BOOK REVIEWS

UN Security Council Reform and the Right of Veto: A Constitutional Perspective, by B. Fassbender. Kluwer Law International, The Hague/London/Boston, 1998. Legal Aspects of International Organization, Volume 32. ISBN 90-411-0592-1, 436 pp., incl. Index and Bibliography. NLG 185/USD 100/GBP 63.

The demise of the cold war and the ensuing activism of the Security Council has raised a number of important issues in international law. Among them are the legal limits to the Council's authority under the Charter, the role of the International Court of Justice alongside the Council's in the maintenance of international peace and security, and the question of the Council's legitimacy.[1] It is part of the latter issue that the author addresses in this book: the reform of the UN Security Council and the right of veto. This aspect of the Council's functioning has been on the agenda since the 1970s but gained new momentum in the 1990s, evidenced by the establishment of an 'Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council' by the General Assembly in 1993.

As the subtitle of the book indicates, Fassbender's approaches the issue from a constitutional angle, in which the Charter is seen as the "constitution of the international community." Given his remark in the introduction that this approach may be seen as part of a Kuhnian paradigm change in international law, the author is aware of the ambitiousness of this venture.

From the outset it must be said that the limits of this article necessitate omitting and simplifying certain parts of this complex book. The book is divided into two parts. In the first part (chapters 1-6), Fassbender lays the theoretical foundation of his work and tries to establish that the Charter of the United Nations should be regarded as the "constitution of the international community." He does so by examining, in the first chapter, the historical origins of the concept of constitutions, a concept which stems from national states. Within states it is the supreme law "governing the organization and performance of governmental functions in a given state [...] and the relationship between state authorities and its citizens." (p. 32). Chapter 2 assesses different schools of thought that have tried to transfer the concept of constitutionalism to the international plane. These are the monistic school of Alfred Verdross and Bruno Simma; the New Haven

1. *See* a.o. J. E. Alvarez, *Judging the Security Council*, 90 AJIL 1-39 (1996); M. Bedjaoui, The New World Order and the Security Council: Testing the Legality of its Acts (1994); D.D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AJIL 552-588 (1993); J. Herbst, Rechtskontrolle des UN-Sicherheitsrates (1999).

School, the Doctrine of International Community (attributed to H. Mosler and C. Tomuschat); and Constructivism as developed by N. Onuf. These approaches are further analyzed in the following chapter, in which Fassbender concludes that states at present have come to the conclusion that there exists an international community to which they owe obligations *erga omnes* to and which is the legislator of *ius cogens*. These obligations are e.g. the non-use of force and the protection of human rights. Accordingly the international legal community is no longer an "association of equals not subordinated to any higher authority."(p. 81)

But according to Fassbender such a community cannot exist "as a distinct legal entity, in the absence of a constitution providing for its own organs."(p. 85). In Chapter 4, therefore, he tries to demonstrate that the United Nations is the institution which furnishes the international community with those organs and that the Charter is the constitutional instrument of the international community. To this effect he analyses the Charter in terms of Weber's ideal type of a constitution. The author, *inter alia*, concludes that the Charter provides for a system of governance and a rudimentary form of separation of powers; that it provides for a hierarchy of norms ex Article 103; that it is a clear and short document aimed at 'eternity'; and that it is universally binding, including non-members of the United Nations and other subjects of international law. From these characteristics it follows that the Charter is to be regarded as the constitution of the international community.

The following two chapters deal with the far-reaching consequences of this conclusion. One of them is that the Charter "embraces all international law" and that there accordingly "is no room for a category of 'general international law' independently existing besides the Charter." (p. 117) In this view the Genocide Convention and the Covenants on Human Rights are seen as 'Constitutional By-Laws' furthering the cause of the Charter. As regards its interpretation, the Charter must be deemed a 'living instrument' which is to be interpreted in a dynamic-evolutionary way which de-emphasizes the original will of its founders. At the same time, however, the constitutional character of the Charter precludes informal amendments to the Charter, it "can only be amended in the procedures provided for in Articles 108 and 109." (p. 141).

Part 2 (Chapters 7-10) covers the reform issue itself, which the author wishes to analyze from "a constitutional angle." In Chapter 7 he explains that the inclusion of the veto in the Charter in the form of Article 27(3) was a necessary condition for the 'Great Powers' of the time, on which the maintenance of international peace and security depended, to join the organization. Fassbender rejects the *clausula rebus sic stantibus* argument, to the effect that the veto is no longer applicable since in the present global context the maintenance of international peace and security no longer rests on the current five permanent members of the Council, because this clause cannot be invoked with regard to constitutions. Chapter 8 deals with the 'premises of reform'. Herein he notes that informal

amendments of the Charter have taken place with regard to the voting procedure of the Council. Thus an abstention or absence from voting by the permanent members is treated as a concurrent vote cast by those members, and the obligatory abstention of a party to a dispute provided for by Article 27(3) has been consistently disregarded. In line with his earlier statement that amendments can only take place pursuant to Articles 108 and 109 of the Charter, the author submits that this practice is "not lawful", but that it "stands as long as it is not challenged as unconstitutional." (p. 183). He then addresses the changes that have taken place in the world since 1945 and future challenges posed thereby to the Council, approvingly noting that the Security Council has interpreted Article 39 so as to include internal conflicts and not just 'classical' inter-state wars.

