recommends institutional and land-based learning but also identifies other accessible educative avenues including social media. Accepting that some Indigenous nations may offer educational opportunities, Askew reminds the reader that this must be seen as a gift and treated with respect.

The book's concluding essays offer words of hope and caution for the role of the *UNDRIP*. If any chapter is to be read here, it is Christie's, whose deconstruction of ideological concerns provides a sense of clarity for the reader. Knockwood's account of the importance of the *UNDRIP*'s implementation for Mi'kmaw communities and how they are achieving its goals will serve as an inspiration for other community leaders. Finally, Youngblood Henderson's beautifully crafted conclusion on inherent dignity reminds the reader of the necessity of the *UNDRIP* and, more importantly, the role that Indigenous legal traditions need to play in its implementation.

Overall the book is a fantastic introduction to different Indigenous legal traditions but, more specifically, to the role they need to play in implementing the *UNDRIP* within Canada. It focuses not only on consent and natural resource rights but also on language rights and the larger questions concerning self-determination and the goal of a nation-to-nation relationship. The editors should be commended for their willingness to embrace this dialogue on how Indigenous legal traditions should be revitalized in the interests of the future legal landscape of Canada.

Joanne Smith
LLM Candidate, Faculty of Law, McGill University

Oliver Chapman
Volunteer Legal Assistant, Agencia Internacional de Prensa Indígena

Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour. Edited by Fannie Lafontaine & François Larocque. Cambridge: Intersentia, 2019. 507 + xix pages.

Vol. 57 [2019], doi: 10.1017/cyl.2020.7

Doing Peace the Rights Way brings together the work of twenty-one researchers, experts, and practitioners in various fields of international law and international relations to honour the work of Louise Arbour, as a judge, prosecutor, and international advocate.[1] By choosing eclectic and sometimes emerging

[1] Fannie Lafontaine & François Larocque, eds, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Cambridge: Intersentia, 2019).

themes, the authors of the nineteen contributions within this collection touch upon both ancient and contemporary challenges that hinder the effective enjoyment of human rights and the promotion of international peace. But what all nineteen contributions have in common, as the editors explain in the "Introduction," is an interest in the "interaction between justice and peace, between human rights and conflict, and between law and politics in both the international and domestic spheres."[2] The resulting work serves as a useful and up-to-date inventory upon which others may draw to develop new reflections.

Organized into three parts, Part 1 of the book is characterized by a desire to upset many preconceptions within the area "of freedom and equality." It begins with a chapter by Andrew Clapham, who argues that we must stop asking ourselves whether non-state actors have human rights obligations and, instead, focus on the scope of these obligations and the means for their implementation.[3] Clapham draws extensively on the output of the bodies of the United Nations (UN), state practice, and the position papers of non-governmental organizations in support of his argument,[4] but he makes no mention of an instrument of binding value — with the draft of such an instrument to regulate the activities of transnational corporations presumably becoming available after the chapter was written.[5] For this reviewer, Clapham has overstated the value of the documents upon which he relies. These documents, at best, highlight the growing recognition that non-state actors represent a threat to the enjoyment of human rights.

In the chapter that follows, William Schabas writes about the temporal aspects of the right to truth, with his starting point being that the legal basis for such a right is clearly established.[6] Schabas is critical of the reluctance of international courts to exercise jurisdiction over violations committed prior to the adoption of the treaties that ground a victim's right to truth,[7] despite

[2] Fannie Lafontaine & François Larocque, "Introduction" in Lafontaine & Larocque, *supra* note 1, 1 at 2.

[3] Andrew Clapham, "Human Rights Obligations for Non-State Actors: Where Are We Now?" in Lafontaine & Larocque, *supra* note 1, 11.

[4] *Ibid* at 14–15, 18–22, 26, 30, 32.

[5] Revised draft of a *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (16 July 2019), online: *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>.

[6] William Schabas, "The Right to Truth: When Does It Begin?" in Lafontaine & Larocque, *supra* note 1, 37.

