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BOOK REVIEWS

Stephen C. Neff, *The Rights and Duties of Neutrals: A General History*, Melland Schill Studies in International Law, Manchester, Manchester University Press, New York, Juris, 2000, ISBN 0719054788, 272 pp., £49.50.
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After the initiation of the United States' 'War on Terror' following the terrorist attacks of 11 September 2001, President George W. Bush put the nations of the world on notice: they were 'either with us or against us [the United States]' in their fight. There could be no middle ground, no neutrality in this 'war'. As a political statement, demonstrating US resolve, Bush's signal was clear. But the statement raised a key legal question: do states maintain their traditional right of neutrality in a war which is not between states but between states and non-state groups?

It is not only for this reason that we might question what role 'neutrality' plays in the contemporary international legal order. States which have traditionally professed political neutrality or possessed legal neutrality have moved to become members of international political organizations, seeing in that membership a firmer guarantee of their external security (witness Swedish, Austrian, and Irish membership of the EU, Swiss accession to the United Nations). The role of neutrality as a principle guiding the provision of humanitarian assistance is also increasingly queried.[1] Swiss complicity in Nazi crimes has cast a pall on neutral commerce. Was Lord Devlin correct, then, when he speculated that '[t]he history of international law in the twentieth century has been and will be the history of the withering away of neutrality'?[2] Is neutrality on the way out?

1. Strengths and weaknesses

Stephen C. Neff's history of neutrality proves invaluable in our attempts to answer this question. His study makes it clear that neutrality has always been a dynamic legal concept, marking the shifting boundary between belligerency and non-belligerency

1. L. Minear, 'The Theory and Practice of Neutrality: Some Thoughts on the Tensions', (1999) 833 *International Review of the Red Cross* 63; D. Plattner, 'ICRC Neutrality and Neutrality in Humanitarian Assistance', (1996) 311 *International Review of the Red Cross* 161; C. Dominicé, 'La neutralité et l'assistance humanitaire', (1991) 35 *Annales de droit international medical* 118–26; M. Torelli, 'La neutralité en question', (1992) 96(1) *Revue Générale de Droit International Public* 5.
2. P. Devlin, *Too Proud to Fight: Woodrow Wilson's Neutrality* (1975),137.

as it responds to the ebb and flow of political and strategic factors. It also makes it clear that the law of neutrality has faced constant revision since its inception. Consequently, '[h]istorical perspective . . . must lead to instant suspicions of any claims of the death of neutrality' (p. 218).

Beginning in the Middle Ages, Neff's study traces the evolution of the 'law of neutrality' through to present times. He focuses particularly on maritime trading aspects of the law of neutrality. The international law of neutrality has found its fullest development at sea, in those areas which are both literally and figuratively beyond the jurisdiction of any one state. Neff states clearly from the outset that there are certain topics on which his study will not dwell, including the criteria for neutral character, loans, aerial warfare, the foreign policy of neutral states, and neutrality in ancient civilizations (p. 3). Instead, he follows key maritime threads – the laws of contraband, prize, blockade, visit, and search – to gather evidence for two key theses: first, that '[t]he law of neutrality is the law regulating the coexistence of war and peace' (p. 1) and, consequently, that '[n]eutrality will end when armed conflict ends' (p. 218); and second, that neutrality is a phenomenon built by the accretion of state practice over the ages, rather than by jurisprudential or doctrinal prescription.

Neff's writing is very accessible. He states that the 'book is not designed only for lawyers' (p. 3), and his writing should certainly be accessible to other readers, particularly students of naval and maritime trading history. In Part I Neff carefully defines the building blocks of his narrative, which he goes on to develop in Part II and – with less success – in Part III. He adopts a style that summarizes and draws together salient elements of the historical narrative, without drowning the reader in unnecessary detail.

We can accept that the book 'does not pretend or attempt to be a treatise on the substantive law of neutrality' (p. 3), and that it focuses on maritime neutrality, even if that renders the title of the volume a touch over-generous. All the same, Neff's self-imposed limits at times appear to shut off avenues of analysis or research from which this volume might have benefited. The volume does not deal as well as it could with the political, social, and moral aspects of the development of the law of neutrality, or the law of neutrality in the UN Charter era. Neff's volume could serve as a useful springboard for further research into these areas, which are discussed below.

2. Organization and content

Neff's study is organized in three parts, dealing with three consecutive periods.

Part I, 'The foundations, 1200–1800', describes the evolution of identifiable sets of rights and duties ascribed to belligerents and neutrals during periods of hostility. In chapter 1, 'Medieval roots', Neff describes the emergence of assertions of neutrality in the sixteenth century against the doctrinal backdrop of the 'just war' theory. In Neff's narrative, these assertions of neutrality were primarily commercially motivated, an attempt by Renaissance princes to assert their right to conduct

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'business as usual' (p. 8) while their peers went to war.[3] Having outlined the roots of neutrality, Neff moves to sketch the elaboration of doctrines of neutrality by jurists including Grotius and Gentili, and early state practice including the *Consolato del Mare*. Neff carefully lays the groundwork for his later discussions, explaining how this early state practice gave rise to rules, principles, and solutions which were adapted in subsequent centuries. These prototypical solutions include the commercial adventure doctrine, rights of visit and search, the character-of-the-cargo principle, contraband, and blockade. Chapter 2, 'The age of parchment', describes the adaptation of these rules through the network of treaties of amity and commerce of the seventeenth and eighteenth centuries. Neff explains how mercantilist ideology and military evolution combined to produce adaptive interpretations of existing rules. In chapter 3, 'In search of first principles', Neff introduces the more theoretical thread of his discussion, identifying three separate doctrinal schools. He names these schools the 'conflict-of-rights' school (because it sees neutrality as a question of conflict between sovereign rights to make war and to trade), the 'code-of-conduct' school (which considers the law of neutrality to be a distinct, codifiable body of law applicable during times of war), and the 'community interest' school (which considers the issue from the perspective that international law should require that which is most in the interest of the international community). Neff's accessible penmanship, married to comprehensive research, is particularly successful in sketching the contours of these competing explanations of the phenomenon of neutrality.

In Part II, 'Innovation and consolidation 1750–1914', Neff describes the adaptation of established rules of neutrality to respond to new political, strategic, and economic circumstances. In chapter 4, 'The invention of total war', we learn how the development of economic warfare strategies in the late eighteenth century required increased intervention in what had previously been characterized as neutral maritime trade. We are introduced to the 'Rule of 1756', the 'continuous-voyage principle', the French 'Continental system', neutral convoys, and armed neutralities. Neff's explanation is built on an impressive command of state practice, including prize court cases. Chapter 5, 'Consensus approached', describes the period of consolidation of neutrality law in the nineteenth century, including the 1856 Declaration of Paris, and the extension of the concept of neutrality into permanent neutrality

3. It would be interesting to see further analysis of the relationship between claims to neutrality and the emergence of the modern, sovereign nation-state. Three aspects could receive further attention. First, we could examine how the right of neutrality as we know it is a classic example of the form of international legal rights as they exist within the Westphalian system – and the implication for neutrality of the emergence of new non-state actors in the international legal order. Second, what does 'neutrality' mean for a non-state actor who does not have access to the centralized military and administrative apparatus on which the enforcement of classical neutral rights and duties depend? The system of cargo passports provided for under the 1370 treaty between England and Flanders provides a good example of how emerging nation-states, with their centralized regulation of commerce, were able to enforce administrative solutions which gave substance to claims of neutrality. (England–Flanders, Treaty of 4 August 1370, in T. Rymer, *Foedera* (1704–13), VI, 659. See Neff, p. 9.) How do non-state actors administer such a solution? Third, it could be useful to look at the role of claims to neutrality such as that of Henry VIII in 1536 (Neff, p. 8) as assertions by Renaissance princes of political independence from Rome and from their peers, and not merely as means to secure fiscal independence.

and 'good offices'. Again, Neff's emphasis is on maritime practice. In chapter 6, 'Consensus ruptured', Neff examines attempts in the second half of the eighteenth century to circumvent the Declaration of Paris. He provides an extensive analysis of attempts to extend the Rule of 1756 in the US Civil War, both by executive governments and by judiciaries in prize courts. In chapter 7, 'Stating the rules', Neff describes the process of codification which led to the 1907 Hague Conventions[4] and the 1909 London Declaration.