Chapter 9, then, deals with the current debate on the reform of the Council relating to its composition and the right of veto. Within this debate a general division exists between the North and the South. In view of its current privileged position on the Council, the North is resistant towards major modifications of its composition and accordingly emphasizes the need for an efficient and effective Council. The South, on the other hand, emphasizes a more equitable geographic distribution and proposes an increase in permanent members. The author discusses the various proposals that have been submitted, alternatively providing for smaller or bigger changes, for expansions with permanent or semi-permanent (rotational) members, for a right of veto for the new members or for an abolition of the right altogether. In the end Fassbender correctly observes that the debate has reached a deadlock.

In the tenth and final chapter the author applies his constitutional insights to the debate. He maintains that any reform of the Council must take place within the context of the aims of the Charter, that is the preservation of international peace and human dignity. (p.284). He then turns to the 'constitutional principles' which should guide any reform, noting that "we cannot claim that there is a legal obligation to follow the lines of thought set out below." (p. 284). Fassbender submits that the reform debate is dominated by three constitutional principles: the principle of sovereign equality, of representativeness, and of effectiveness. According to the first principle, incorporated by Article 2(1) of the Charter, every state is entitled to equal rights and duties under the law. This provides for an argument against special prerogatives for certain states under the Charter. Those prerogatives are justified, however, by the principle of representativeness, which holds that a constitution should reflect the dissimilarities between its constituents. The principle of effectiveness provides for the outer limits of amendment in the sense that an amendment cannot do away with the primary objectives of the Charter, or the means to achieve these objectives, e.g. by abolishing the Security Council. In the process of identifying these principles the author dismisses arguments related to the veto as a check on the Council's powers; to the need for an enhanced legitimacy of the Council; and to democracy within the United Nations. Fassbender then devises his own proposals. He submits that the

permanence of certain members is contrary to the principle of representativeness, which must reflect actual and not past dissimilarities of its members. An increase in the membership would therefore have to include a new category of 'semi-permanent' members: through "periodic elections [...]a certain number of Council seats would be allocated for ten oryears." (p. 324). This would be in accordance with both the principle of sovereign equality and representativeness. With regard to the veto, Fassbender is silent on the question whether any new members of the Council should enjoy such a right but maintains that, in view of the principle of *nemo debet esse judex in propria sua causa*, the right to veto should be limited to decisions under Chapter VII of the Charter. In the conclusion, which, as has been correctly observed by A.L. Paulus, is somewhat paradoxically titled "Constitution-building without a hegemon",[2] Fassbender maintains that if any substantial reform is to take place the US has to take the lead. Without such leadership it is to be expected that a reform will be limited to an increase in the non-permanent membership, as happened in 1963.

Bardo Fassbender has engaged in an ambitious journey indeed, but the present author has some doubts as to whether he has properly reached his destination, let alone established that a Kuhnian paradigm change has taken, or is taking, place. To be sure, Fassbender cites Inis L. Claude to the effect that a "scholar's proper role is less to answer questions than to question answers." (p. xi). In the end, however, the constitutional approach to the Charter employed in this book leads to several additional questions on the questions posed and the answers provided.

The conclusions reached by Fassbender are based on various controversial assumptions. Thus in a single sentence the Charter is characterized as a "rather short and clear text confined to the most important goals and policies of the newly defined community" (p. 99). But as Watson has observed, "The Bill of Rights may seem hopelessly vague to students of the U.S. Constitution, but it is a model of clarity and detail compared with the corresponding provisions of the U.N. Charter."[3] Indeed it is quite difficult to discover substantive rules in the Charter apart from those dealing with the maintenance of international peace and security. The social and humanitarian provisions of the Charter are framed in very general terms, from which it is difficult to distill concrete norms binding entities other than the UN organs.

In the constitutional view adopted by Fassbender, furthermore, the powers of the Security Council are interpreted very broadly, so as to include the power of law making and the power to take enforcement measures against non-members of the United Nations. Article 103 is, moreover, read as "stating a priority of the Charter over all conflicting obligations of states regardless of their source." (p.

2. *See* A.L. Paul, *Book Review*, 10 EJIL 209-211, at 211 (1999).
3. G. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 Harvard ILJ 1-45, at 34 (1993).

120). Although consistent with the constitutional approach these are quite contentious premises that can hardly be said to have been settled by jurisprudence or in the legal literature.

The constitutional principles guiding Security Council reform identified by Fassbender, that of equality, representativeness and effectiveness, are already part of the Charter. A discussion on a reform of the Council will therefore necessarily include these principles, irrespective of whether one sees the Charter as an ordinary treaty, the constitution of the United Nations, or the constitution of the international community. In that sense the constitutional approach does not seem to provide for specific insights on the matter.[4]

Moreover, in the introduction the author submits that, by virtue of the constitutional character of the Charter, the reform of the Council is not "simply a matter of politics" but that states have to attend to certain legal principles and concepts. Ultimately, however, he has to concede that the constitutional approach does not identify any legal obligations on the part of states, apart from the duty not to dispose of the primary objectives of the United Nations. This implies that the reform issue is a political matter after all.

