphed over the ideas of a visionary" (p. 122), leading the world into new illusions. He correctly observes that during this period the UN peace-keeping efforts shifted from inter-state to intra-state conflicts.[13] Nevertheless, again the UN failed more than it succeeded. This reviewer agrees with the author that the absence of a strategy to prevent conflicts is one of the main reasons for these

11. M. Bertrand, The Third Generation World Organization (1989); and M. Bertrand, A New Charter for Worldwide Organization (1997).
12. Renewing the United Nations, *supra* note 10, especially paras. 69-75.
13. Box XXIII, accompanying the book, at 130. For a comprehensive survey of UN peace-keeping operations *see also* The Blue Helmets: A Review of United Nations Peace-keeping (1996).

failures, despite the fact that the words preventive diplomacy and early-warning are very popular UN jargon.

Chapter III gives the best explanation for the persistent climate of 'unreality' at the UN (p. 66). The author describes most of the activities in the economic and social sphere, showing his in-depth knowledge of and familiarity with the inside workings of the secretariat and the operational tools of delegations.

It is true that the United Nations adopts resolutions, declarations, and medium term plans containing vague ideas and principles as to make consensus easier and verification of implementation more difficult. Two examples not mentioned by the author underscore this point. The General Assembly on 4 December 1986 adopted a resolution on "Setting International Standards in the Field of Human Rights", giving "guidelines for the adoption of identifiable and practicable rights and obligations".[14]

In another resolution,[15] adopted the same day, it proclaimed the "Declaration on the Right to Development", paragraphs one and two of which contain vague and loose principles rendering nugatory the effect of the guidelines. In 1992, during the Rio Conference on Environment and Development, governments committed themselves firmly to 'Agenda 21', containing specific, attainable, long-term objectives.[16] At the mid-term review in New York in June 1997, very little progress could be reported.

There unfortunately still does not exist a coherent system wide coordination between the different agencies and programs (p. 80). The Economic and Social Council, to follow-up on the different world conferences held between 1992 and 1996, however, has instituted a high level segment to discuss enhancing coordination and avoid overlapping of programmes.

Mr Bertrand is furthermore correct in stating, with respect to the personnel policy, that "[e]ven the best elements lose the motivation necessary for proper performance of the task" (p. 90) and that "the member states have denied to the UN the means necessary for the formation of a secretariat having a very high level of competence and cohesiveness [...] and which could have enhanced the UN's credibility" (p. 92).

The author is reticent towards the recognition of progress made by the United Nations in the field of international law (p. 105). The number of conventions adopted is indeed impressive, but involved much more codification than innovation.

14. UN Doc. A/RES/41/120 (1986), para. 4c.
15. UN Doc. A/RES/41/128 (1986).
16. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/RES/47/190.

Once again, the reader should do some complementary reading in order to judge the veracity of the author's contention.[17] Fortunately, the author gives the credit due to the role of the United Nations in the field of human rights. It is indeed important to recognize that the UN has given legitimacy to the "war being waged by non-governmental human rights organizations" (p. 115). In this connection, it may be interesting to observe that during the elaboration of the Universal Declaration of Human Rights in 1948[18] only a handful of NGO's were present, that approximately 150 NGO's attended the first World Conference on Human Rights in Teheran in 1968[19] and that over 2000 NGO's participated in the Vienna Conference in 1993.[20]

The peculiarity of the book is that the text is accompanied by 24 meticulously elaborated boxes with very detailed information. This special layout probably has a bearing on the price, because one cannot get away from the fact that the book is rather expensive.

Unfortunately, the wealth of information given in the book contains many, and in my view, avoidable typographical and factual errors. At the turn of page 7 it reads: "[i]t would be unfair now to reproach them for their failure to appreciate the magnitude of the task, or [sic] to have made use of all the intellectual tools which were available to them at the time." The word 'not' certainly has been omitted before 'to have', because the current structure lacks a logical train of thought, and makes the reader misunderstand the author's idea altogether.