Part III, 'New challenges 1914–2000', is in some ways the weakest of the three parts of the study. Chapter 8, 'A great war and new departures', begins well, providing an excellent overview of the innovations in maritime neutrality during the First World War: long-distance blockade, blacklisting and rationing, and submarine warfare. Chapter 9, 'The collective-security era', is, in contrast, less coherent. It describes how the international community abandoned the pacifist concept of neutrality that had arisen prior to the First World War in favour of a global pact for armed neutrality, the collective security mechanism of the League of Nations. Neff describes innovations in both the broad concept of neutrality ('new neutrality', 'neutral solidarity') and attempts at codification of maritime neutrality. He describes multilateral applications of neutrality at a geostrategic level (as in the 1939 General Declaration of Neutrality of the American Republics), and unilateral policy developments such as the US policy of 'non-belligerency' (which led to the occupation of both Greenland and Iceland in 1941 by a formally neutral power). By chapter 10, 'Modern times', the thread of Neff's narrative is clearly beginning to fray. He deals briefly with a large range of disparate strands: the effect of UN law on neutrality, peacekeeping operations, the Geneva Conventions, Arab oil embargoes, the San Remo Manual, Nazi gold, and a moral take on neutrality. Some issues in particular seem undertreated: Neff casually refers to neutrality as 'non-alignment' in Cold War terminology, without considering the complexities of proxy war. He touches on the *Nicaragua* case, but fails adequately to grapple with the complex questions it raises about attribution, complicity, and legal responsibility, and their relationship to formal neutrality. Neff's treatment of military neutrality beyond the maritime environment is patchy, and at times his conclusions are troubling. For example, he claims that '[t]he base-of-operations principle has seldom been invoked since 1945', citing only one example (Israel's 1968 attack on Beirut airport). No mention is made of a range of other state practice which directly or indirectly relied on the same justification, including Israel's raid on the headquarters in Tunisia of the Palestine Liberation Organization (PLO), US strikes on Libya, Sudan, and Afghanistan in response to terrorist attacks, the US incursion into Cambodia during the Vietnam War, South African attacks on African National Congress (ANC) camps in neighbouring countries, and Ugandan and Rwandan incursions into what is now the Democratic Republic of Congo.

4. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 Oct. 1907, 205 CTS 299; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 Oct. 1907, 205 CTS 395.

3. Opportunities and challenges

Neff's analysis is at its strongest when applied to the eighteenth and nineteenth centuries, but suffers a little in the twentieth century. The law of neutrality has taken on a whole new cast in the UN Charter era, since Chapter VII actions taken by the UN Security Council may require UN member states to support UN enforcement actions, in direct conflict with their traditional duties of neutrality. Neff highlights the similarities between this situation and just war doctrines – both approaches prohibit standing by in favour of active intervention on the side of 'just' belligerents. At the same time, Neff argues that the law of self-defence has replaced belligerent rights in the UN era, giving belligerents acting out of necessity or in self-defence extra freedom to affect the activities of neutrals (pp. 192–6). These two different approaches to neutrality sit uncomfortably together. The first, 'just war', paradigm suggests that there is no room for neutrality; the second assumes its continued vitality. This is a tension that Neff – or other authors – could usefully explore further.

State practice in fact indicates that there is a continued role for traditional forms of neutrality, particularly in the maritime context, but that these forms have also been adapted to the collective security context.[5] The collective security framework both casts the exercise of some traditional rights of neutrality as illegal and moulds those same rights into new enforcement mechanisms.[6] Nowhere is this trend more obvious than in the Maritime Intervention Force (MIF) in the Persian Gulf.[7] Neff's cursory treatment of the MIF (pp. 194–5) is surprising, given his maritime focus. Established by the UN Security Council, the MIF involved more than 100 ships and 25,000 personnel from 20 countries in the 1990–1 period alone, when more than 15,000 vessels were intercepted. The operation has since continued and developed. The significance for customary international law of such a complex and sustained operation cannot be overlooked, and the MIF has raised a number of important operational questions, including whether UN-authorized maritime interdiction operations can be conducted in territorial seas and international straits,[8] and the nature of the relationship between Chapter VII maritime interdiction operations and the laws of naval warfare.

While these finer points of maritime interdiction law may seem abstract, they are in fact at the heart of contemporary geostrategic developments. When Neff's book was published in 2000, he can have had little idea that the United States would lead a group of states to establish a programme for the interdiction of prohibited weapons

5. D. L. Peace *et al.*, 'Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)', (1988) 82 *American Society of International Law Proceedings* 146.
6. See UNGA Res. 3314, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9361 (1974) (Resolution on the Definition of Aggression). Art. 3 lists the 'blockade of the ports or coasts of a State by the armed forces of another State' as an act of aggression. See also N. Ronzitti, 'The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision', in N. Ronzitti (ed.), *The Law of Naval Warfare* (1988) 6. Recent Chapter VII embargo enforcement actions on Yugoslavia and Sierra Leone, and in the Persian Gulf all relied on a combination of contraband, blockade, and general visit and search rights.
7. See L. E. Fielding, 'Maritime Interception: Centerpiece of Economic Sanctions in the New World Order', (1993) 53 *Louisiana Law Review* 1191; J. H. McNeill, 'Neutral Rights and Maritime Sanctions: The Effects of Two Gulf Wars', (1991) 31 *Virginia Journal of International Law* 631.
8. Fielding, *supra* note 7, at 1201.

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trade to and from North Korea – the so-called Proliferation Security Initiative (PSI). It remains unclear, as I write, what the activities of the PSI will involve, and whether it will be justified as the exercise of belligerent rights of visit and search and the interception of contraband (assuming the 11 states reportedly involved are prepared to accept that they are in a state of belligerency with North Korea) or on some other basis. It should come as no surprise to readers of Neff's volume that the plan has echoes of earlier interdiction attempts, especially the Non-Intervention Agreement of the Spanish Civil War by which neutral states searched each other's vessels for prohibited weapons imports (pp. 180–1). Indeed, the PSI is, like all developments in the law of neutrality past, the latest iteration of the compromise between competing sets of rights held by different stakeholders in the international community, including the rights to trade, to make war, and to security.

Equally important questions remain to be examined outside the maritime context. Some of the questions which lie beyond the scope of Neff's study include neutral nationals' membership of the armed forces of belligerents,[9] the provision of financial and logistical assistance by neutrals to belligerents, and the violation of neutral territory (whether by transit of belligerent forces over land, or through air space, waters, or cyberspace[10]). By avoiding these broader questions of military neutrality, Neff avoids the question of when a neutral illegitimately interferes in the domestic affairs of another state, and what the consequences of such illegitimate interference are. This allows him to limit his discussion to narrowly 'legal' questions, avoiding issues of 'political' and 'moral' neutrality.

In my opinion, Neff's analysis could be taken further by bringing these questions back into the analytical equation. In order to understand contemporary neutrality we must address the relationship between neutrality and complicity, particularly in the context of the involvement of international commerce in war-making, exemplified by the Swiss profits from Nazi commerce.[11] This investigation takes us beyond the classical boundaries of 'neutrality', defined in space by state borders and in time by declarations of war. It takes us into the messy reality of contemporary conflicts, involving states, non-state armed groups, terrorist organizations, and commercial ventures, all acting in multiple locations simultaneously, with ill-defined temporal boundaries between 'peace' and 'war'. Problems such as Nazi gold and the 'heirless' assets looted during the Second World War have forced us to look at global regulatory solutions which apply to all of these actors, and at all times, not only during periods of open conflict.[12] These problems require sophisticated international regulatory schemes such as the international programme for the certification of diamonds, tying in all the stakeholders at all the key moments of profit-accumulation and transfer.

9. This is a key question in the treatment of many of the detainees at Guantánamo Bay.
10. See G. K. Walker, 'Information Warfare and Neutrality', (2000) 33 *Vanderbilt Journal of Transnational Law* 1082.
11. H. I. Sobel, 'Neutrality, Morality and the Holocaust', (1998) 14 *American University International Law Review* 205. D. Vagts, 'Switzerland, International Law and World War II', (1997) 91 AJIL 466; D. Schindler, 'Neutrality and Morality: Developments in Switzerland and in the International Community', (1998) 14 *American University International Law Review* 155.
12. Schindler, *supra* note 11, at 170.