Another critique relates to the consequences that flow from the finding of the Charter as the "constitution of the international community." Fassbender maintains that as such the Charter embraces all international law. Indeed obligations *erga omnes, jus cogens*, 'world order' treaties such as the two Human Rights Conventions, and the customary law of the sea are all part of, or upheld by, the Charter. The Charter is thus presented as a *deus ex machina*, incorporating and transforming every conceivable rule of international law into the 'constitutional law of the international community.' This process is in need of some additional clarifications.

These critical remarks notwithstanding, the book does provide a welcome contribution to the ongoing debate on the status of the Charter and the reform of the Security Council. The author has tackled a complex problem and in doing so has come up with a thought provoking argument that he applies consistently. As such the work is a valuable addition to any collection related to the United Nations. Its -given the publisher- comparatively modest price should not stand in the way of acquiring it.

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4. *Cf.* C. Tams, *Book Review*, 41 GYIL 567-571, at 571 (1998).

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Comparative Law in a Changing World, by Peter de Cruz, Cavendish Publishing Ltd., London/Sidney, 1999, xx + 512 pp., ISBN 1 85941 432 X.

Professor de Cruz purports to offer us a *tour d'horizon* of comparative law. His textbook[1] indeed provides substantial information about many classic and some less well-explored topics on the subject. Going beyond the scope of traditional comparative-law works, de Cruz also examines European Union law, offers current-affairs accounts (which most comparative lawyers consciously try to avoid), invokes theories of convergence and globalization and attempts a little bit of futurology. From the perspective of this reviewer, an approach that took into account the dynamic, or simply anarchic, element in the evolution of legal systems, and the interplay between Global and Local would be very welcome. It remains to consider how much this book fulfills this task.

The content of the book can be better examined by distinguishing four types of comparative-law scholarship. First, there is the 'general' discussion about the essential premises of comparative law, its role, nature etc.; second, the elaboration of the *method* and techniques of comparison; third, the *macro*, 'background' description of legal systems / families / traditions / cultures and especially the conceptual craftsmanship involved in the construction of such analytical categories; finally, while fundamental ideas about law affect these exercises, the comparative method is employed into – and illustrated by – the *micro* comparison of specific areas of law. Postwar comparative law has witnessed a trend away from discussing the essential premises of comparative law – with the exception of 'new' or 'critical' approaches to comparative law that challenge these very premises. Most notably, there has also been a shift from conceptions to method, a rush away from trying to fit legal systems into categories and toward the micro-comparison of very specific sets of rules, with a distinctly Western focus. This is true primarily in Europe, while in the United States, where traditional comparative law has lost much ground in the last quarter-century, the move has been toward 'area studies', especially of East Asia and the Islam.

These developments may be explained in three ways, all related to the existential problems of postwar comparative lawyers. First, the generation brought up after the War have identified themselves, from relatively early points in their careers, as participants in a certain – technocratic and 'non-political' – sort of international governance, through uniform-law legal instruments and international institutions (including arbitral justice). Second, we can discern a feeling that enough work has been done already with regard to the categorization and *grosso modo* description of legal systems. This feeling, which in turn feeds these 'global governance' projects, is motivated by a disappointment with grand theoretical projects altogether (a common idea, after all, in modern international le-

1. The book was first published by Kluwer in 1993 as a *Modern Introduction to Comparative Law* and then, a few chapters added, in its current title by Cavendish in 1995.

gal scholarship), or by the sense that whatever was to be achieved at the high level of generality has already been achieved and it is now time to work from the details up (a notion often encountered today in established social sciences). The third reason for the shift to micro-comparison seems to be the existential urge of comparative lawyers to make their domain attractive. This is especially true in the England of the 1980s and 1990s, when a new generation of comparative law teachers came into existence and found themselves "in search of an audience", in the words of prominent comparativist and Oxford Professor Basil Markesinis – who actually suggested narrowing comparative law's object of study as a way to make it more interesting to students and practitioners alike.

Professor de Cruz should be given credit for attempting to deal with this existential quest, and with his own search for a marketable niche, through a comprehensive treatment of comparative law. In the first and last chapters of his book (Ch. 1 "Comparative Law"; Ch. 14 "A New World Order?") he tries to define comparative law and fit it into legal scholarship and the "changing" world of our time. He then addresses "The Classification of Legal Families" (Ch. 2), followed by four chapters (Ch. 3 to 6) on "The Civil Law System", "The English Common Law System", "European Community Law", "Socialist Law and Other Types of Legal Systems". He then considers the "Techniques of Comparative Law" (Ch. 7), followed by chapters on "A Comparative Study of Judicial Styles and Case Law" and "A Comparative Study of Statutory Interpretation" (Chs. 8 and 9). Finally, he devotes four chapters to "comparative studies" of legal fields (Ch. 10 on Contract and Tort, Ch. 11 on Corporate and Commercial Law, Ch. 12 on Sale of Goods and Ch. 13 on Labor Law).