On page 28, the enumeration is in retrospective; consequently, the 'International Court of Justice' should read 'Permanent Court of International Justice'. In Box IX, page 47, the author refers to the situation in West Irian or Papua New-Guinea. The conclusion by the author that the transfer by the UN Authority of the territory to Indonesia led to a further war of independence is too bold a statement.[21] At page 54, Box X, it reads: "[t]he Camp David accords [...] were signed 26 March 1979". The Camp David Accords were signed on 17 September 1978, but the Peace Treaty between Egypt and Israel was signed on 26 March 1979.[22] At page 55 the reference to 'Diego Cordovan' should read 'Cordovez', currently appointed as the Secretary-General's Special Advisor on Cyprus. At page 57, in the box on Biafra, May 1976 should read May 1967, as the succession was declared on 30 May

17. *E.g.* C. Joyner, The United Nations and International Law (1997); and Views From the International Law Commission, International Law on the Eve of the Twenty-First Century (1997).
18. UN Doc. A/RES/217A (III) (1948).
19. UN Doc. A/CONF.32/41 (1968).
20. UN Doc. A/CONF.157/23 (1993).
21. *See* I. Van Aggelen, *Decolonization: Dutch Territories, in* R. Bernhardt (Ed.), Encyclopedia of Public International Law, Vol. I, 983 (1992) and the literature cited there.
22. Camp David Agreement Between Egypt and United States, 17 ILM 1463 (1978); and Egypt-Israel Treaty of Peace, 18 ILM 362 (1979).

1967.[23] In the box on *Trade Organization* at page 69, it is erroneously stated that the WTO replaced GATT in 1993. The WTO was established by the Marrakesh Agreement on 15 April 1994.[24]

The author discusses the duplication by UNCTAD of the work of the ECOSOC and General Assembly, but does not refer to its duplication of work by the newly created WTO (pp. 85-86). For that reason, UNCTAD's existence was recently seriously threatened.

Page 98 erroneously refers to "the right of humanitarian interference". The correct term is humanitarian intervention! The box, which however really bothers the reader, is Box XXI on the human rights machinery (p. 114). The Working Group of Governmental Experts on the implementation of the Covenant on Economic, Social and Cultural Rights is mentioned there as subsidiary body of the ECOSOC. This is completely irrelevant, as the Working Group was replaced in 1985 by the quasi-judicial Committee on Economic, Social and Cultural Rights.

The number of Working Groups mentioned is imprecise. The Human Rights Commission in 1995 decided to close altogether the discussion on apartheid. Therefore, it is an error to refer to the Working Group on the Crime of Apartheid. The 1997 session of the Commission had a total of eight inter-sessional and pre-sessional working groups. The Sub-Commission does not have 27 experts, but 26. At page 115, it should read 'Committees', and not 'Commissions' created in connection with the human rights program. The enumeration is incomplete, but correctly refers to the Committee on the Elimination of Discrimination Against Women (CEDAW).[25] Another reference to this Committee in Box XIV under the heading "Coordination of Policy and Sustainable Development" (p. 74) is completely out of place. The reference to 'the Office of the Under-Secretary-General for Human Rights' should be 'Office of the High Commissioner for Human Rights'.

The book is accompanied by a useful bibliography and index, although the author failed to refer to the 'Blue Series'[26] published by the United Na-

23. *See* S. Cronje, The World and Nigeria: The Diplomatic History of the Biafran War 1967-1970 (1972).
24. The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, reproduced *in* 33 ILM 1 (1994).
25. UNGA Res. 34/180, UN Doc. A/34/46 (1997).
26. Boutros Boutros-Ghali, The Blue Book Series: The United Nations and Apartheid, 1948-1994; The United Nations and Cambodia, 1991-1995; The United Nations and Nuclear Non-Proliferation; The United Nations and El Salvador, 1990-1995; The United Nations and Mozambique, 1992-1995; The United Nations and the Advancement of Women, 1945-1996; The United Nations and Human Rights, 1945-1995; The United Nations and Somalia, 1992-1996; The United Nations and the Iraq-Kuwait Conflict, 1990-1996; The United Nations and Rwanda, 1993-1996; Les Nations Unies en Haïti, 1990-1996; and The United Nations and the Independence of Eritrea.

tions since 1995. Eight volumes have been published thus far and four are in preparation.