[7] See e.g. *Janowiec and Others v Russia* (GC), No 55508/07, [2013] V ECHR 203, online: *European Court of Human Rights* <http://hudoc.echr.coe.int/eng?i=001-127684>. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, [2015] ICJ Rep 3.

https://doi.org/10.1017/cyl.2020.7 Published online by Cambridge University Press

their continuing nature and the prohibition on statutory limitations for atrocity crimes.[8] The explanation for this reluctance may reside in the uncertain legal foundations of the right to truth. Because it is not a free-standing right, its implementation is dependent on the enforcement of the rights from which it arises, notably the rights to justice and reparation.[9] It is regrettable for this reviewer, however, that Schabas did not mention the roleplayed by truth and reconciliation commissions. The importance of thecollective dimension of the right to truth would have justified consideration of the implementation role to be carried out by non-judicial mechanisms.

The justiciability of human rights is also a theme touched upon in Part 1. Alana Klein's chapter comments on the lack of imagination shown by Canadian courts in securing the judicial protection of human rights of an economic, social, and cultural character.[10] For Klein, "the question is famously no longer about whether such rights can be protected, but rather how,"[11] as she draws attention to the creativity of courts elsewhere, most notably in Brazil, Colombia, and South Africa.[12] However, one should not underestimate the contribution of non-judicial strategies for enforcing rights, including awareness-raising activities and the use of human rights indicators, benchmarks for progress, and human rights impact assessments.[13] These are all ways of securing respect for economic, social, and cultural rights, although Louise Arbour herself has recognized that "the realization of social and economic rights is an inherently political undertaking."[14]

This statement also rings true for civil and political rights, as shown in the contribution by Hina Jilani.[15] Jilani claims that models of undemocratic governance provide fertile ground for violations of human rights,[16] with the authors of Chapter 3 providing a cogent case study focused on the causal connection between poor economic governance in Nigeria, the armed conflict against Boko Haram, and serious human rights violations.[17] Jilani

[8] Schabas, *supra* note 6 at 51.

[9] *Ibid.*

[10] Alana Klein, "Social and Economic Rights and the Legal Imagination" in Lafontaine & Larocque, *supra* note 1, 65.

[11] *Ibid* at 67.

[12] *Ibid* at 70–72.

[13] *Ibid* at 75, 84.

[14] Cited in *ibid* at 84.

[15] Hina Jilani, "Building a Culture of Inclusivity in a Diverse Society" in Lafontaine & Larocque, *supra* note 1, 85.

[16] *Ibid* at 86, 88.

[17] Tity Agbahey & Gilles Olakoulé Yabi, "Corruption, Inequality and Boko Haram in Nigeria" in Lafontaine & Larocque, *supra* note 1, 53.

rejects a procedural conception of democracy that, with the rule of law, is essential for the enjoyment of human rights.[18] Instead, she shows that human rights violations are caused by multiple factors.[19] She also believes that mass mobilization must remain constant, noting that judicial victories are never immune from the attacks of the political elite.[20]

Part 1 then concludes with two chapters examining concrete cases where human rights are unduly restricted and violated in the name of state security. Michael Spratt argues that this is the case with the war on drugs in Canada,[21] while Pablo Espiniella makes a related case focused on the treatment of unaccompanied child migrants.[22] Spratt believes that criminal policies based on order and retribution cause far greater social havoc beyond the sole punishment of offenders.[23] He advocates for criminal policies based on scientific evidence, not ideology,[24] but, as Espiniella demonstrates, scientific evidence is not always conclusive. In the absence of documents attesting to their age, security issues lead states to treat children as migrants rather than as minors,[25] with the author suggesting that, where evidence is unavailable, a presumption of minority should prevail.[26] Such a presumption is also consistent with the recognition that medical evidence is not without its own margin of error.[27]

Part 2 of the book focuses on the theme "of peace and justice." Addressing the deterrent purpose of the International Criminal Court (ICC), James K Stewart uses his contribution to make the claim that the much discussed debate over peace versus justice within the context of the court is futile.[28] For him, the interests of justice take precedence,[29] with peace to be achieved through the provision of justice for the victims,[30] even though in many cases the peace agenda is dictated for the victims by the forces involved. With

[18] Jilani, *supra* note 15 at 88–89.