The author's approach to comparative law starts with the traditional statement that comparative law is "primarily a method, rather than a body of rules" (p. 5). In fact, no one today thinks of comparative law as a 'body of rules'—while many would speak of a *discipline* that reaches beyond the 'comparative method' defined strictly, to include the examination of foreign legal systems, cultures etc. *as such*. Unfortunately, the method *v.* discipline debate is only mentioned, very briefly, in Chapter 7 of the book, in the course of setting (further) the background for a comparative method.[2] That Chapter first examines "general considerations" concerning problems that might arise in a comparative study (e.g. linguistic, cultural differences, comparability or the selection of the object of study). Its second section, dealing with the "quest for methodology", discusses micro- and macro- comparison, and the functionality approach. The third and final section presents a 'blueprint' for a comparative method, very much influenced by Zweigert & Kötz. The 'blueprint' itself is quite detailed – it

2. Disciplinary identity and aesthetics aside, this debate involves real stakes. Viewing comparative law as a method makes it easier to eventually convert it into a "convergence tool". The presentation of the notion of convergence as an ideal in parts at least of this book offers an actual example of this tendency.

includes, for example, some legal research tips – but it would have been useful if the author had included some practical examples. Unfortunately, unlike, for example, Book II of Zweigert & Kötz, neither the 'macro' nor the 'micro' studies in the book are employed to that effect.

As far as the classification and description of legal systems is concerned, the author's use of certain terms poses a problem. While in the general chapters and in much of the book Professor de Cruz uses the term 'legal system' to connote *national* legal systems (this reviewer admittedly thinks of the term as implying a certain degree of normativity and structure, not unlike the French term *ordre juridique*) and discusses the terms 'legal family', 'legal tradition' and 'legal culture' that have been proposed by various authors, he then uses titles such as "The Civil Law System" and the "English Common Law System" in describing the entire respective legal families. In the introduction, he also speaks of "parent legal families", and then of "parent legal systems" as an equivalent to "legal families". However, it is legal systems and not legal families as such that have influenced or "parented" other legal systems – and a "legal family" never plainly consists of the parent (*sic*).

This being said, Professor de Cruz has the good sense to opt for the description of "parent legal systems" within each family (rather than describe an 'ideal type' of e.g. civil law tradition, as some other English-speaking comparative lawyers), with some regard for divergence. Thus, his book distinguishes, correctly, between a French and a German stream within the 'civil law' tradition: the two streams have been of course interacting, and their influence has merged into the legal cultures of several European countries – a point not adequately made in the book. Except for a brief description of the "Swedish style of judgment" in Ch. 8, neither the Nordic nor the Latin American countries are treated as a distinct group of "civil law" legal systems. In considering the common law family, the book is right to treat United States law as quite distinct from English law, and to consider American constitutional law and federalism issues; on the other hand its treatment is incomplete insofar it neglects the importance of American jurisprudential developments such as the legal realist movement (and various postwar trends).

For de Cruz, the world is and definitely was divided into "civil law", "common law" and "socialist law". On p. vi he states that "all other comparative law books used to assume that there are three main parent legal families" – a claim undermined on p. 186 where he says that scholarship was divided as to whether socialist law was really a different legal family or part of the civil law tradition. In fact, Socialist law in Eastern Europe, which has been the main object of socialist-law study, was radically different from civil law with respect to the underlying jurisprudence, some fundamental legal concepts and the administration of justice system. Whatever the ultimate fate of economic development and political reform in certain countries, such differences are for the most part already a thing of the past in Eastern/Central Europe and the former Soviet Union. The

study of Socialist law nevertheless still makes sense: on the one hand, it involves a different – and quite interesting – mode of legal thinking; on the other hand, a Socialist legal tradition still influences mentalities and activities in former Socialist countries and survives in Cuba and a few spots in Eastern / Southeastern Asia. We should, however, keep in mind that Asian Socialism has been merged quite early on with non-Western ideas about law that might make redundant some of the observations initially made in Socialist Europe (a fact which might suggest that, while law had been regarded as superstructure in Socialist thought, it has been that latter which was imposed as superstructure on legal practice). Especially Chinese law might be better understood at this stage by considering pre-Communist Chinese legal thought and moral philosophy more than Pashukanis and the socialist writers; a certain tendency toward the 'Westernization' of economic law (consider e.g. the 1999 Chinese Act on Contract Law) must also be noted. Professor de Cruz does not reflect much on these lines; instead, he defends the usefulness of a chapter on Socialist law by implying that not that much has changed, and gives a garrulous portrayal of 1990s Transition Russia.[3]

The fact that Socialist and all other types of legal systems are treated together in the same chapter is disappointing. While traditional comparative law has indeed been constructed, especially in the common-law world, on the basis of an antithesis between 'common law' and 'civil law', the 20th century has seen many honest attempts to give appropriate place to the diverse legal cultures of the rest of the planet, as well as to emphasize the divergence within the two 'central' categories. In this book, "hybrid" legal systems (the expression is used to describe the legal systems of mixed civil-law and common-law influence) are piled along, and the next step is to examine non-Western "concepts of law". By now it is clear that understanding an 'exotic' system or tradition requires a more comprehensive approach and indeed the book's treatment of Japanese and Chinese conceptions of law fail to really grasp the Japanese and Chinese legal cultures, let alone the whole specter of non-Western legal cultures. The omission of any discussion on Islamic legal systems speaks for itself.