In conclusion, taken into consideration that the book is an updated version by the author of the French version *L'ONU*, published in 1994 by 'Edition La Découverte', and the many editorial and printing errors, this book is too expensive and could price itself out of the market.

*Johannes van Aggelen**

A New Charter for a Worldwide Organisation, by M. Bertrand & D. Warner, Nijhoff Law Specials, Kluwer Law International 1997, ISBN 90-411-0286-8, 304 pp., US$ 81/UK£ 55/Dfl. 125.

Especially since the end of the Cold War, strong criticism has been levelled at the UN and the Bretton Woods Institutions because of their apparent inability to react to contemporary international problems in a meaningful way. The book under review – far from being just another proposal advocating reform of the present system – is, in addition, an extensive discussion by well-known experts of previous and present efforts in this direction.

It is the product of a meeting convened in Geneva from 27 February to 1 March 1995 to coincide with the 50th Anniversary of the United Nations. At this meeting Maurice Bertrand (a former member of the UN Joint Inspection Unit)[1] introduced a proposal for a Charter for a new World Organization to replace the existing UN, the Bretton Woods Organizations, and the Specialized Agencies. The contributors acknowledge that the present political climate cannot accommodate reform, but the possibility of reform is increasing because of the recognized failures in the field of United Nations security, in the IMF, and in the G7. Consequently, reflections on the present situation continue to be useful. The primary aim of the book is not to gain support for the Bertrand proposal but to make a valuable and fresh contribution to the continuing debate on reform of the global institutions.

The book contains a preface, an introduction, 18 chapters (which include the written commentaries of 13 of the meeting participants and a short conclusion by the Editors), and an extensive index. Chapters one to three were written by Maurice Bertrand. The individual chapters reflect the points of convergence and divergence of the other contributors. In the introductory chapter, Bertrand discusses the necessity of conceiving a new Charter for the Global Institutions and lists the objectives that the new organization should

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1. UN Doc. A/RES/2150 (XXI).

achieve: these are *inter alia* that the primary aim of the Organization should be conflict *prevention* and eventual *repression* should be left to regional alliances; it should be a co-ordinating organization, dealing with security and economic problems together; it should have a limited power of intervention in relation to a few problems; and it should be truly democratic with not just the influence of a few great powers and it should have an equitable and credible representation.

In Chapter two, Bertrand presents an illustrative schematic representation of the current and proposed systems, using diagrams and statistics to show the current 'non-system' of international organization and his proposed coherent system. Chapter three contains the working papers and the Draft Charter for the New World Organization. Bertrand holds that the whole system should be overhauled, but many other contributors balance this view by stating that amending the present Charter would be sufficient to achieve the necessary improvements. This is a particular attraction of the book: where Bertrand neglects important issues or makes insupportable proposals, the scepticism and the counter-proposals of the other contributors voice the necessary criticisms.

The key organs proposed in Bertrand's Charter include a Global Security Council with 20 members (representation to be established according to Gross National Product and population) which will be "a central component capable of synthesising all the organisation's problems of competency, and directing it efficiently" (p. 17). The Charter also proposes a World Parliament (of 700 to 800 elected representatives); a General Assembly with a consultative capacity (of approximately 150 members, grouping countries with a population of less than one million by regions); a Commission (similar to the European model); various organisms representing civil societies; a Council of Minorities; a World Central Bank; and judicial organs. Chapter four provides a useful summary of discussions and lists the seven points of convergence and the five points of divergence. It is not the intention of this modest review to analyze the results of the discussions; but merely to refer the reader to the extensive individual contributions.

Chapters five to sixteen contain the responses to and the critical appraisals of the Bertrand proposal. Several themes and common areas of concern emerge from the additional contributions. In Chapter five, Victor-Yves Ghebali gives a comprehensive overview of important pre- and post-Cold War proposals for reform of the United Nations system. The useful contribution by Saul Mendlovitz in Chapter six includes (in Appendix 1) a discussion on the Draft Convention on the Monitoring and Reduction of Arms Production and Stockpiling and Transfers.[2] He, like other contributors, advocates that the Charter should include the regulation of arms reduction. In

2. UN Doc. A/RES/2826 (XXVI).

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Chapter seven, Yoko Yokota interestingly notes that technological advances and the fact that we have now reached the "ultimate stage in history" (p. 134) dictate that reform is necessary. The present system is insufficient to support the decision that humankind as a whole (not just sovereign states) must take whether to choose the 'catastrophic' course (absolute destruction) or the opposing 'paradisiac' course.