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The emergence of these global (rather than inter-state) solutions suggests the emergence of global ethical bottom lines as thresholds for participation by both state and non-state actors in international society. It is the emergence of a very skeletal global ethical regime. The ethical minima or bottom lines which make up this regime act as thresholds which actors (individuals, states, and certain non-state groups) must meet before they may benefit from the protections of international law and the commercial systems it underpins. It is no longer enough to be a 'neutral bystander': certain minimum norms of active conduct are demanded of all actors – individuals, states, non-state organizations. Gross violations of these standards entail criminal liability, whether at the national or international level.

Recently, we have seen a new willingness on the part of the most powerful enforcement agents in the international community – states – to enforce this skeletal global ethical regime. This willingness marks a fundamental shift in the idea of neutrality, from passive bystanding to active enforcement of ethical minima. We see an emerging trend for states to investigate and punish criminal violations of these minima (the so-called 'international crimes' of genocide, crimes against humanity, and war crimes). We see, also, the renewal of the doctrine of humanitarian intervention as a community enforcement action by formally 'neutral' states. It is notable that contemporary advocates of humanitarian intervention envisage armed intervention not in the context of inter-state war, in which neutrals continue to possess clear duties of non-intervention, but in the quasi-military context of crimes against humanity and genocide, in which no formal right or duty of 'neutrality' arises.[13]

This new emphasis on the active enforcement of global ethical norms makes us look anew at a whole range of bystanding activity, in case it should amount to complicity. Actors who were traditionally duty-bound not to intervene are now required to act. We see this in recent moves to define and limit journalists' duties of confidentiality in the context of international crimes. We see it, too, in changing attitudes to civilian immunity during armed conflict. Is the Palestinian woman who, after collecting water in the Jenin refugee camp incursion, reported on Israeli troop positions to Palestinian insurgents a civilian or a combatant? nAre Jewish Israeli settlers civilians, immune from attack, or private agents of the Israeli state's occupation of Palestinian land – and therefore open to attack – or something in between? Are the fighters held at Guantánamo Bay POWs, civilians who have committed a crime by taking up arms, or something else? All of these questions turn on where the border between neutral bystanding and illegitimate complicity lies. The question has real operational effects, with organizations such as al-Qaeda and the Iraqi armed

13. '"Neutrality" in the face of genocide is unacceptable and must never be used to cripple or delay our collective response to genocide.' US Ambassador for War Crimes David J. Scheffer, in M. Cherif Bassiouni *et al.*, 'War Crimes Tribunals: The Record and the Prospect: Conference Convocation', (1998) 13 *American University International Law Review* 1383, at 1395. See also D. F. Vagts, 'The Traditional Legal Concept of Neutrality in a Changing Environment' (1998) 14 *American University International Law Review* 83. For a broader treatment of neutrality as recurring question in the morality of war see Alfred Rubin's contribution to A. T. Leonhard (ed.), *Neutrality: Changing Concepts and Practices* (1988).

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forces using confusion over these questions to disguise their attacks under literal and figurative civilian clothing.

What are the duties of the providers of humanitarian assistance within this new paradigm, where neutrality is almost a dirty word?[14] Neutrality is at the heart of the classical conceptualization of humanitarian assistance, particularly in the guise of the International Committee of the Red Cross (ICRC).[15] Interestingly, the ICRC has always held that neutrality does not require inaction. Rather, as Jean Pictet put it, 'like a swimmer, [the ICRC] is in politics up to its neck. Also like the swimmer, who advances in the water but who drowns if he swallows it, the ICRC must reckon with politics without becoming part of it'.[16] The duties of non-state actors like the ICRC in enforcing this global ethical regime remain uncharted.

It is clear that much state practice must be forthcoming before this global ethical regime will be fully fleshed out. One of the key questions that practitioners and commentators need to grapple with is what the content of states' ethical bottom lines is. Respect for human rights is a strong contender – states must not only respect their nationals' human rights, but prevent the proliferation of means for transnational abuses of human rights (terrorist infrastructure, weapons of mass destruction, transnational organized crime). Other contenders remain, though: for example, the Wahabist Islamic movement suggests that adherence to Islam should be a bottom line for legitimate participation in the international community, non-adherence providing a trigger for international intervention (or *jihad* by agents of the Dar al'Islam against the Dar al'Harb).

Whichever global ethical minima prevail, this renovation of the humanist project at the international level marks a key challenge for notions of neutrality and complicity, security, and sovereignty. To answer the question I asked at the beginning: neutrality is clearly *not* on the way out – the challenge is to establish a stable boundary in the contemporary era between neutrality and illegitimate action, to create certainty for international actors (whether individuals, states, non-state groups or commercial ventures) as to their international rights and duties. It is a challenge of startling immediacy, in the form of the PSI and MIF, and with important ongoing ramifications for the regulation of international commerce. As a record of the long history of the shifting boundary of legitimate neutrality, Neff's volume will act as an important guide for captains of our ships of state – and for commentators on the shores – as we all attempt to navigate these dangerous shoals in years to come.

*James Cockayne**

14. See Dominicé and Torelli, both *supra* note 1.
15. See Minear and Plattner, both *supra* note 1.
16. J. Pictet, *The Fundamental Principles of the Red Cross* (1979), 59–60.

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Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis*, Aldershot, Ashgate Publishing, 2003, ISBN 075462224X, 282 pp., £60.00, $104.95.

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This book discusses the development of some important and complicated doctrines and principles on 'territoriality' in international relations. It is a historical or 'temporal' study of the doctrines regarding *terra nullius*, the rule of inter-temporal law and, in particular, *uti possidetis*, as they have developed since Roman times. Castellino and Allen are particularly interested in the impact of the changes in these doctrines in the period of colonialism and its aftermath. They set out to examine the doctrines (or principles) of *uti possidetis* and *terra nullius* in their historical development, also in order to understand better what the significance of the rule of inter-temporal law is.

The book has seven substantive chapters. The first, introductory, chapter and, in particular, chapter 2 examine the doctrines and principles under consideration in their origins in Roman law. Chapters 3 and 4 deal with colonialism and post-colonialism in Latin America and in Africa. Chapter 5 discusses a number of territorial cases brought before the International Court of Justice. Chapter 6 examines the territorial dismantling of the former Yugoslavia and, in particular, the reports of the Badinter Commission. Chapter 7, written by Jérémie Gilbert, analyzes the protection of indigenous territorial titles under international law and, by way of conclusion, chapter 8 provides a summary account of the preceding chapters.

The first chapters, on the Roman law origins of the two central concepts of *uti possidetis* and *terra nullius*, are rather inconsistent in quality. Chapter 1 has a somewhat unfortunate opening. It introduces the doctrine or principle of *uti possidetis*, but spends only three pages on its Roman law origins, primarily relying on secondary sources like the works of Hugo Grotius, Hedley Bull, and Malcolm Shaw. It acknowledges the principle's place in the Roman *jus civile* and then proceeds without much evidence – apart from the observation that the Roman norm 'was designed to protect existing arrangements of *possessio*' – to the statement that this norm forms the basis for the modern doctrine in respect to international territory. The rest of the chapter discusses some of the differences between the Roman and the modern doctrine/norm, continues with a further introduction to what is to follow in the rest of the book and ends with a section on the 'Shortcomings of *Uti Possidetis*'. The two prime flaws of the modern doctrine of *uti possidetis*, which are further examined in the book, are here set out: the principle creates new identities within rigid boundaries that cannot always be maintained and it transforms internal boundaries into international ones without much regard for national unity.

The second chapter more seriously tries to trace aspects of the rules of modern territorial acquisition back to the Roman property regime. The basic characteristics of Roman law are presented in a much more balanced account than in the previous chapter, including its main instruments in respect to ownership. The distinction between *jus gentium* and *jus civile*, and between possession and ownership are introduced. Furthermore, the prescription mechanism of *usucapio*, which became

increasingly important during the later phases of Roman expansion, is explained, as well as the role of the *praetor*, notably of his interdict of *uti possidetis* concerning the retention of possession of unmoveable kinds of property. The chapter continues by tracing the origins of the doctrine of *terra nullius* to the Roman law rules concerning *occupatio* and describes the adoption of the doctrine in the modern *jus gentium*. The chapter is, generally speaking, a balanced review of the relevant parts of Roman law. Although a 'thorough grasp of the underpinnings of ancient theory and practice' (p. 29), as the authors set out to provide, requires different levels of engagement with Roman law and with the relevant literature, the chapter adequately shows that Roman law made 'an immense contribution to the treatment of territory within modern *jus gentium*' (p. 56).