The inclusion of Chapters on "European Community Law", "Judicial Styles" and "Statutory Interpretation" (Chs. 5, 8 and 9) is a move in the right direction (even if some might have argued for their integration into 'established' chapters of the book). Themes such as the comparison of modes of legal reasoning, and the examination of the international institutions and instruments on legal systems and traditions based on the nation-state are starting to occupy a – distinct – place in the comparative legal discourse. Comparing how civil-law and com-

3. In talking about Russia in the 1990s, there is a jump from the legislative initiatives circa 1992/1993 to anecdotal stories about a Nigerian's trial in 1997, the state of Yeltsin's health in 1998 and Russia vis-à-vis the Kosovo crisis in 1999. Political events that occurred in the meanwhile and might have affected the rule of the law in Russia, such as Yeltsin's showdown with the Duma and the Constitutional Court crisis are omitted. Predictions about the turning of Russia into a quasi-military dictatorship also turn the clock several years back.

mon-law judges function, and how they in effect perceive their function, illuminates the divisions and similarities between legal traditions in a way that the 'ideal types' portrayed in part of the literature cannot. The impact of European law on the legal cultures of member states (and beyond) is an important topic not yet seriously treated in comparative law works. Unfortunately, Professor de Cruz does not carry us much down the road. Chapter 5 provides an introduction to EC law, with some examples of how the various European legal traditions have influenced the EC style; the analysis however is rather shallow, and the reader may in the end not be convinced that the chapter as it stands fits into the book. Chapters 8 and 9 admittedly provide much interesting information, but no noticeable reflections.

The book also includes four chapters (10 to 13) of comparative studies on 'economic law' fields (obligations, corporations, sales, labour). The studies are, primarily, presentations of the basic elements of French, German and English law in these areas. The chapters could be better perceived as an illustration of what was told about these legal systems, and their legal families, in Chapters 3 and 4 than as comparative studies in the sense of Chapter 7. While English common law is only briefly described in Chapter 4, where emphasis is given instead on US law and the "common law" Southeast Asia, which may be justified for a book for use by English students, the chapters on Obligations (Ch. 10) and especially Sales (Ch. 12) – as well as the preceding Chapters 8 and 9 – begin with a description of the foreign laws first, followed by a description of English law that takes half of the chapter, as if this was a book destined to teach English law of obligations in a comparative background. For the purposes of teaching comparative and foreign law on the contrary, it would probably help the British student to be first reminded of English law, and then have foreign legal systems explained to her. This is only done in Chapter 13 (on labour law), which also devotes more space to French and German law; Chapter 11 (on companies) goes to the other extreme and almost omits discussion of English law, which might have actually interested the occasional foreign reader.

The final chapter of the book illustrates both its flaws and its potential strengths: trying, maybe a little bit too hard and too hastily, to prove comparative law's value in our 'changing world', Professor de Cruz mobilizes theories and strategies of convergence between legal systems and ideas about the 'New World Order' talked about in the early 1990s. In fact, the same reader the author seems to be wooing will probably think his view of the global landscape as "*so* early 90s", while regular readers will likely be left confused as to the usefulness of reading one more opinion about the fall of the Soviet Union. Undoubtedly, some of the criticism launched against the book's consideration of current political developments has to do with a dominant conception of comparative law as 'pure' private law. At the same time, going beyond that conception remains a difficult task, as the book shows.

Comparative Law in a Changing World leaves many expectations unfulfilled. The author's aspiration to "a fresh appraisal of comparative law as a methodological and socio-legal construct" does not materialize. The book's main contribution to the comparative law discourse lies in putting together all the topics it discusses and in making more widely available some of the ideas it presents. It does not contain much original thinking about comparative law and it sometimes feels like patchwork. The structure is also questionable and there are several cases where the same discussion is repeated or continued in another chapter of the book, where the same term is used with different meanings, or where a switch in the author's position may be noted. Furthermore, the writing is not always clear and in many cases the details are not mastered. In several parts of the book, and especially the section on present-day Russia, the facts are simply incomplete: one has the feeling that new data were simply added to the unchanged 1993 text. Several factual mistakes have also survived into this edition.[4] Nonetheless, the appearance of a modern comparative law textbook originally written in the UK, half a century after Gutteridge, can only be positive in the long-run. The 'encyclopaedic' aspects of the book should also make it a useful reference to English undergraduates, for whom it has primarily been written. While *Comparative Law in a Changing World* cannot challenge the depth and sophistication of Zweigert & Kötz or David & Brierly, it is probably easier to read and will hopefully promote a certain degree of acquaintance with foreign legal systems, and with the basic notions about comparative law and its study, into basic legal education.