In Chapter eight, Victor-Yves Ghebali asserts that the most pertinent problems facing the new Organization relate to issues of sovereignty and the use of force. In an in-depth discussion of inter-state and intra-state norms of conduct for a new World Organization Charter, he suggests that the principle of the non-use of force by nation-states could be extended to "*criminalise* actions committed against the territorial integrity and political independence of nation-states; the basic norms of human rights and humanitarian law; the planet ecosystem and the peaceful democratic evolution of civil societies" (p. 147).

In Chapter nine, Susan George focuses on the destructive effects of the deregulated market on global well-being. She notes that in the past, events sparked off the establishment of a new international organization – she warns that it is now perhaps the "universal threat of financial chaos and collapse" (p. 151). Arthur Groom, in Chapter ten, disagrees with Bertrand's assertion that the collective security system of the United Nations is ineffective and rejects calls to change the composition of the UN Security Council. He notes that to fulfil the requirements of Chapter VII of the UN Charter, the composition of the Security Council should be balanced not politically, but in terms of security capabilities. He notes further (as do other contributors) that while Bertrand's giving the task of collective security to regional alliances may be *an* answer, it is not *the* answer for collective security. "We must also remember that although we are enjoined to love our neighbours, we also have a high proclivity to fight them" (p. 177).

Richard Stanley in Chapter eleven states that Bertrand's main argument posited in support of a complete overhaul of the system as opposed to an amendment of the present Charter, is defunct. Achieving the political support necessary to introduce a New Charter would effectively be equally difficult to amending the present Charter (under Articles 108 and 109 UN Charter a two-thirds majority of all members and the positive affirmation of the five permanent members of the Security Council are required). Political reality dictates that both paths require a 'step-by-step' approach. In Chapter twelve, Charles Maynes commends the Bertrand Charter for its recognition of the regional influence of the big powers, but warns that problems of restraint of powers would arise if they are given a free rein in collective security. In Chapter thirteen, Dominique David concludes that a combination of global and regional security is the only solution to conflicts of an increasingly complicated nature. In Chapter fourteen Jan Woroniecki points to the

necessity of having a central body to deal with security and economic matters. He points to the fact that the shift from the academic to the decision-making stage will be crucial because the proposed Charter is not a reflection of an international consensus or a desire or preparedness of governments to introduce a change in global relations.

In Chapter fifteen, Christian Comeliau discusses the necessity of a convergence of aims and policies in the fields of international security and economic development. He believes that the present institutions lack an overall coherent policy linking these two globally interrelated areas.

In Chapter sixteen, Mohammed Bennouna notes his concern (as do other contributors) that the General Assembly should not be an exclusive organ and that all sovereign states should be given the opportunity to be heard and to sit at "the heart of the organization". Finally, Chapter seventeen provides a list of participants and contributors.

The fact that the commentaries address most of the points of criticism, satisfies the temptation to be critical of the content of the proposed Charter. One possible lacuna of the book is the lack of an overall conclusion (this can be found only to a degree in Chapter four and in the short conclusion). It might have been interesting to develop a new draft Charter, combining and incorporating the commentaries and the initial proposal. However, this is a minor point of criticism and the carefully compiled book nevertheless more than achieves its primary aim of making a novel and challenging contribution to ongoing discussions regarding reform. It is a valuable contribution to any academic discussion on the state of international organization at the turn of the century, and will serve as an excellent tool for any further discussion about which direction reforms should go.

*Karen T. Hennessy**

Foreign Affairs and the US Constitution, by L. Henkin, Clarendon Press, Oxford, 1996, ISBN 0-19-826099-7, 582 pp., US$ 29,95/UK£ 22,50/Dfl. 75.