In chapter 3, on the treatment of territory in Spanish America, the authors argue that the sanctity of boundaries was accepted, if not propagated, in the Creole discussion of independence in the early nineteenth century. Moreover, the Creole action (the authors' term for the movement towards independence in Latin America) is at the origins of modern-day *uti possidetis*, setting the basic conditions for its potential application elsewhere. In Latin America it also showed its limits: boundary and territorial matters proved to be a regular cause of war. These flaws were only partly mitigated by the frequent recourse to arbitration (usually following war) to solve territorial conflict among the new states. Another specific step taken in Latin America, primarily in order to avoid further colonization by European powers, was the denial of the application of *terra nullius* in Latin America. The authors point at the parallel with, and in a sense confirmation of, this point of view in the Monroe doctrine, declared by the United States in 1823. They conclude by showing that the developments in Latin America laid the groundwork for the territorial consequences of decolonization in Africa, the subject of chapter 4.

In chapter 4 – just like the preceding one, this is largely a descriptive chapter – colonial treaty regimes are examined for the impact they have had on the formation of modern African states. In terms of the prevailing doctrines on the acquisition of territory, for all practical purposes the colonizing powers perceived Africa as *terra nullius*, the authors argue, because they possessed the power to occupy them. Nevertheless, the legal personality of African entities was to some extent recognized in order to facilitate and formalize their transfer. An analytical sidestep to the contemporary law of treaties leads them to the conclusion that the validity of the treaties with the African entities cannot sustain modern legal standards. The same conclusion is drawn in respect to the further legitimizing seal that was provided by the 1884–5 Conference of Berlin. The chapter is concluded by an assessment of the 'post-colonial ramifications', notably of the choice to 'settle' people within fixed colonial territorial boundaries. The authors conclude (p. 115) that this is what has been agreed to by both relevant Vienna Conventions, on the Law of Treaties (1969) and on Succession of States in respect to Treaties (1978).

Chapter 5, entitled 'Cases concerning territoriality before the International Court of Justice', in a somewhat unusual way analyzes ICJ cases on territory. The authors have set out to follow the development of the doctrines concerning 'territoriality'

and some related matters in times preceding the 'post-colonial phase'. They hope to find not only how the doctrines on territoriality in this modern jurisprudence are taken as having evolved, but also how 'the parties to the disputes perceive them to be applicable to them' (p. 119). Thereto, they make use both of the ICJ viewpoints and of the pleadings of the parties.[1] The criterion to select cases is (i) that they should concern disputes over territory decided in the UN era; and (ii) that they should all reflect directly on the doctrines discussed in the book, or, somewhat less straightforwardly, that they should reflect on 'sentiments that could be construed as indicating such doctrines and values' (p. 120). On the basis of a selection process that I find somewhat hard to follow,[2] eight cases are thus analyzed. The results of the analysis of these cases, ranging from the 1959 Belgium–Netherlands *Case concerning Sovereignty over Certain Frontier Land* to the Cameroon–Nigeria *Case concerning the Land and Maritime Boundary* (not yet decided at the time of writing), are not too surprising. *Uti possidetis* has been used quite often, whereas rules in respect of *terra nullius* have not. The chapter questions as an adequate reflection of the state of international law the view of the Chamber in the 1986 *Burkina Faso/Mali* case that *uti possidetis* is also applicable to administrative frontiers outside a situation of decolonization. This point has later been taken up by the Badinter Commission regarding the former Yugoslavia (the subject of the next chapter). Also in respect to the *Burkina Faso/Mali* judgement, the ambiguity in the meaning of 'title' is recalled: it 'comprehends both any evidence which may establish the existence of a right, and the actual source of that right' (para. 18). The authors are not impressed by the quality of the choices the Court has made when faced with contrary or differing historical evidence offered by the parties. They are equally unimpressed by what the Court has accepted as sources of territorial rights, and point to the denial of that status to the rights of nomadic peoples. Finally, the application of '*colonial effectivites*', increasingly significant in territorial decisions in the last decade, is criticized. This complex notion is intimately linked to the application of *uti possidetis*, because it is used to determine what precisely is to be possessed in the post-colonial period (or where the location of the post-colonial boundary is supposed to be). Castellino and Allen do not believe *colonial effectivites* to be appropriate for achieving this purpose, because what they should or should not include is too unclear and, at the time, the consent of the governed has never been sought by the colonial state. In that sense they are equally objectionable as is *uti possidetis* itself.

In chapter 6 the views of the Badinter Commission on the territorial treatment of the former Yugoslavia are reviewed and analyzed. The authors focus on the application of the *uti possidetis* principle to administrative borders in a non-colonized setting

1. Although references are only to the pleadings of the parties as referred to in the judgements, not, as far as I could see from the references to the ICJ website, directly to the documents submitted by the parties.
2. Notably at pp. 120–1 the reasons for the exclusion of the *Temple of Preah Vihear* and *Western Sahara* cases ('since materials abounds in terms of their treatment of issues of territoriality' and, in addition, there is a reference to chapters from a previous book by Castellino, p. 121) remain unclear to me. Why the Libyan continental shelf cases (with Tunisia and Malta) are included is also difficult to see, since the authors exclude territorial cases 'that fall primarily under the purview of the Law of the Sea' (p. 121). The Libyan cases are dealt with in three pages that do not seem to produce overly interesting results.

(and in a federal republic). Following a discussion of whether secession from the republic had taken place or that it had dissolved, the chapter adequately describes the Commission's struggle with the application of the notion of self-determination and the right of secession, heavily restricted in international law. Notably, the most controversial of the Commission's Opinions, number 3 – giving the 'Badinter principles' – is examined for its implications on issues of territoriality. The authors agree with the criticism of the principles, that is, that they are inadequate renditions of the principles of international law, but they also analyze them on grounds of desirability. The disintegration of Yugoslavia was a mixed process in terms of secession (Croatia and Slovenia) and dissolution (Bosnia-Herzegovina and Macedonia) and they point to the important differences between secession, dissolution, and decolonization. Treating the Yugoslavian case as similar to decolonization and thereby applying the principle of *uti possidetis* is unfair, they argue. For one thing it would be unfair because in Latin America (and even in Africa) the new states had in fact agreed to the application of the principle to their situation. In Yugoslavia such agreement was rather questionable. The authors disagree with those who believe that the solution sought by the Badinter Commission for the issues at stake in terms of *uti possidetis* and stability and inviolability of boundaries was acceptable in terms of the state of international law (as expressed in the *Burkina Faso/Mali* judgement). The authors take issue in particular with the argument that the solution found is preferable for the sake of establishing basic order and the need to minimize threats to internal and external security. For one thing the application of *uti possidetis* has not prevented numerous wars in Latin America, and it is hard to say whether the relative territorial stability in Africa has been beneficial in the light of prolonged gruesome internal strife in numerous states. So, although *uti possidetis* might produce order in the short run, more research and insight are needed to find out whether it does not produce greater disorder in the long run. A further dubious point, in their view, is whether the boundaries so established are really 'acceptable' boundaries (as Malcolm Shaw has argued). They reiterate the argument that the acceptability is to be found primarily on the part of the international community and is much less when viewed in terms of the interests of the local populations. Furthermore, the principle does not apply to non-federal states (so far), and that may make it less attractive to central authorities to provide autonomy to minorities, in particular to offer them any territorial status, because that is now perceived as encouraging secession. Finally, and this is a criticism mentioned before, including in territorial arbitration: administrative boundaries are often established in ways that do not at all take the interests of the relevant parties into account, for one thing because their sheer object and purpose is so totally different from those of international boundaries. In Yugoslavia the lines between the federal states were primarily drawn to facilitate administration; they did not have much more pretension. In that respect a strict application of *uti possidetis* indeed reduces 'complex questions of national allegiance and intricate layers of national identity to a simple problem of line drawing in the ostensible interest of order' (p. 198) that may sow future havoc.