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Israel among the Nations, edited by A.E. Kellermann, K. Siehr, T. Einhorn, T.M.C. Asser Instituut, The Hague & Kluwer Law International, The Hague/Boston/London, 1998. xvi, 392 pp. ISBN 90-411-1142-5. NLG 250/USD 150/GBP 88.

The cover of this book, written on the occasion of Israel's 50th Anniversary, features a picture of the Israeli flag among other flags in front of the United Nations Headquarters in New York. In combination with its title, "Israel among the

4. While the book is rich enough with details to excuse *lapsus calami* such as locating the Germanic influence in the South of *ancien régime* France and that of Roman law in Northern provinces (p. 13; it is put right on p. 60-61), or putting Greece among the legal systems of "mixed" common and civil law influence (p. 35), the author bears responsibility e.g. for claiming in several points that the Commonwealth of Independent States has been transformed into the Russian Federation (pp. 35, 475 &c.) – at the very moment when he emphasizes the (non-) transformation of Russian / socialist law as a major aspect of the "changing world".

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Nations'', one would expect a publication on Israel's position in the world. This is not the case, however. The book does not discuss Israel's isolated position in the past nor the increasing acceptance of Israel in the last decade. There is not even a reference to the Camp David or Oslo Accords. It is a different book from what its cover and title suggest. The book deals in particular with the role of the judiciary in Israel's democracy, which is based on the Jewish tradition. The case law of the Supreme Court is at the centre of the book. For this reason, the editors, in their very brief preface, are correct in stating that "this book underlines the tension between Israel, the unique Jewish State among nations, and Israel, a nation like many others." A cover picture featuring the beautiful Supreme Court building in Jerusalem with the small corridor leading to Israel's parliament – symbolising the separation of the judicial and legislative powers – and the old city's religious monuments on the Temple Mount in the background, would have been more appropriate.

The editors do not offer a reason for the selection of articles. They are simply placed in alphabetical order based on the author's surname. Their quality varies substantially; some are really outstanding, very original and based on research or a very profound insight in the subject matter. In this context, I mention in particular Haim Cohn and Menachem Elon, both former Deputy Presidents of the Supreme Court, as well as Harvard professor Joseph Weiler. A number of authors have written sympathetic essays, which are neither original nor excellent. Other writings are superficial at times, their topic hardly connected with the Israeli context. The contributions of most Dutch writers are quite disappointing. It is also a pity that the book lacks an index, which would have made it more accessible and would have enabled the reader to compare different writers on the same topic. The peace process has been barely covered and in view of the recent electoral changes, including a directly elected prime-minister, and the effects thereof, I missed an elaboration on the system of parliamentary elections. Nevertheless, much material has been collected to be of interest to a broad range of lawyers.

The book consists of twenty articles, which I will now briefly discuss. The first, entitled "The Civil Code Interpretation in Israel" is written by Aharon Barak. It is based on the purposive interpretation method. Michael J. Beloff compares the public laws of the United Kingdom and Israel. Both legal systems lack a written constitution, but have introduced Basic Laws. Israel proclaimed Basic Laws on Human Dignity and Liberty and on Freedom of Employment; the United Kingdom promulgated the Human Rights Act. Miriam Ben-Porath, who was both State Comptroller and an Ombudsman, writes about her work. In the role of ombudsman she sees herself as a direct defender of democracy and human rights, whereas she views State Comptrollers as indirect defenders, since they submit recommendations to Parliament. Yehuda Z. Blum also describes his past work as Israel's permanent representative at the United Nations. Although it is fine to read work by direct participants, their involvement precludes a certain

distance. For instance, Blum not only refers to a letter he himself wrote with regard to anti-Semitic outbursts at the UN, but also simplifies in the explanation of the selective attention the UN paid to Israel in comparison with other countries. The following sentence may illustrate this: "The UN did not find the time to discuss the Vietnam conflict. And when "Solidarity" was outlawed in Poland in 1981, the UN totally ignored that crisis, which was deemed to be a purely domestic matter; instead, it devoted dozens of meetings to the *Knesset* law extending Israeli jurisdiction and administration to the Golan." As a professor of international law, he knows the effect of veto power on agenda setting during the Cold War. This selective attention unfortunately goes hand in hand with a certain degree of discrimination of Israel, because it is not allowed to belong to a regional group of UN Member States. Israel is not eligible to participate in such major UN organs as the Security Council or ECOSOC. An interesting remark by Blum is that the UN's inaction in 1948, when Israel was attacked by all its Arab neighbours "became a source of profound disappointment for Israelis who felt abandoned by the international community and quickly realised that the fate and future of the new State hinged on their own ability to withstand the armed aggression they had to confront." He adds: "By successfully defeating the armed aggression aimed at destroying it, as well as the UN's Partition Resolution in its entirety, Israel in effect saved the UN's reputation from the terrible damage that the success of that aggression would have caused to it."