Almost 25 years after the first edition, the long awaited, renewed, reorganised, and updated second edition of *Foreign Affairs and the US Constitution* has been published. Bearing in mind the fact that since the end of the Cold War the United States of America has been setting the tune on the world stage, a book which offers a current insight for the 'outsider' (i.e. a non-US citizen) over American foreign affairs and the people behind its scenes, is

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very welcome. The foreign affairs policy of the US has a direct impact upon the course international politics (will) take(s). A few examples of recent US political decisions which have had an enormous impact on the international stage are the non-payment of its membership fees due to the United Nations, the Helms-Burton Act concerning trade with Cuba, and the influence of its stance on the peace process in the Middle East. If the United States blow their nose, there is a storm in the rest of the world.

The subject of the book is 'Foreign Affairs and the US Constitution', and it attempts to illuminate the constitutional provisions that deal with foreign relations and the special significance for foreign relations of general constitutional clauses and extraordinary constitutional theories (p. 6).

The US Constitution is designed along the lines of separation of powers as set out by Montesquieu in his book *L'esprit des Lois* (1748): the separation of the legislative, executive, and judicial power and the balancing of these powers against each other. However, the attribution of authority and functions with regard to foreign affairs is less clear cut than the attribution of authority and functions with regard to domestic affairs: "[t]he great unknowns and the perplexing issues in the constitutional law of foreign affairs continue to lie between President and Congress – the definition of their respective constitutional domains, the consequences of interference or failure of co-operation in the exercise of their separated powers" (p. ix).

The book is divided into four parts: *Foreign affairs as national affairs* (Part I); *The distribution of constitutional power* (Part II); *Co-operation with other nations under the constitution* (Part III); and *Constitutional limitations: individual rights and foreign affairs* (Part IV). It is accompanied by an elaborate Table of Cases, Table of Statutes, an impressive amount of endnotes (218 pages), containing a wealth of information, and – as an appendix – the Constitution of the United States of America. The book closes with a short index.

Part I deals with the constitutional authority of the federal government. From the birth of the United States, the federal government has conducted the relations with other sovereign nations. But on which constitutional basis do different branches of government act? As far as the conduct of foreign relations is concerned, the Constitution "seems a strange, laconic document" (p. 13). It is outspoken in one sense; it denies explicitly important foreign affairs powers to the states. But as for the distribution of authority and functions within the federal government, the Constitution remains awkwardly silent. Some powers are explicitly attributed to one branch of government, other powers and functions are not mentioned at all in the Constitution. One might, justifiably so, come to the conclusion that foreign relations have been treated in a rather distant way by the draughters.

Does the fact that the Constitution vests in the President the power to conclude treaties also give him the power to terminate them? Does the attri-

bution of some powers imply others? Some of the powers are, according to the Supreme Court of the US in the *Chinese Exclusion* case,[1] inherent in the nationhood and sovereignty of the United States (p. 16). No explanation, however, is given by the Court where support for this view might be found in the Constitution. According to Henkin this leads one to conclude that the powers to conduct foreign relations do not derive from the Constitution. In *United States* v. *Curtiss-Wright Export Corp.*[2] the Supreme Court, by way of Judge Sutherland, stated "that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution [...]. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family [...]. This, the court recognised, and [...] found warrant for its conclusions not in the provisions of the Constitution, but in the law of nations" (p. 18).

This theory has not unanimously been accepted, although it remains an authoritative doctrine. Whether one bases the authority to conduct foreign affairs on 'sovereignty' as in the *Curtiss-Wright* case, or on the implied power theory as in the *Chinese Exclusion* case, or on the fact that it does not derive from the constitution at all, all that is connected with foreign affairs comes within the realm of the constitutional powers of the federal government. The question remains as to who is empowered to conduct which part of the foreign affairs: "[m]ajor struggles between President and Congress [the two major players in the foreign affairs] then, are equally intractable under every theory of constitutional power in foreign affairs" (p. 22).

In Part II, Henkin embarks upon a very thorough investigation, along the lines laid down in the Constitution, of the distribution of powers of each branch of government, both in theory and in practice. In subsequent chapters, he deals with powers vested in the President and the Congress, where they have sole power to act, where they have to cooperate, or where they have concurrent authority. In the last chapters of this part the – voluntarily – limited role of the courts and the even more limited role of the states, as prescribed by the Constitution, are examined.

