criminal responsibility and the procedural innovations at the ICC, to see what specific normative problems these produce.

One cannot help but ask: where in this volume is the spirit of adventure, of conceptual innovation and risk, of genuinely looking forward by reference to a wider realm of philosophical resources than just those in one's own backyard? Is it the fragility of the very prospect of the philosophy of international law as a discipline that encouraged the editors to surround themselves with traditional philosophical concerns that were not originally developed in the context of the specificity of international law and its institutions, and which are now simply transposed and imposed, via the safe hands of Anglo-American philosophical celebrities, onto old-fashioned categories and a worn-out taxonomy of international law? One wonders why this book was not seen and taken up as an opportunity to demonstrate what a philosophical treatment of international law could achieve, namely something innovative enough to be capable of de-familiarizing and challenging theoretical predispositions and practical self-understandings, while at the same time being informed by and engaging with the particularities of practice on the ground.

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At a certain period in history, the conduct of war and economic activity began to be seen as incompatible. In his essay on 'Perpetual Peace', Immanuel Kant argued that 'the spirit of commerce sooner or later takes hold of every people, and it cannot exist side by side with war'.[1] War and commerce were relegated to different spheres of activity, as the state's increasing monopoly on violence went hand in hand with the separation between the use of force and commercial enterprise. While war was fought between states, commerce became the preserve of individuals.

In the nineteenth century, this distinction between public war and private commerce was sharpened. War was a state that was declared or otherwise manifested by sovereign authority. The 'state-of-war' doctrine meant that states were at war only if they intended to be – if they possessed the requisite *animus belligerendi*.[2] Types of private force that had been common in previous centuries – mercenaries and

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1 I. Kant, 'Perpetual Peace: A Philosophical Sketch', in H. S. Reiss (ed.), *Kant: Political Writings* (1991), 114. In a somewhat similar vein, the American columnist Thomas Friedman argued in 1996 that countries in which McDonald's restaurants were established had never gone to war with each other. T. L. Friedman, 'Foreign Affairs Big Mac I', *New York Times*, 8 December 1996, available online at www.nytimes.com/1996/12/08/opinion/foreign-affairs-big-mac-i.html. This theory was disproved by the 2008 war between Russia and Georgia. M. Rice-Oxley, 'War and McPeace: Russia and the McDonald's Theory of War', *The Guardian*, 6 September 2008, available online at www.guardian.co.uk/world/2008/sep/06/russia.mcdonalds.

2 A. D. McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals', (1925) 11 *Transactions of the Grotius Society* 29.

privateers – no longer fitted within the dominant conception of war as an exclusively public act.[3]

Indeed, the private sphere was deemed to be a distinct space uncontaminated by warfare. Commercial intercourse and private property were to remain, as far as possible, free from the interference of belligerents. Thus, the law of neutrality recognized the rights of citizens of neutral states to continue trading with belligerents, unless such trade constituted contraband or unneutral service. The rules relating to booty of war provided that private property, as opposed to governmental property, was to remain immune from capture, except for certain exceptions such as weapons and ammunition.[4]

Distinctions between states and their citizens, and between public and private property, permeate the Hague Conventions of 1907. Under Hague Convention XIII, a neutral state is prohibited from supplying, directly or indirectly, 'war-ships, ammunition, or war material of any kind whatever', yet it is not required to prevent its citizens from doing so.[5] Destruction or seizure of enemy property is prohibited unless 'imperatively demanded' by the necessities of war.[6] During occupation, '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated'.[7] Of the 15 articles in the Hague Regulations on belligerent occupation, 11 of them deal with the protection of private property.[8]

There is nothing immutable about these distinctions, however, and they now appear to reflect an age of liberalism that has passed. According to one commentator, writing in 1944, the Hague Conventions 'speak the language of nineteenth-century political institutions and of nineteenth-century war'.[9] The practice of warfare in the twentieth century demonstrated that the divisions between the functions of the state and the individual, between governmental and personal property, 'have everywhere become blurred and obliterated'.[10]

The developments of the twenty-first century seem to suggest that a considerable shift is taking place. The state's monopoly on force is challenged by the re-emergence of private entrepreneurs of violence – such as warlords, international criminal cartels, and private military and security companies – who appear to operate in the sluices of the international system and pose urgent challenges for legal regulation. The privatization of armed conflict has

3 D. Kennedy, *Of War and Law* (2007), 64. On the history of the control of non-state violence in Europe generally, see J. E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (1994).