Haim Cohen has written a fine article on religious freedom and religious coercion in the State of Israel. He starts by stating: "[a] 'Jewish democracy' may at first sight appear to be a contradiction in terms" and continues by making clear that Israel as a Jewish state is not a religious or theocratic state, because the state's Jewishness is not identical to the Jewish religion. Although many religious Jews wish to impose their will on the majority, it is in particular the Supreme Court that draws the line. The right to marry a person of one's own free choice is violated in particular by such discriminatory coercion as the prohibition against mixed marriages, marriages between a priestly descent and divorcees, the prohibition against a bastard marrying a person other than a bastard, and childless widows who could only marry a brother-in-law. The Canadian law professor, Irwin Cottler, deals in rather general terms with the dilemma of democracies upholding human rights while being confronted with terrorism. He prefers to reconceptualize the approach to counter-terrorism as a human rights foreign policy, in which the focus should lie on the rights of the victims rather than on the rights of terrorist suspects, but also acknowledges the repressive character of counter-terrorism. Alan Dershowitz, of Harvard Law School, has written an essay entitled "Israel: the Jew among Nations", in which he defends the Israeli judiciary. He goes a bit too far, in my view, where he compliments the Israeli system because only in Israel the judiciary was involved in the authorisation of certain forms of interrogation. In the past, official judicial

authorisation was required for torture, thus bringing it from the back room to the foreground of public debate.

The Israeli professor of international law, Yoram Dinstein, describes the international legal dimension of the Arab-Israeli conflict. His premise that extremists on either side of the Arab-Israeli conflict constantly score debating points predicated on historical rights is the basis for an intelligent essay. He agrees with Blum that Israel was not created by the UN Partition Resolution, but was born on the battlefield. He argues in particular that "had Israel been defeated militarily, the partition Resolution would not have saved it [...] At no time did the Council even determine that a breach of the peace had occurred as a result of the Arab invasion." Only after some months in the middle of July 1948, the Security Council agreed –SC 54 – that the situation in Palestine constituted a threat to the peace (*see* Article 39 Chapter VII of the UN Charter). However, this did not result in mandatory decisions. He makes clear that with regard to the occupied territories Israel views itself bound by the humanitarian law of the Fourth Geneva Convention and that its Supreme Court considers the Hague Regulations to be customary international law. At the end of his article, he states: "[i]t is not the use of force as such, but the illegality of the use of force, which invalidates treaties whereby territories are ceded from one country to another. Since the Arab countries were the Aggressor states in June 1967, any border rectifications favourable to Israel (agreed upon in a prospective treaty) would be legitimate under current international law." This is not as self-evident as he suggests.

Talia Einhorn elaborates on the legal framework for Israel's international trade from both an international and a domestic perspective. This approach enables her to deal with developments in Israeli society, which started with the full control of the economy by the political establishment of Labour and Trade Unions. Economic institutions were made part of the political system. State control was reinforced by tax measures to protect domestic industry from imports. The liberalisation policy was initiated in 1991. It may result in free trade, which is advantageous for Israel. The author advocates free trade, because its limited natural resources makes Israel dependent on imports; imports constitute competition to the domestic market; and the size of Israel makes it necessary for Israeli industry to engage in exports. She deals in particular with the Israeli-Palestinian Customs Union, domestic regulations and the protection of free trade by the judiciary.

Menachem Elon, the former Deputy President of the Supreme Court and Law Professor in Jerusalem, has written the longest article – fifty pages – on the values of a Jewish and democratic state, which he tries to synthesize. He really deserves that much space for his interesting essay. It deals with a typical continuing Israeli problem: how the Supreme Court can protect the rule of law in Israel, which is endangered by religious fundamentalists. Jewish values, although also based on biblical sources, are much more comprehensive than strict ortho-

dox rules and encompass the values of national awakening and the Zionist movement, which resulted in the establishment of the State of Israel and the enactment of the *Basic Law: Human Dignity and Liberty.* In the collective responsibility for the *Kibbutz,* for instance, human rights are intertwined with individual obligations. He distinguishes between value-based legal principles with and without a sensitive-ideological component. In order to reach a synthesis in the case of the second category, he investigates the sources of both Jewish law and democratic thought. For instance, under Jewish law, a father has the sole right to determine the children's education, but in Israel both parents have equal rights thanks to the influence of democratic values on Jewish values in the area of women's rights. With regard to the subject of euthanasia, he compares Israel with the United States and the Netherlands. He establishes that a synthesis of Jewish law and democratic values leads to a different conclusion (active euthanasia is excluded because the patient's consent is irrelevant in Jewish law) from that which would be reached were only democratic values applied (not such a sharp line between active and passive euthanasia). Cases of a legal-ideological nature, for instance, the closure of a public street through a religious district to all traffic on the Sabbath, cannot be resolved by a theoretical synthesis based on sources, but requires a practical compromise and much more judicial restraint.