His study in chapter 7 of the protection international law offers to indigenous rights, primarily in international human rights instruments, leads Gilbert to the

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conclusion that international law is (still) very weak in this respect. More interesting developments have taken place in some municipal systems, notably the Canadian and Australian legal systems, which the author discusses in some detail. He describes the core of the legal basis of indigenous (or aboriginal) rights (i.e., exclusive occupation before the assertion of sovereignty and a substantial maintenance of that title over time) as it has developed in these systems. The more specific content of such rights is also examined. However, the recent decision by a provincial court in British Columbia (20 July 2003) shows that although in Canada jurisprudence has led to the recognition of territorial rights, related matters such as indigenous commercial fishing rights are still highly controversial. In his decision Justice William Kitchen declared granting such preferential rights for native people to be discriminatory and a violation of the Canadian Charter of Rights and Freedoms. Gilbert provides a good and up-to-date account of indigenous land and other territorial rights as (hardly) protected under human rights law and (some) municipal legal systems. He does not, however, delve very deeply into international law issues other than those under human rights. For example, he does not discuss whether pre-sovereignty indigenous territorial titles (to some extent) may still have survived as international titles or are definitely extinguished (whether or not abusively). Although useful as such, in a book on title to territory in international law his account seems therefore slightly out of place.

Title to Territory in International Law is more a history of ideas and doctrines of international relations than a study in international law. From the latter perspective it is often too superficial and too much based on secondary sources, too wide-ranging in its scope and simply not analytical enough to produce an adequate analysis of the state of the relevant international law now (or for that matter in the past). Moreover, the study ignores important international legal literature on the subject (such as Marcelo Kohen's *Possession contestée et souveraineté territoriale* or Sharon Korman's *The Right of Conquest*, to mention two). The authors too often limit themselves to mere statements or provide insufficient analysis for their assessment of the current state of international law. The analysis of some modern ICJ jurisprudence on territorial issues in chapter 5 is of limited interest to international lawyers. Taking account of some of the many professional reviews of these cases would probably have been beneficial for its depth of treatment. The law of treaties is accorded minimal space in order to deal with the complicated and, here, rather important *rebus sic stantibus* rule. Equally few words are wasted when they argue that the 1969 Vienna Convention on the Law of Treaties propose an 'ultimate denial of the right to renegotiate boundary treaties under modern international law'. It is, furthermore, merely assumed that the rule of inter-temporal law is part of the body of modern international law. The authors accept the rule as commendable but object to its often incoherent and inappropriate application. However, in a study like this, more serious attention should have been paid to the legal status and meaning of this important and difficult principle. Still, the better chapters are worthwhile for an international lawyer to read. All in all the authors try to assess the doctrines and principles under consideration for their possible (material) consequences for the individuals and groups involved, and such an attempt is somewhat unusual in international law.

As a study of ideas, especially for those who are not very familiar with the subjects dealt with, the book is certainly daring in its aspirations, and it provides some good chapters offering inspiring thoughts for further research. Notably, chapters 2 and 6 are, generally, in this category and so is Gilbert's chapter 7 (although it is not entirely clear why this last chapter, in terms of its current approach, has been included in the book). However, chapters 1 and 5, and to a considerable extent 3 and 4 as well, leave much to be desired, from the perspective also of an assessment of the doctrines. As a whole the study is too unbalanced and suffers too often in its execution from the implicit preconceived (ideological) views of the authors and from remarkable inaccuracies and sloppiness[3] – some of which should have been addressed in the editing process.

*Harry Post**

Nicolas de Sadeleer, *Environmental Principles – From Political Slogans to Legal Rules*, Oxford, Oxford University Press, 2002, ISBN 0199254745, 433 pp., £60.00.
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Is international environmental law the carrier of a new normativity? This existential question emerges from the cracks in environmental normative production, amidst which are created new principles, based on a new axiology for the national and international order. The legal maturing of these principles occurred according to a *sui generis* crystallizing logic. Indeed, from their origins as vague political slogans, the principles have been incorporated into enforceable laws and instruments. Nicolas de Sadeleer's work, *Environmental Principles – From Political Slogans to Legal Rules*, reveals this phenomenological and consubstantial aspect of the evolution of environmental principles and undresses the intrinsic and extrinsic implications of such an evolution for the law.

Far from being similar to classical principles of law in general, they contribute to ensure the regulation, the assessment, and the management of risk, an admittedly crucial contemporary phenomenon. Nicolas de Sadeleer underscores the autonomy of these new principles as well as, simultaneously, the central place occupied by environmental law in the international legal system and, at the domestic level, as a major influence on other areas of regulation, such as economic law.

3. Britain did not occupy the Falkland/Malvinas Islands in 1823 (p. 77) but in 1832. Grotius did not write *De Jure Pacis Bella*, but *De Jure Belli ac Pacis*, and not in the sixteenth century but a century later. The boundary on the island of Timor was not 'clearly a Portuguese construction in the division of the island of Timor' (p. 20), but a boundary agreed by the Portuguese and Dutch colonial powers (controversial and the subject of arbitration in 1914); Belgium separated itself from the Kingdom of the Netherlands, not the other way around as is argued on p. 122 (and so on).

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Through the analytical description of three essential principles of international environmental law – the 'polluter pays' principle, the prevention principle, and the precautionary principle – the functional and material variableness of this *corpus juris* is highlighted, functional variableness in the sense that the functions of environmental principles vary between curative, preventive, and anticipatory logic. The work excels in demonstrating that beyond their difference in nature, these principles reveal a differentiated degree of protection, whether for the environment or for human health. Material variableness is highlighted by reason of the interchangeability of the status of these principles. Indeed, they oscillate between various legal garments, wearing, alternatively or simultaneously, the form of rules, directing principles, standards, or approaches.

Through this epistemic approach, the study is articulated around two essential points: on the one hand, the function of such principles in the assessment and the management of risk and, on the other hand, the legal status of these principles, that is, their proper place in the legal systems in the spheres of international law, the European Union, and domestic orders. This original approach sets the work apart from more traditional analyses by reversing the usual tendency to start by evaluating the legal status of a rule, to scrutinize only then (and therefrom) the function such rules might have in practice. The author asserts the emergence of an atypical process of norm formation, whereby the function of a rule will exert a significant influence over the legal status of the said rule. In so doing, he effectively unearths new grounds of legality.

A strong emphasis is placed on various aspects of 'postmodern law'. This brings a fresh and original perspective to the study of international law, where main doctrinal writings have remained relatively silent on the subject, while authors have been equally discreet in bringing it to bear in the spheres of Community and domestic law. This makes this book one of the most comprehensive works written so far when it comes to the usefulness of postmodern law, and of its content, scope, and limits, as viewed here through the prism of the newly devised principles of environmental law. Through its rigorous description of what contemporary law is, Nicolas de Sadeleer substantiates a genuine transformation of the normative process and the consequent alterations of the international and domestic legal orders. The book is useful in helping legal scholars come to grips with this fact and stimulates the debate on new modes of legal regulation. The author's method effectively incorporates aspects and issues emanating from all spheres pertaining to the principles of environmental law, be they legal, political, scientific, technical, historical, economic, or philosophical. His work will thus undeniably prove useful to a great number of actors involved in the field (such as policy-makers, civil society representatives, members of the scientific community, and so on). Moreover, one finds here an original conceptual frame as well as a careful effort at defining principles of environmental law, which too often suffer from vagueness in their apprehension or formulation.

Another point to be highlighted is the legal treatment of scientific expertise. The book explores the stakes, the obstacles, and the potential solutions that could facilitate the often uneasy rapport between law and science. It thus acts as a welcome

path towards creative thinking in terms of setting up institutions and formulating national and international public policy, with the appropriate pragmatism in putting forward new integrative elements of the decision process.

The book also stimulates forward thinking about new issues and emerging challenges, notably as to the relationship between international environmental law and international economic law. Some fundamental questions are asked, so that legal scholars may immediately set out on their examination, with a view to providing appropriate solutions to crucial problems (regarding for instance biotechnology regulation, or the controversy surrounding the interpretation of the Agreement on the application of sanitary and phytosanitary measures (SPS agreement) or the Agreement on technical barriers to trade (TBT agreement)).

Lastly, this book constitutes a veritable font of knowledge and facilitates access to both continental and Anglo-Saxon doctrine spanning the last 20 years. Its effort at achieving a synthesis of the various theories and opinions prevailing in the field of environmental law must be duly commended. For all these reasons, Nicolas de Sadeleer's book is requisite reading for everyone interested in the development of modern law.

*Laurence Boisson de Chazournes**

Stephen McCaffrey, *The Law of International Watercourses, Non-Navigational Uses*, New York, Oxford University Press, 2001, ISBN 0198257872, 514 pp., $139.50 (hb), ISBN 0199264104, 552 pp., $74.00 (pb).