[19] *Ibid* at 90–91.

[20] *Ibid* at 91–102.

[21] J Michael Spratt, "Made in Canada: A Failed War on Drugs" in Lafontaine & Larocque, *supra* note 1, 103.

[22] Pablo Espiniella, "Unaccompanied Children Out of Their Country of Origin: Trapped in the Administrative Net" in Lafontaine & Larocque, *supra* note 1, 121.

[23] Spratt, *supra* note 21 at 105.

[24] *Ibid* at 110.

[25] Espiniella, *supra* note 22 at 127, 131.

[26] *Ibid* at 136.

[27] *Ibid* at 137.

[28] James K Stewart, "The Deterrence Rationale in a Criminal Justice Accountability Regime" in Lafontaine & Larocque, *supra* note 1, 147.

[29] *Ibid* at 152.

[30] *Ibid.*

respect to the strategies of the ICC to prevent crimes, Stewart claims that much will depend "upon the success with which it does its work, and the focus here must be initially, and especially, upon the [Office of the Prosecutor]."[31] Here, he takes up research in the social sciences that claims that "the swiftness, and especially the likelihood, of punishment may more effectively deter crime than the severity of punishment."[32] However, for this reviewer, this results-oriented vision should not overshadow the appearance of impartiality.

Indeed, the challenges facing the ICC are inherent in international institutions. In her chapter, Mona Rishmawi examines the practice of human rights fact-finding missions, highlighting their credibility as their most important asset.[33] In Syria, Libya, Sri Lanka, Iraq, and Guinea, investigations by the Office of the UN High Commissioner for Human Rights were carried out without the consent of the states concerned but, nevertheless, had an impact. As Rishmawi's contribution demonstrates, human rights and criminal investigations differ in their methods and principles, but the two modes of investigation are both dependent on the appearance of impartiality and independence to secure their effectiveness.

Next, the contribution of Luc Côté examines the question of whether the desired independence of an international prosecutor can be achieved.[34] The question is important since every international prosecution must rely on the cooperation of states in carrying out its activities, and decisions to prosecute must also take into account considerations that have political implications.[35] However, for this reviewer, Côté's conclusion seems fatalistic. He writes that "to appear independent, he or she needs to act as such, showing impartiality and measure in his or her conduct, something that unfortunately no law can provide."[36] But, as a legal concept, impartiality requires all litigants to be treated fairly in a transparent and consistent manner, and, thus, the prosecutorial strategies embraced at international courts, such as the ICC, must view this as a matter at the heart of both the rule by law and the rule of law.

Lisa Oldring's chapter also deals with the principle of the rule of law, particularly in the post-9/11 context, where in the interests of national

[31] *Ibid* at 163.

[32] *Ibid* at 151.

[33] Mona Rishmawi, "Peace and Justice: Human Rights Fact-Finding in Raging Conflicts" in Lafontaine & Larocque, *supra* note 1, 171 at 179–80.

[34] Luc Côté, "The Independence of International Prosecutors" in Lafontaine & Larocque, *supra* note 1, 253. For the textual guarantees of independence, see *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, arts 15(1), 42(1) (entered into force 1 July 2002) [*Rome Statute*].

[35] See e.g. *Rome Statute*, *supra* note 34, art 53.

[36] Côté, *supra* note 34 at 275.

security, states have adopted measures seriously limiting the enjoyment of human rights.[37] The powers of intelligence services have also been strengthened in a way that affects the proper administration of criminal justice.[38] Oldring suggests that such powers need robust controls, both internally within the services and externally within the executive, the judiciary, and the legislature.[39] Oldring, however, does not say how the flexibility sought in the global fight against terrorism could be reconciled with the requirements of strict legal controls, particularly in circumstances where a pragmatic idealism is favoured by states.