The well-known American professor of constitutional law, Louis Henkin, has written a very broad article about constitutionalism and its values, which contains hardly any reference to the Israeli context. The article remains superficial, US-oriented with regard to individual civil human rights, and pays no attention to socio-economic human rights, which is of interest in the case of Israel. In the preceding article, Elon, for instance, deplores the change in contemporary Israeli democracy, where collective responsibility is being replaced by individual autonomy. The only challenging part in Henkin's article is his question as to whether it is possible to have both a Jewish and a constitutional state and whether Israel seeks to fly under the banner of cultural relativism in claiming the right to deviate from constitutionalism. He does not answer the question, however. In a long article, Alfred Kellermann deals in a technical way with the quality of legislation in Europe and Israel. A considerable number of drafts for improving European legislation pass by, leading to disappointing conclusions for the Israeli practice. Peter Malanczuk deals with the legal framework of the economic relations between Israel and the European Union. The article consists of an uninspiring enumeration of treaties and lacks analysis. In his conclusion, he raises the question as to whether Israel will ever be a full member of the European Union, briefly draws our attention to the European role in the ongoing multilateral negotiations on water, arms control and trade, rightly pointing at the enormous trade deficit of Israel with the EU, which gives rise to continuous problems. Problematic is the tendency that Israelis rarely follow European events, the majority of today's Israelis being only interested in the United States

with regard to all areas of learning, scientific research, culture, entertainment and so on. The gap between Europe and Israel is getting wider.

The French lawyer and Holocaust survivor, Samuel Pisar, has written a fine essay on Israel and the Righteous among Nations, which includes his testimony in the trial against the French collaborator Papon. He underlines that the "Righteous" (Non-Jews saving Jews during Holocaust) were humble people, who will protest vehemently when you praise their altruism and courage, because in their view it was the only thing to do. Israel rewarded these people with Yad Vashem medals.

Alfredo Mordechai Rabello deals with the codification of Israeli private law in a comparative perspective. Family law is not involved, because in Israel family law is governed by either Jewish, Islamic or Canon law. There is an on-going debate in Israel on whether the human rights in two basic laws in Israel, the one on Human Dignity and Freedom and the other on Freedom of Occupation, should also govern the affairs conducted by private citizens amongst themselves. This so-called 'horizontal' approach must be adopted according the President of the Supreme Court as a result of the *Defrenne* case, decided by the European Court of Justice.

Shabtai Rosenne catches our attention with an article on the legal aspects of the transition from being a mandate to independence. He scrutinizes the roles of the UN, the British and Jewish authorities in the period between the adoption of the Partition Resolution and the Declaration of the State of Israel; an example of State succession in practice, not as expounded in theory, where the predecessor state did not co-operate in the change of sovereignty or authority. The Italian professor of international law, Giorgio Sacerdoti, compares the trial of Priebke – the SS-captain who ordered the execution of 335 Italian civilians in 1944 – with the trial of Erdemović, who was involved in the summary execution of Bosnian civilians in Srebrenica. The article is called "Individual responsibility and superior orders for war crimes". The author subscribes to the doctrine of limited or partial responsibility, which implies "that obedience to superior orders is allowed as a defence only when the orders were not so manifestly illegal that a subordinate may not have known that they were unlawful." This doctrine may explain the different outcomes in both trials. Kurt Siehr has written about "A statute on private international law for Israel", recommending some guiding principles. Interesting is the question as to whether decisions by foreign courts on, for instance, family law should be recognised in Israel, the Israeli secular court not being competent in these cases.

The article by Robert Siekmann on "United Nations Peacekeeping in the Middle East: Establishing the Concept" is below par. It is not only outdated, containing no reference to the new generations of peace-keeping forces, but totally irrelevant in the context of the book, because Siekmann does not link the specific Middle-Eastern problems to the peace-keeping forces, which is the obvious thing to do. He does not even mention the 1967 crisis, when U Thant

withdrew the peacekeeping force UNEF I, after which the Six-day War broke out. He hardly discerns the reason for this peacekeeping force after the Suez War. This peace-keeping force was created on the initiative of Canada to overcome the huge quarrels among NATO allies. Besides, a strong role can be attributed to the UN Secretary-General, Dag Hammerskjöld. The non-UN peacekeeping forces in the Sinaï (MFO) and the Lebanon (MNF) with a strong American presence are not discussed, although they are an illustration both of relying on American guarantees, and of American failures. Peacekeeping is very much related to the problems of the Arab-Israeli conflict, but Siekmann succeeds in dissociating these. Fortunately, the final essay by Israeli-born Harvard law professor, Joseph Weiler, is excellent. It is entitled "Israel, The Territories and International Law: When Doves Are Hawks", which suggests a polemic article. It is indeed polemic in the best academic tradition, because Weiler develops his arguments to convince the reader of his controversial statements. An example is the way he defends his proposition that the Dovish view has served the purposes of the most Hawkish elements in the conflict. In the Dovish view, the right to occupy did not entail a transfer of sovereignty. Thus "you exercise control over the territory as a belligerent occupant but you are able to deny local citizens any political rights since they do not become citizens of the occupying state – and all this with the penumbra of legality accorded to this status in international law. Legally you get the land without the people." These are challenging thoughts. The book contains many high-quality articles and offers an insight in the way in which the rule of law is maintained in contemporary Israel.

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