4 W. G. Downey, 'Captured Enemy Property: Booty of War and Seized Enemy Property', (1950) 44 AJIL 488.

5 Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague 18 October 1907, in force 26 January 1910, Arts. 6 and 7.

6 Annex to Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, Art. 23(g).

7 Ibid., Art. 46. See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, Art. 33.

8 H. A. Smith, 'Booty of War', (1946) 23 BYIL 227, at 230.

9 H. A. Smith, 'The Government of Occupied Territory', (1944) 21 BYIL 151, at 151.

10 Ibid.

meant that the distinctions between the use of force and the practice of commerce have become merged in a perhaps unprecedented way.

In *War, Commerce, and International Law*, James Thuo Gathii, the Governor George E. Pataki Professor of International Commercial Law at Albany Law School in New York State, has produced an ambitious and provocative work that seeks to explore historically the relationship between war and commerce. Gathii's focus throughout is on the ways in which war and commerce interact, but especially on the way in which the rules relating to war and commerce have been unequally applied to subjugate the colonized and to further the imperial ambitions of powerful states.

The book is divided into seven chapters. The first, which functions partly as a precis of the themes pursued in more detail in subsequent chapters, examines four different ways in which the relationship between war and commerce has been understood historically. Gathii argues that while modern international law seeks to protect private property and commercial intercourse from belligerent interference, powerful states continue to find ways to justify confiscation of property (pp. 5–10). Chapter 2 examines the effect of conquest on private property and contract rights in classical international law. After examining various rationales for the prohibition of the confiscation of private property in the law of armed conflict (pp. 47–51), Gathii then highlights the way in which that prohibition has been unevenly applied, in relation to the conquest of Native American land as well as in more recent examples (pp. 61–9). The third chapter turns to the protection of private property during belligerent occupation. Here, Gathii's primary focus is on the occupation of Iraq by the United States and United Kingdom following the invasion of 2003, as recognized in UN Security Council Resolution 1483.[11] The administration of private property by the Coalition Provisional Authority in Iraq is subjected to considerable criticism (pp. 85–93) and compared to the practices of the occupying powers in Italy, Germany, and Japan following the Second World War (pp. 93–9).

Chapters 4–7 take in a broader range of subject matter. Chapter 4 examines the way in which the law of neutrality was applied by the United States Supreme Court in a way favourable to the United States' place in the international system. As a militarily weak state with little leverage against the might of England and France, the United States sought to pursue a posture of neutrality in relation to wars in Europe. It insisted on the principle that 'free ships make free goods', and argued that it was permitted to carry on its mercantile activities largely unhindered by belligerent interference. The US Supreme Court's affirmation of broad commercial freedoms is contrasted pointedly with its jurisprudence concerning Native American land (pp. 137–43). Chapter 5 addresses the inequalities of capital-importing and capital-exporting states against the backdrop of the Calvo clause and the Drago doctrine, the concept of the New International Economic Order that gained momentum in the 1970s, and contemporary investment protection law. These rules may be seen, according to Gathii, as 'a set of assumptions and limitations that set the terms on which powerful and less powerful countries relate' (p. 186). Chapters 6 and 7 confront

11 UNSC Res. 1483 (22 May 2003), UN Doc. S/RES/1483.

more directly the contemporary challenges to the state's monopoly on violence, in the context of resource wars and 'new wars of scarcity'[12] (in Chapter 6) and private military and security companies and mercenaries (in Chapter 7).

It should be apparent that Gathii's book covers a considerable amount of ground, and it amounts to an ambitious attempt to trace the vagaries of the relationship between war and commerce in the context of the legacy of colonialism. The diverse strands of enquiry covered, however, do not always cohere in an entirely convincing manner – which is not helped by the absence of a general conclusion.