In her chapter, Fannie Lafontaine provides an example from Canada, where immigration measures rather than prosecutions have been used to remove the perpetrators of international crimes from Canadian territory.[40] At issue appears to be the complexity engendered by the prosecution of international crimes by a third country as well as the astronomical costs associated with such prosecutions.[41] Removal under immigration laws is thus a compromise,[42] with limited political repercussions despite the fact that the few prosecutions that have taken place in Canada have not caused the feared political controversy abroad. Although a reality, budgetary considerations are a sibylline way of naming what is, in essence, the lack of political will, with Lafontaine arguing that there can be no justification for Canada acting in a way that is incompatible with its international obligations by reason of a lack of money.[43]

François Larocque's contribution raises a similar concern.[44] He argues that an inconsistency persists in international law between the prohibition of torture as a rule of *jus cogens*, coupled with the recognition of the right of victims to reparation, and procedural obstacles to the exercise of civil remedies by these victims in a transnational context.[45] Citing the respected works of Ian Brownlie and Philip Jessup, Larocque sees no reason to distinguish between rules of criminal jurisdiction and rules governing

[37] Lisa N Oldring, "'Exceptional Measures' in Times of Crisis: Terrorism, National Security and the Rule of Law" in Lafontaine & Larocque, *supra* note 1, 199.

[38] *Ibid* at 213.

[39] *Ibid* at 214.

[40] Fannie Lafontaine, "When the End Lacks the Means: National Prosecution of International Crimes and Canada's Paper Tiger Approach" in Lafontaine & Larocque, *supra* note 1, 221.

[41] *Ibid* at 238–39.

[42] *Ibid* at 247–51.

[43] *Ibid* at 250.

[44] François Larocque, "Torture, Jurisdiction and Immunity: Theories and Practice in Search of One Another" in Lafontaine & Larocque, *supra* note 1, 277.

[45] *Ibid* at 279.

jurisdiction in civil matters.[46] Yet, for this reviewer, this is precisely the heart of the problem, with foreign state immunity continuing to hold ground because of the failure to codify the matter of civil jurisdiction for serious human rights abuse,[47] bolstered by the conservative approach of the International Court of Justice, which accepts no limitation to the rule of material immunity in the name of order and the good conduct of international relations.[48] The criticism made by Larocque and others is fair,[49] with this reviewer further noting that the positivist and voluntarist paradigm that still dominates international law also poses real difficulties in this context for the protection of human rights.

Confronted with this paradigm, Tim McCormack uses his chapter to argue that there is a need for a "long term view of incremental progress" when it comes to assessing the effectiveness of international law.[50] Slow progress comes at significant historic moments, with McCormack connecting the fall of the Berlin Wall with the subsequent creation of international criminal courts as an example.[51] Even when major states like the United States, China, India, or Russia do not take part in these developments, McCormack believes that their influence and impact provide lessons "for the progressive development of international law."[52] He is, however, less optimistic when he assesses the progress made in respecting the rules in armed conflicts, with prosecution recognized as "an *ex post facto* response."[53] The failure "to prevent even some armed conflicts from occurring" is also a valid criticism to be lodged against our current system of global governance.[54]

This theme of global governance animates Part 3 of the book, subtitled "Of Women and Leadership," with leadership and governance being intrinsically linked. Beyond the proliferation of institutions and rules of international law, it is fundamental to know by whom and how we ensure their effective functioning. In his chapter, Fabrizio Hochschild writes that a "bold,

[46] *Ibid* at 289, citing Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003) at 298 and Philip Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956) at 64.

[47] See *European Convention on State Immunity*, 16 May 1972, ETS No 074 (entered into force 11 June 1976); *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, UN Doc A/RES/59/38 (2004) (not in force).

[48] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, [2012] ICJ Rep 99 at para 60.