Attila Tanzi and Maurizio Arcari, *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing*, International and National Water Law and Policy Series 5, London/The Hague/Boston, Kluwer Law International, 2001, ISBN 9041116524, 358 pp., $127.00.
DOI: 10.1017/S0922156504241930

Although the 2002 World Summit on Sustainable Development in Johannesburg has given considerable attention to water-related issues and has called for the ratification of several multilateral agreements, it has not made any reference to the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses[1] in any of the adopted resolutions. A new opportunity for ministers to promote the UN Convention in the International Year of Freshwater at the 3rd World Water Forum in Kyoto on 16–22 March 2003 has also been foregone. On 1 September 2003, more than five years after the adoption of the UN Convention, which has no more than 16 signatories, only 12 states have expressed their consent to be bound to it out of the 35 that are required for it to enter into force. Some

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1. See (1997) 36 ILM 703–18.

promotion would seem to have been in order if the Convention is to be saved from oblivion . . .

The subject of this review is two works on the law of international watercourses that focus on the Convention. Stephen McCaffrey provides a general introduction to the law of the non-navigational uses of international watercourses that ends with an outline of the Convention. Attila Tanzi and Maurizio Arcari follow up on that with a detailed commentary of the provisions of the Convention. These works can therefore best be read in this order. McCaffrey's book is divided into four parts – the introduction (Part I), the theoretical bases of the law of international watercourses (Part II), a survey of state practice related to international watercourses (Part III), and the fundamental rights and obligations of states sharing an international watercourse (Part IV). The annexes to this work contain the texts of the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, the 1966 International Law Association Helsinki Rules on the Uses of the Waters of International Rivers, and the 1994 International Law Commission Resolution on Confined Transboundary Groundwater. The work of Tanzi and Arcari contains six chapters addressing the theoretical background and genesis of the UN Convention (ch. 1), its scope (ch. 2), and its substantive principles (ch. 3), the obligation of co-operation and its procedural application (ch. 4), the environmental protection of international watercourses (ch. 5), and the settlement of disputes (ch. 6). The appendices contain the text of the Convention together with the statements of understanding pertaining to its text and a table of ratifications and declarations as at 11 April 2001 – including the nine ratifications at the time. This review follows the organization of both works and begins with introductory observations on political and hydrological aspects followed by the theoretical bases of international watercourses law, case studies, and the fundamental rights and obligations of states sharing an international watercourse.

Both works introduce the subject with some political observations. There is agreement that conflicts over water resources relate to the geographical division between upstream and downstream states, the quantity as well as the quality of water, and the growing demand for freshwater supplies that are renewable but limited. This brings Tanzi and Arcari to the conclusion that the issue of environmental protection has now acquired an important place on the international agenda concerning the regulation of transboundary watercourses (p. 11). McCaffrey argues that conflicts over water resources are likely to increase in the future as a result of imbalances between supply and demand. In spite of this dark scenario, he argues that consciousness of the prisoner's dilemma and the tragedy of the commons to the use of shared resources has taught *most* riparian states that 'co-operating with their co-riparians is ultimately more in their self-interest than proceeding unilaterally' (p. 21). McCaffrey thus leaves us with the impression that *some* riparian states, most of which are to be found in the hot spots of the world, still need to be convinced of this.

The political introduction (ch. 1) of McCaffrey's work is followed by a hydrologic introduction (ch. 2) discussing the hydrologic cycle; the concept of the watercourse

system – that is the surface and subsurface waters of a 'watershed' or 'drainage basin' – the natural differences between surface waters and related groundwater, and confined groundwater; the distinction between successive watercourses that traverse boundaries and contiguous watercourses that form boundaries, a distinction that is 'difficult to justify in law or policy' (p. 43); and the relationship between navigational and non-navigational uses of international watercourses. This part ends with a legal conclusion: '[i]t would be going too far in the current state of international law to suggest that all freshwater is *res communis*. But it is critical that states begin to conceive of the *hydrologic cycle* in this way' (p. 53).

Both works address the theoretical bases of international watercourse law. The introduction to the second part of McCaffrey's work (ch. 3) recalls that conflicts over water resources are likely to increase in the future and that '[t]his ominous prospect calls for the development of new approaches – legal, institutional, conceptual – to these problems' (p. 57). This chapter is followed by an extensive treatment of the origin of one doctrine that has become obsolete, namely the Harmon Doctrine, which considers international watercourses as exclusively national resources (ch. 4). This chapter seems to be solely for historic reference, in particular because the main elements of this doctrine are summarized in the subsequent chapter that examines four principal doctrines of international watercourse law (ch. 5). According to these doctrines, with respect to the section of an international watercourse that is situated on its territory, a riparian state either has:

- absolute territorial sovereignty (Harmon Doctrine), which means that a downstream state has to accept every use of the upstream states irrespective of its impact on the quantity and quality of the water flowing into the downstream state;
- absolute territorial integrity, which means that an upstream state may do nothing that might affect the natural flow of water into the downstream state;
- territorial sovereignty that is limited by the obligation not to use that territory in such a way as to cause significant harm to other riparian states; or
- a community of interest with other riparian states which means that a riparian state must take into account the interests of other riparian states when it makes use of the water of an international watercourse.

According to the authors of both works there is virtually no support for the doctrines of absolute territorial sovereignty and absolute territorial integrity (McCaffrey, p. 171; Tanzi and Arcari, p. 13). In their view, the doctrine of limited territorial sovereignty may be regarded as the source of rights and obligations of states sharing an international watercourse (McCaffrey, pp. 137, 171; Tanzi and Arcari, p. 14). The doctrine of community of interest is portrayed in both works as a theoretical context for the law of international watercourses. According to McCaffrey, 'it cannot be said that the theory [of community of interest] is the source of concrete legal rights and obligations' (p. 172; see also p. 170). According to Tanzi and Arcari, the doctrine is a progressive theoretical construction of the law of international

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watercourses put forward in legal literature (p. 21). However, this doctrine finds its origin in the *River Oder* case.[2] In this dispute over navigational rights, the Permanent Court of International Justice concludes that riparian states have a community of interest. According to the Court, '[t]his community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State to the others.'[3] In the light of this dictum, the conclusions of the authors of both works on the legal status of this doctrine may be called into question. This may furthermore be underlined by the statement of the International Court of Justice in the *Gabčíkovo–Nagymaros* case that '[m]odern development of international law has strengthened this principle for non-navigational uses of international watercourses as well.'[4] It must be admitted, however, that the dictum of the Permanent Court of International Justice cannot be applied *mutatis mutandis* to non-navigational uses of international watercourses and that the International Court of Justice does not clarify the meaning of the doctrine in relation to non-navigational uses. It is nevertheless reassuring to read in McCaffrey's work that 'the notion that all riparian states have a community of interest in an international watercourse reinforces the doctrine of limited territorial sovereignty, rather than in any way contradicting that doctrine' (p. 168). One can only wonder why this analysis has not been taken one step further: limited territorial sovereignty and community of interest would seem to be two sides of the same coin, and the fundamental rights and obligations of states sharing an international watercourse flow from that, namely the obligation to utilize an international watercourse in an equitable and reasonable manner and the obligation to prevent significant harm to other riparian states. According to Tanzi and Arcari, both obligations flow from the doctrine of limited territorial sovereignty (p. 15), but this conclusion does not fit easily with the description of this doctrine given above. In contrast, McCaffrey links the doctrine of community of interest to joint management of an international watercourse to prevent co-riparians from making 'unilateral claims and responses in respect of the watercourse' (p. 169). Although joint management of an international watercourse by riparian states is certainly desirable, it does not reflect the current state of the law – and the author's cautious formulations on this point seem to recognize that. The point is, however, that the doctrine of community of interest can be combined with unilateral action by riparian states. In the *Lake Lanoux* case, the arbitral tribunal stated that in case of a dispute between co-riparians, 'one of them is never obliged to suspend the exercise of jurisdiction because of the dispute except when it assumes an obligation to do so'. [5] The tribunal only stressed that 'according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction

2. See *Territorial Jurisdiction of the River Oder (Great Britain, Czechoslovakia, Denmark, France, Germany, and Sweden v. Poland)*, Judgement of 10 Sept. 1929, 1929 PCIJ (Ser. A), No. 23.
3. *Ibid.*, at 27.
4. *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgement of 25 Sept. 1997, [1997] ICJ Rep. 7, at 56 (para. 85).
5. Arbitral Tribunal Established by France and Spain, *Lake Lanoux* case, (1957) 24 ILR 101, at 132 (para. 16).