Some of the foreign affairs powers in the Constitution are exclusively attributed either to the President, e.g. treaty-making powers; the right to appoint and receive ambassadors; the command of the armed forces; the supervision of the lawful execution of the laws of the land; and being the sole organ of communications with other nations; some or to Congress, such as to regulate commerce with foreign nations; to declare war; to allocate monies; and to legislate.

1. Chinese Exclusion case, 130 US 581 (1889).
2. United States *v.* Curtiss-Wright Export Corp., 299 US 304 (1936).

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The power of the President is limited by the powers the Constitution grants to Congress; by Congressional legislation; and by the Bill of Rights. Congress has a very powerful instrument to influence the foreign affairs of the US, even in those areas where the President is the 'acting power', is the 'power of the purse'. According to Henkin, Congress should not use the money lever in cases where it is not empowered to exercise any authority of function: "[i]f Congress has authority under the Constitution to reject, regulate or terminate a Presidential activity it can do so by legislation or by refusing to appropriate funds or by terminating funds previously appropriated. But what it cannot constitutionally regulate by legislation, it may not properly do so by exercise of any power of the purse" (p. 115).

Congress has hardly ever refused to allocate funds necessary for the implementation of international undertakings. However, it does sometimes question the amounts required, allocates less than requested, or delays – in case of membership fees due to the UN for years – to appropriate funds.

Part III looks into the implications of treaties and the activities of international organization on the US system. The treaty-making power entrusted to the President in the Constitution is subjected to the advice and consent of the Senate (Article II(2)). A consent, which is seldom refused, but can be delayed for a considerable period of time (e.g. human rights treaties) or is often surrounded with reservations, understandings, and decisions.

Treaties are regarded as part of the laws of the land, irrespective of their content. The Constitution does not provide a hierarchical structure; it does not state the place international agreements have in relation to congressional legislation and the Constitution. Like any other law of the land, treaties and executive agreements are subject to the limitations set out in the Constitution or Bill of Rights. The Supremacy clause (Article VI(2) of the Constitution) only looks at the relation between treaties and state laws, the latter is subservient to the former.

One, however, has to make the usual distinction between self-executing and non self-executing treaties. The author is of the opinion that this is an anomaly. In the Constitution, he says, there is a very strong indication that self-executing treaties are the rule and non self-executing treaties the exception. The tendency, shown by both the Executive and the Courts to regard treaties, or provisions thereof, as non self-executing, runs counter to the language and spirit of the Constitution, more in particular the Supremacy clause (pp. 201, 202).

The role of Congress might seem limited in the treaty-making process: only the Senate is allowed to give advice to the Executive and is required to give its consent. In the implementation of obligations arising out of international agreements however, the role of the Congress is considerable. The responsibility for the enforcement and execution of treaty obligations falls within the Presidential power 'to faithfully execute the laws'. If in the proc-

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ess domestic action (e.g. legislation) is needed the President has to seek Congressional support. At this stage it is possible for Congress 'to voice their discontent', either by delaying the appropriate legislation or by refusing to place the appropriate funds at the disposal of the Executive.

Congress can also influence the execution of treaty obligations in another way. Most treaties deal within the domain of the legislative powers of Congress. It is not unthinkable that a later act of congress is irreconcilable with treaty obligations laid down earlier. As the Supremacy clause does not state a hierarchy, the rule *lex posterior derogat legi priori* is applicable. Then a situation arises where the US is still bound by its treaty obligations, but has to default on them because of domestic legislation. The power to enact legislation, which is inconsistent with treaty obligations, and the legality of it, seems to be a well-established practice at this time (p. 211).

Apart from treaties, there is another important source of international obligations: the executive agreement. This may take the form of an agreement concluded by the President or of a Congressional executive agreement. The latter is an agreement concluded by the President on authority, by majority of vote, of the Congress. Neither agreement is mentioned in the Constitution and the question arises whether these instruments, which mostly deal with the same matters as treaties, are constitutional. Are they not just a way to get around the requirement of a two-third majority in the Senate? Do they have the same status as treaties, do they qualify as law of the land?