[49] Larocque, *supra* note 44 at 311–12.

[50] Tim McCormack, "Revisiting Challenges to International Humanitarian Law" in Lafontaine & Larocque, *supra* note 1, 317 at 329–33.

[51] *Ibid* at 333–39.

[52] *Ibid* at 338.

[53] *Ibid* at 346.

[54] *Ibid* at 350.

enlightened leadership with a global, long-term vision is critical."[55] Through a comparison of the efforts of UN Secretary-General Dag Hammarskjöld with those of Louise Arbour, Hochschild reveals that compliance with international norms often depends on the integrity, courage, and loyalty to the goals and principles of the UN exhibited by those tasked with their observance.[56] His work shows that, when the vision for which one exercises leadership is sufficiently shared and clarified, courage is easily assumed. However, Hochschild recognizes that, in the presence of conflicting values, courage may be slower to emerge, or to be discerned, although it remains absolutely essential for effective governance.[57]

A case study on poor leadership is then provided by Philip Alston who writes about the lack of recognition of a meaningful role for human rights at the World Bank.[58] Under the pretext that the bank's texts prohibit interference with the political affairs of states and focus solely on economic considerations when granting loans, the international financial institution fiercely resists adopting an approach that takes human rights considerations into account. At the same time, the World Bank has developed policies "on issues as diverse as corruption, money laundering, terrorist financing, governance and rule of law," which are just as political as human rights considerations for many governments.[59] For Alston, this inconsistency is based on an artificial construction of the bank's mandate and a vision that is both anachronistic and counterproductive.[60] Taking human rights into account would allow the World Bank to better understand the socio-political contexts in which it invests, which in turn would make its aid more effective. Its resistance to human rights raises the question of whether the World Bank really has an interest in fighting extreme poverty and promoting shared growth, being the goals that it displays everywhere as slogans.

Slogans can be hollow formulas aimed at instigating the imagination, while they hide the situations of ineffective governance that give them a semblance of vitality. For Antonia Potter Prentice and Camille Marquis Bissonnette, this is the case with UN Security Council Resolution 1325, which was adopted in 2000 in order to foster a strong "women, peace and security" agenda. The authors claim that the resolution has produced some concrete and tangible results because "it has pushed changes in the

[55] Fabrizio Hochschild, "Leadership in the United Nations and the Challenge of Courage" in Lafontaine & Larocque, *supra* note 1, 355 at 355.

[56] *Ibid* at 370.

[57] *Ibid* at 374.

[58] Philip Alston, "The World Bank as a Human Rights-Free Zone" in Lafontaine & Larocque, *supra* note 1, 375.

[59] *Ibid* at 379, 387.

[60] *Ibid* at 385–90.

https://doi.org/10.1017/cyl.2020.7 Published online by Cambridge University Press

perception of women within peace processes and institutional architecture in particular."[61] But if all we have achieved is a change of perception, given the *UN Charter*'s long-standing guarantees of gender equality and the equal participation of men and women in the UN organs,[62] it is time to question the value of such declarative resolutions.[63] Potter Prentice and Marquis Bissonnette identify the resolution's numerous failures,[64] demonstrating the need to focus on leadership and enforcement rather than on more rules and institutions. Indeed, they recommend moving away from a feminist logic favouring the promotion of women's rights, preferring to embrace the problem in terms of gender equality and human rights.[65]

The last two chapters of Part 3 draw the same conclusion. Dealing with women incarcerated in Canadian prisons[66] and women prohibited from wearing the *niqab*,[67] these contributions serve to show that substantive gender equality cannot be achieved without the leadership of those concerned — namely, women. Kim Pate's chapter shows that, since Louise Arbour's 1996 report into events at the Kingston prison,[68] the situation of incarcerated women has deteriorated due to a focus on the excessive criminalization of marginality and the marginalization of criminalized women, particularly women and girls from Indigenous communities.[69] For her part, Natasha Bakht shows that despite openly anti-*niqab* policies being adopted in Canada and France, women are at the forefront of challenging those policies in the courts.[70] Thus, they refuse to be told what is better for them by paternalistic, patriarchal, and misogynist systems.