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compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own'.[6] In spite of the call for the development of new approaches at the beginning of this paragraph, no such approaches emerge from the analyses of theoretical bases, or they must lie in McCaffrey's earlier appeal to conceive of the hydrologic cycle as a *res communis* (p. 53) or the observation of Tanzi and Arcari that the law on international watercourses has gradually shifted from the regulation of coexistence to the promotion of co-operation (p. 17).

Case studies are the subject of the third part of McCaffrey's work, where the major cases before international courts, arbitral tribunals, and national courts (ch. 6), as well as selected case studies from different regions of the world (ch. 7), are surveyed. This survey is not complete – how could it be in view of the sheer number of disputes over water resources in both past and present? Although the work by Tanzi and Arcari does not have a separate section where case studies are presented, their analysis of the law on international watercourses is throughout their work illustrated by references to such case studies – the only noteworthy omission being the *Kasikili/Sedudu Island* case.[7] On the other hand, one should note the added value of the comparison that is made between the UN Convention and the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (see e.g. Tanzi and Arcari, pp. 73–4).[8]

Both works provide a detailed analysis of the fundamental rights and obligations of states sharing an international watercourse. The point of departure of the fourth part of McCaffrey's work is the UN Convention (see ch. 8 for an overview), of which the substantive and procedural obligations are examined in more detail in subsequent chapters, which address the obligation to utilize an international watercourse in an equitable and reasonable manner (ch. 9), the obligation to prevent significant harm to other riparian states (ch. 10), the obligation to protect international watercourses and their ecosystems against unreasonable degradation (ch. 11), procedural obligations (ch. 12), the special case of groundwater (ch. 13), and dispute avoidance and settlement (ch. 14). Tanzi and Arcari review the UN Convention almost on an article-by-article basis (chs. 2–6) after their introduction. In both works, the line of reasoning is illustrated by references relating to the history of the UN Convention, in particular the work of the International Law Commission and the UN General Assembly.

The UN Convention applies to the non-navigational uses of international watercourses, such as irrigation, energy production, recreation, and waste disposal. However, the use of living resources is not covered except to the extent provided for in the part of the UN Convention that deals with the protection, preservation, and management of international watercourses and except insofar as other uses affect such resources (statement of understanding pertaining to Article 1).

6. *Ibid.*, at 139 (para. 22).
7. See *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgement of 13 Dec. 1999, [1999] ICJ Rep. (not yet published).
8. See (1992) 31 ILM 1330.

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Navigation is also not covered except insofar as other uses affect navigation or are affected by it (Article 1). Compared with non-navigational uses, navigation is a relatively benign use, because it is non-consuming. In this respect, McCaffrey points to the interesting irony that 'while upper riparian states on successive international watercourses generally have the more powerful position vis-à-vis lower riparians with regard to non-navigational uses by virtue of their physical control over the watercourse, it is the lower riparians that control navigation' (p. 46). The priority navigation once had over other uses has, with the rising social and economic importance of non-navigational uses, given way to equality of uses. Although the UN Convention recognizes the equality of uses in the absence of agreement or custom to the contrary (Art. 10(1)), it requires special regard to be given to the protection of vital human needs in the resolution of a conflict of uses (Art. 10(2)). According to Tanzi and Arcari, the protection of vital human needs marks 'a shift from a "neutral" approach [to] a "presumptive" priority' over all the other factors that have to be taken into account in relation to the assessment of the equitable utilization of international watercourses (p. 141).

The UN Convention is of a residual nature and does not supersede existing watercourse agreements. However, parties to such special watercourse agreements are invited, where necessary, to consider the harmonization of these agreements with the UN Convention (Art. 3(2)). Tanzi and Arcari warn that 'this provision might result in a deterrent against ratification by those States that were parties to watercourse agreements that they considered fully satisfactory and not applicable to all co-riparians' (p. 85). The provision on future agreements permits states to conclude special watercourse agreements that 'apply and adjust' the UN Convention (Art. 3(3)). Tanzi and Arcari stress that such application and adjustment must remain 'within the limits of the basic principles set out in the Convention' (p. 85). However, this conflicts with their argument that the UN Convention does not purport to provide rules of a *jus cogens* character (Tanzi and Arcari, p. 86; see also McCaffrey, p. 303). This must mean that states may even set aside the basic principles set out in the UN Convention *inter se* as long as such regulation does not affect other riparian states.

The obligation to utilize an international watercourse in an equitable and reasonable manner has traditionally been linked to the allocation of water. McCaffrey recognizes that the preferable approach would clearly be a holistic one that takes into account both allocation and protection of water. However, he cautions that the performance of both functions 'has resulted in a degree of confusion and perhaps in an overloading of a principle whose implementation is already a complex matter' (p. 325). The UN Convention alludes to such holistic approach where it requires the obligation to be implemented 'consistent with adequate protection of the watercourse' (Art. 5). This brings Tanzi and Arcari to conclude that 'any restrictive approach to the scope of the equitable utilisation principle, traditionally conceived to be confined to the apportionment of waters among co-riparians, has been definitively removed' (p. 115). In contrast to McCaffrey, Tanzi and Arcari are of the opinion that the obligation to utilize an international watercourse in an equitable and reasonable manner must be reoriented in order to warrant not only the best allocation

of water, but also its adequate protection (p. 20). In both works, the obligation is characterized as a process, because it will involve the balancing of interests of riparian states that may lead to different results from case to case and may change over time with changes of circumstances as result of natural change and human capabilities. Although there is therefore no rule of general international law that absolutely protects established uses, the state proposing the new use bears the burden of demonstrating that it constitutes equitable utilization (McCaffrey, p. 336). It may be clear that this is a significant disadvantage for a later developing upstream state.

As for the obligation to prevent significant harm to other riparian states, the authors of both works agree that it covers harm caused by changes in the level of the natural water flow as well as harm caused by changes in the quality of the natural water flow. The obligation does not prohibit all harm, but only harm that exceeds the threshold of harm, that is, harm that is significant. This threshold cannot be defined in abstract terms, but is context-dependent. Thus the determination of the threshold may lead to different results from case to case and may change over time. According to McCaffrey, the function of the threshold is to trigger discussions over (i) whether and to what extent harm has occurred and, if so, (ii) whether the source state has exercised due diligence to prevent the harm, and (iii) whether it is reasonable for the complaining state to insist on being free from the harm (p. 380). The flexible terms of this obligation are referred to as the 'mitigated no substantial harm principle' by Tanzi and Arcari (p. 145). They stress that (i) water quality objectives and criteria will be instrumental to determine whether harm exceeds the threshold (p. 151), (ii) due diligence standards will vary according to the specific circumstances of the particular watercourse (p. 154), and (iii) the determination of all appropriate measures will be made in the light of more specific guiding principles, such as the best available technology, the best environmental practices, a previous environmental impact assessment, and the precautionary principle (p. 156; see also pp. 264–5).

The complex question on the relation between the obligation to utilize an international watercourse in an equitable and reasonable manner and the obligation to prevent significant harm to other riparian states is addressed in both works. Upstream states are more likely to invoke the obligation to utilize an international watercourse in an equitable and reasonable manner as it allows for more flexibility, whereas downstream states will prefer the application of the obligation to prevent significant harm to other riparian states as it warrants more protection. McCaffrey has described the relation between the relevant provisions of the UN Convention (Arts. 5 and 7) as the 'Dance of the Seven Veils: a number of qualifiers and elastic phrases make the character of the relationship between the two rules tantalizingly obscure' (p. 308). In a similar vein, Tanzi and Arcari observe that the UN Convention has not cut the Gordian knot as to which rule prevails (p. 175). According to McCaffrey, there is no need to reconcile these obligations, because 'it is not the causing of significant harm per se, but the unreasonable causing of such harm that is prohibited . . . : significant harm may have to be tolerated in order to achieve an overall regime of equitable and reasonable utilization' (p. 370). He finds support for his view in the *Gabčíkovo–Nagymaros* case, where the International Court of Justice has

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'strongly endorsed equitable utilization, leaving little doubt that it is the governing principle. This suggests that the Court sees little utility in the no-harm doctrine as a mechanism for resolving complex problems of allocation of the uses and benefits of internationally shared freshwater resources' (p. 356). However, the Court has also stressed the great significance that it attaches to 'the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States'.[9] He also finds support in the provision of the UN Convention pursuant to which the payment of compensation may be in order when significant harm will be or has been caused (Art. 7(2)); this provision implicitly acknowledges that the causing of significant harm is not necessarily wrongful (p. 308; see also p. 309). Tanzi and Arcari come to different conclusions. Although they stress that the 'interpretation of Articles 5–7 does not lead to considering a significantly harmful use *ipso facto* inequitable, . . . the presumption is to be inferred from Articles 5–7 that a use that causes significant harm is inequitable' (p. 179). They also refer to Article 7(2) in support of their findings. In their view, the wording of this provision clearly suggests that it only covers significant harm that is caused in spite of the exercise of due diligence (p. 172). Hence, the provision only applies where the causing of the harm has not been wrongful. Although this textual analysis provides a different perspective that is more convincing, questions will continue to be raised on the relation between the obligation to utilize an international watercourse in an equitable and reasonable manner and the obligation to prevent significant harm to other riparian states.