There are certain difficulties with Gathii's approach. First, the extent of Gathii's critique of international law itself is somewhat uncertainly expressed. Gathii's history of the connections between war and commerce is a history of power relations: between states in the centre of the international system and those at the periphery, between imperial states and the colonized. What remains unclear throughout the book is whether the rules relating to the regulation of commerce inherently reinforce relations of dominance and power, or whether it is only the application and adjudication of these rules that reflect such relationships. While Gathii occasionally gives the impression that international law is no more than a bundle of strategies for the assertion of power, his emphasis is primarily directed towards the way in which the rules relating to war and commerce have been unequally applied and adjudicated (p. xxi).

Second, the historical examples selected to demonstrate the unequal operation of international law are primarily examples of adjudication: Gathii's historical examples of the way in which powerful states have been able to shape these rules are primarily discussions of cases. While these examples are illuminating, the emphasis on case law inevitably means that other aspects of the relationship between war and commerce in the context of colonialism are excluded, and much-needed context can be lost. For instance, in his discussion of the law of neutrality, Gathii focuses almost exclusively on the role of the US Supreme Court in the development of a jurisprudence that accorded broad commercial freedoms to neutrals and certain restrictions on the activities of belligerents. He concentrates particularly on the changing attitudes of John Marshall, later to become chief justice of the US Supreme Court, who was centrally involved in many of the debates and negotiations surrounding the United States' position of neutrality in the Revolutionary Wars in Europe.

The principal point made by Gathii is that the use of the law of neutrality by the United States was essential to its emergence as an independent commercial nation (p. 121). It was Marshall, as a justice and subsequently chief justice of the US Supreme Court, who decisively shaped the concept of neutrality to fit the United States' trading interests, notably holding that the neutral character of goods was not affected by carriage in ships owned by belligerent powers. Yet, although Gathii's account of a number of important US cases is persuasively told, his focus on Marshall at the expense of a deeper history diminishes the extent to which the United States was following the doctrines and deploying the same legal strategies that had been

12 The phrase 'new wars of scarcity' is borrowed from J. Gray, *Heresies: Against Progress and Other Illusions* (2004), 115.

pursued by European states for decades.[13] Other aspects of the law of neutrality that developed in the context of colonialism, such as the 'Rule of 1756' (discussed briefly at p. 109), which was developed by powerful states in order to prevent neutrals from engaging in trade with belligerent colonies, are largely overlooked.[14]

Third, the structure of the book is somewhat unbalanced, as a great deal of material is introduced in the final two chapters. Indeed, these chapters hint at a much deeper critique of the formalist distinctions of nineteenth-century international law, including the law of statehood and the use of force. However, the range of material introduced means that this critique cannot be developed in the necessary detail.

The wide coverage of the book leads to some errors.[15] Liberal principles of commercial intercourse for neutrals are said to be contained in the Hague Regulations Respecting the Laws and Customs of War on Land (pp. 115, 137, and 143) rather than in Hague Conventions V and XIII.[16] The Second Hague Conference is described as taking place in 1906 rather than 1907 (p. 149). There are also some questionable interpretations, such as Gathii's claim that the principle of humanity 'supersedes' the requirements of military necessity in the law of occupation (p. 80).

Despite these criticisms, *War, Commerce, and International Law* offers much that is provocative and stimulating. It will undoubtedly be a spur to further reflection on trade, property, and armed conflict.

*James Upcher**

13 See J. Sofka, 'American Neutral Rights Reappraised: Identity or Interest in the Foreign Policy of the Early Republic?', (2000) 26 RIS 599, at 602. For a different view that emphasizes the differences between American and European approaches to neutrality, see M. Bukovansky, 'American Identity and Neutral Rights from Independence to the War of 1812', (1997) 51 IO 209.

14 See generally R. Pares, *Colonial Blockade and Neutral Rights, 1739–1763* (1938), 180–204.

15 The most disabling error in the book, however, concerns the numbering of cross-references in the footnotes, which are predominantly incorrect throughout.

16 Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907, in force 26 January 1910, Art. 7; Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907, in force 26 January 1910, Art. 7.

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