To conclude, this book pays a well-deserved tribute to the career of Louise Arbour through contributions that are impactful in their analysis and

[61] Antonia Potter Prentice & Camille Marquis Bissonnette, "Come a Long Way and a Long Way to Go: UNSCR 1325 and Women's Participation in Peace-Making" in Lafontaine & Larocque, *supra* note 1, 401 at 412.

[62] See *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, arts 1(1), 8 (entered into force 24 October 1945).

[63] See Alain-Guy Tachou-Sipowo, "The Security Council on Women in War: Between Peacebuilding and Humanitarian Protection" (2010) 92:877 Intl Rev Red Cross 197 at 213.

[64] Potter Prentice & Marquis Bissonnette, *supra* note 61 at 412–14.

[65] *Ibid* at 416.

[66] Kim Pate, "Why Are Women Canada's Fastest-Growing Prison Population and Why Should We Care?" in Lafontaine & Larocque, *supra* note 1, 423.

[67] Natasha Bakht, "Moving Beyond Facial Equality: Examining Canadian and French Niqab Bans" in Lafontaine & Larocque, *supra* note 1, 443.

[68] Canada, Commission of Inquiry into Certain Events at the Prison for Women in Kingston, *Report* (Ottawa: Public Works and Government Services Canada, 1996) (Louise Arbour, Commissioner).

[69] Pate, *supra* note 66 at 427, 430–33.

[70] Bakht, *supra* note 67 at 461.

constructive in their proposals. While the book may have, within certain chapters and through the profile of some of its authors, an activist content, the fact remains that the various subjects are treated seriously. It is not a groundbreaking book on the theory of law and international relations and thankfully so. Instead, the book serves as an indispensable bridge between the theory and practice of law and international relations, providing a useful guide for understanding the complex relationships between law, politics, and power in the implementation of human rights on both the international and national legal planes. As Louise Arbour herself has explained, unless there are gaps, the law is not often the most difficult issue;[71] it is at the political level, when rights have to be given concrete meaning, that things get tough.[72] Her words of advice animate this book: "[T]rust your instinct. Don't be scared. You have to be able to take risks, not to fit the mold and not to let anybody squeeze you into their expectations."[73]

Alain-Guy Sipowo
Catalyst Fellow 2019–20, Osgoode Hall Law School

Performance Requirement Prohibitions in International Investment Law. Par Alexandre Genest. Leiden: Brill, 2019. 274 + iv pages.

Vol. 57 [2019], doi: 10.1017/cyl.2020.8

Il s'agit d'un plaisir de recenser la thèse de doctorat, maintenant publiée, d'Alexandre Genest, intitulée *Performance Requirement Prohibitions in International Investment Law*. Cette monographie s'ajoute à une littérature encore trop mince sur un sujet souvent considéré comme nébuleux ou secondaire du droit des investissements, les prescriptions de résultats et leurs prohibitions. Le sujet a été brièvement couvert par certains ouvrages généraux sur le droit des investissements ou sur les traités modèles, ainsi que par quelques articles ou rapports d'organismes comme la Conférence des Nations Unies sur le commerce et le développement, mais il semble s'agir de la première monographie entièrement consacrée au sujet.[1]

[71] "An Interview with the Honourable Madam Justice Louise Arbour" (2014) 46:2 Ottawa L Rev 383, republished in Lafontaine & Larocque, *supra* note 1, 471, especially at 501.

[72] *Ibid* at 487–88.

[73] *Ibid* at 495.

[1] Voir Alexandre Genest, *Performance Requirement Prohibitions in International Investment Law* (Leiden: Brill, 2019) aux pp 2–3, nn 4–5. Voir notamment Barton Legum, "Understanding Performance Requirement Prohibitions in Investment Treaties" dans Arthur W Rovine, dir, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007*,