The obligation to protect and preserve the ecosystems of international watercourses, as well as related provisions of the UN Convention, 'represent a recent effort by the international community to restate, and progressively develop, the law in this field' (McCaffrey, pp. 384–5). According to Tanzi and Arcari, the result of this effort is the 'lowest common denominator' (p. 231). These provisions impose a due diligence standard, but it is noted that the level of the required diligence increases as polluting substances become dangerous, and, at some point, the obligation may become a strict one (McCaffrey, pp. 386–7; Tanzi and Arcari, pp. 259–63). The core obligation of these provisions is the obligation to prevent new pollution, and to reduce and control existing pollution. With respect to existing pollution, states must even tolerate significant harm, provided that watercourse states exercise due diligence to reduce it to an acceptable level. This obligation has been intended by the International Law Commission to be a specific application of the obligation to utilize an international watercourse in an equitable and reasonable manner and the obligation to prevent significant harm to other riparian states, but it is not altogether clear what this means (McCaffrey, p. 385). In particular, it is not clear how the equitable and reasonable utilization standard comes into play, because the only standard in the obligation to protect international watercourses and their ecosystems against unreasonable degradation is the threshold of significant harm.

9. *Gabčíkovo–Nagymaros Project, supra* note 4, at 41 (para. 53).

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Procedural obligations have a prominent place in the UN Convention and customary law on international watercourses. Overarching is the obligation of riparian states to co-operate with each other with respect to the use of international watercourses. However, neither the UN Convention nor customary law requires riparian states to extend their co-operation to the establishment of joint bodies for the management of an international watercourse (Tanzi and Arcari, p. 191). A riparian state remains competent to take unilateral action with respect to an international watercourse, but must respect procedural obligations with the aim of taking into account the rights and interests of co-riparian states (see also above). Accordingly, a state must give prior notification of planned activities that might affect other states sharing an international watercourse, must consult and, if necessary, negotiate with those states on factual matters and their interests or positions, and exchange data and information with those states on a regular basis in respect of those activities. Compliance with these procedural obligations in good faith will require a prior environmental impact assessment to determine whether planned activities may have adverse significant transboundary effects (McCaffrey, p. 408; Tanzi and Arcari, p. 205). The threshold in procedural obligations – significant adverse effects – is lower than in the obligation to prevent significant harm to other riparian states to avoid legitimizing the presumption that planned activities fall *ipso facto* under this obligation (Tanzi and Arcari, p. 202).

Both works only address selected aspects of dispute avoidance and settlement which is, after all, a horizontal international law issue. The third-party dispute settlement mechanisms of the UN Convention are based on consensualism except for the fact-finding procedure. Obviously, the identification of relevant facts is essential for the operation of the equitable utilization principle and other substantive principles, including the obligation to prevent significant harm to other riparian states. The results of the fact-finding procedure are, however, of a recommendatory nature and provide input for further negotiations. This does not mean that adjudication may not be a suitable means for the interpretation and application of the law on international watercourses, because the fact that 'the equitable utilisation principles and the no harm rule are primarily aimed at serving as terms of reference for negotiations is not at variance with the argument that these rules are justiciable' (Tanzi and Arcari, p. 294). This may be illustrated by the approach of the International Court of Justice in the *Gabčíkovo–Nagymaros* case, where the interpretation and application of the law on international watercourses were to be the basis for a negotiated settlement of the dispute. Tanzi and Arcari especially mention the services that the World Bank and the Permanent Court of Arbitration may provide with respect to the settlement of disputes on the law of international watercourses – the special promotion of these institutions is forgiven (pp. 286–91). For the settlement of disputes at the national level, it is important that access to justice is available on a non-discriminatory basis. Although there is less evidence of state practice concerning equal access to domestic remedies in regions outside Europe and North America, McCaffrey notes a trend in favour of granting such rights (p. 438) and the UN Convention contains a provision to that effect (Art. 32). Tanzi and Arcari note on this provision of the UN Convention that one may challenge the argument that the local remedies rule does not apply

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in cases of transboundary environmental harm when effective local remedies exist (pp. 174–5). However, where the transboundary environmental harm has resulted from an internationally wrongful act, harm to private persons is necessarily a violation of the territorial integrity of the injured state and may therefore be included in the claim of the injured state without prior exhaustion of local remedies.[10]

The UN Convention does not cover confined transboundary groundwater, covering groundwater only insofar as it is related to surface waters. Although the UN Convention applies the same rules to surface waters and related groundwater, McCaffrey calls this into question. Given that groundwater moves slowly and, once contaminated, may take a longer period to purify itself, he suggests that 'a good case could be made for applying legal regimes to the two that are at least somewhat different' (p. 430). According to McCaffrey, the special characteristics of groundwater imply a heightened standard of diligence, 'one that may approach very nearly "strict liability"' (p. 431; see also p. 433). Although confined transboundary groundwater is not covered by the UN Convention, it has been addressed in a resolution of the International Law Commission that was adopted when it finalized its work on the law of the non-navigational uses of international watercourses (for text, see McCaffrey, p. 473; Tanzi and Arcari, p. 67n.). Meanwhile, the International Law Commission had taken up the study of confined transboundary groundwater in the framework of its study on shared natural resources. Although confined transboundary groundwater does not fit easily within the meaning of the term 'watercourse', for McCaffrey 'there seems little doubt that the rules governing such groundwater are the same, *mutatis mutandis*, as those governing surface waters and related groundwater' (p. 38; see also p. 433 and Tanzi and Arcari, p. 66). This statement would seem to be at variance with the call for applying legal regimes that are at least somewhat different. However, the application of legal regimes that are the same – which is also called for by the resolution of the International Law Commission on confined transboundary groundwater – is only to be temporary, because '[t]his situation should prevail only until a special regime can be tailored for international groundwater' (McCaffrey, p. 433).

Finally, both works address the fate of the UN Convention. Given the pace of expressions of consent to be bound since 1997, it may be doubted whether the UN Convention will ever attract the required number for its entry into force. According to the authors of both works, incentives for states to express their consent to be bound are few (McCaffrey, p. 314; Tanzi and Arcari, p. 303). The conclusion of specific watercourse agreements by states to regulate the uses of their international watercourses, the protection of positions in pending disputes, or a mere lack of interest, such as that of island states, will not induce states to express their consent to be bound to the UN Convention. In spite of this dark scenario, the reference to the UN Convention by the International Court of Justice in the *Gabčíkovo–Nagymaros* case only three months after its adoption is a strong endorsement of the UN Convention and 'seems likely to lead states to refer to it in support of their positions concerning

10. See also the recent debate in the International Law Commission on the local remedies rule in UN Doc. A/57/10, 145–53.

internationally shared water resources' (McCaffrey, pp. 193–4; see also Tanzi and Arcari, p. 302). However, having represented a downstream state in negotiations on the conclusion of a specific watercourse agreement, it must be said that I have witnessed upstream states refusing to include any references to the UN Convention in the agreement. Be that as it may, it would seem that 'the most important elements of the Convention – equitable utilization, prevention of harm, prior notification, protection of ecosystems – are, in large measure, codifications of norms that either exist or, in the case of ecosystem protection, are at least emerging' (McCaffrey, p. 316; see also Tanzi and Arcari, pp. 91, 302). And that cannot be changed by states that would like to ignore the existence of the UN Convention.

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