Headquarter agreements and various multilateral agreements establishing international organizations have taken the form of Congressional executive agreements. The Constitutional doctrine to justify these agreements is not clear, but in practice no branch of government seems to feel restricted by it. The main advantage of such an instrument is that it will be less likely that the House of Representatives, left aside in the treaty-making process, will block domestic legislation required by these agreements. They did give their consent to the initial agreements. This practice has now been approved in Paragraph 303 of the 1987 *Restatement of Law, Third, The Foreign Relations Law of the United States*. It recognizes the equality of the Congressional agreement to treaties and are thus part of the laws of the land.

The power of the President to conclude so-called sole executive agreements has never been challenged as long as it stayed within the ambit of its sole executive authority. Controversy has arisen in those cases where the Senate felt that the President overstepped its constitutional authority; a line too fine to draw and very much subject to the political 'mood of the moment'.

Besides, the author looks into the 'novel constitutional issues' that arise from the membership of the US to international governmental organizations, and the activities those organizations engage in. One of the questions which arises, is "[w]hether, by adhering to the United Nations Charter and accept-

ing the authority of the United Nations Security Council, the treaty-makers have improperly delegated powers of Congress or of the President to an international body" (p. 251). In theory it could be argued that the provisions in the Charter could create a situation where the Security Council can force upon the US a line of action which it would not like. For example, to place troops at the disposal of the Security Council and under the command of the UN, although according to the Constitution only Congress is empowered to declare war and the President is Chief Commander, and in those cases in which war is not yet declared, the President has the ultimate decision to deploy troops. In practice such a situation will not occur. Firstly the US have a veto in the Security Council, and secondly in the absence of any Article 43 agreement[3] – and that is the current situation – the Security Council can only recommend or authorise the use of force. For other types of mandatory obligations the veto will effectively prevent any unwanted situation for the US.

Of a different nature is the obligation arising from Article 17(2) of the Charter, which provides that "[t]he expenses of the organization shall be borne by the Members as apportioned by the General Assembly". The action undertaken in the 1990s by Congress to delay the appropriation of funds might not be unconstitutional, due to the Supremacy clause, but is certainly to be considered as a serious breach of an international obligation entered into voluntarily by the US.

If an international organization might be able to impose law upon the US against its will, this is not a case of unlawful delegation of power by any of the governmental branches "for it is not exercising legislative powers of the United States [...]. It is creating law *for* the United States not *of* the United States, international law for the United States as a nation, not domestic US law for the governance of the inhabitants of the United States" (p. 263-264).

However, a different situation would arise if regulations of those international organizations impinged directly on individual rights and interests within the United States. They will be laws of the land, subject to the same requirements and limitations applicable to domestic laws.

In Part IV the fundamental and overriding constitutional limitations on governmental action is looked into: the obligation to respect individual rights. The US Constitution does not explicitly give the people their rights; the rights of the people are the presumption upon which the Constitution has been built. The Constitution recognizes these rights and denies the government the authority to infringe them. Irrespective of the 'source' of the legislation.

3. *See* Art. 43 UN Charter which states: "[a]ll Members of the United Nations undertake to make available to the Security Council, with a special agreement or agreements, armed forces, assistance, and facilities, necessary for maintaining international peace and security".

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The book under review describes the various issues, which arise in connection with foreign affairs and the US Constitution, both in theory and practice. A simple book review could never do justice to the diligence, accuracy, and knowledge displayed by the author. One is forced to make choices. At times the book gives rise to more questions than it provides answers, but this – to me – seems to be inherent in the subject of the book. It is an area, which is in constant motion; new challenges come up almost every day. I would like to draw two very general conclusions. Firstly, not all that is old is out of date. A constitution, which is over two centuries old, is still capable of solving problems occurring in the late 20th century and will be able to face problems occurring in the 21st century. Secondly, the idea one might get from the press namely that President and Congress are constantly at loggerheads, locked in a power-struggle, is false. In practice, the separation of powers in government with regard to foreign affairs works very well. Despite the fact that the Constitution is 'a strange, laconic document' with regard to explicit distribution of powers for the conduct of foreign affairs.

This book offers a very good and in-depth analysis of the constitutional provisions and their application in practice. It is extremely well-written and clarifies the possible problems with a host of examples originating from practice and case law. It is a must for anybody who is interested in the role the US plays on the international scene. I highly recommend it.

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