

## BOOK REVIEWS

Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002, ISBN 0521811309, 260 pp., £45.00 (hb).

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'International humanitarian law has, to a large extent, grown beyond its state-centred beginnings'.<sup>1</sup> This observation, made by Judge Rodriguez in his dissenting opinion to the *Aleksovski* judgment at the International Criminal Tribunal for the former Yugoslavia (ICTY), is reiterated in Liesbeth Zegveld's book on armed opposition groups. It underlies her thorough and lucidly written book on the accountability of non-state actors during internal armed conflict. Fifteen internal armed conflicts provide the factual framework of this study, all of which have been qualified as non-international armed conflicts by international bodies and authoritative commentators. The conflicts selected differ in intensity and duration and cover a wide variety of internal strife, for example that occurring in Northern Ireland, Afghanistan, El Salvador, and Kosovo.

In analysing the law relevant to armed opposition groups, the author assumes the perspective of the *subjects* of law. She submits that in doing so she deviates from the common approach to internal armed conflicts, which focuses on the rights of victims. However, the victim-oriented approach has not provided satisfactory answers to the question of who is *obliged* to respect or ensure respect of victim's rights. Accountability is understood in this book in a broad way, as covering both the substantive obligations of armed opposition groups and the responsibility for breaches of these obligations. Indeed, a large part of this study describes the obligations of armed oppositions groups under international law.

The author examines the law relevant to armed opposition groups as it is applied and developed by international bodies, that is, international courts and tribunals and other bodies, such as the Inter-American and the UN Commission on Human Rights. Relying on the practice of international bodies (referred to by the author as 'international practice'), the author aims at identifying 'trends in decision-making in international law in the light of treaty and customary law which are relevant to the acts of these groups' (p. 4). This raises the issue of the formation of customary law

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1. Dissenting Opinion of Judge Rodriguez Presiding Judge of the Trial Chamber, *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1T, 25 June 1999, para. 31.

in the field of international humanitarian law. The ICTY Appeals Chamber in *Tadić* deduced the existence of a rule of customary law through state practice by looking at official pronouncements of states, military manuals, and judicial decisions.<sup>2</sup> This approach blurs the distinction between state practice and *opinio juris*, and it has been suggested that it ‘entails some disregard for the *usus* element of custom in favour of *opinio juris*’.<sup>3</sup> The author recognizes the neglect of state practice in determining customary international humanitarian law. Whilst questioning the Tribunal’s assertion that this flows from a lack of information from the battlefield, she observes instead that it stems from the ‘peculiarity’ of international humanitarian law (p. 23). She fails, however, to clarify what exactly this peculiarity is and why the discrepancy between actual and prescribed conduct is so apparent in this field of law. That aside, the author’s reliance on international practice should be welcomed. Although the practice of international bodies does not feature as a source of law in Article 38 of the Statute of the International Court of Justice, it may provide decisive evidence of the law. Moreover, international bodies increasingly play an important role in determining the applicability of international humanitarian and human rights law.

The first part of this study is concerned with substantive law applicable to armed opposition groups. Its title, ‘The Normative Gap’, identifies the result of the author’s analysis of the normative framework. In examining the normative gap left by international humanitarian law, the author discusses the liberal approach displayed by some international bodies in identifying customary law. She points at the practice of the UN Commission on Human Rights in applying Additional Protocol II to the 1949 Geneva Conventions to armed opposition groups operating on the territory of a state that has not ratified Protocol II (Sudan). A similar attitude can be discerned in the identification of customary law relating to internal strife *outside* Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II. The author supports this liberal approach, not least because it fills the gaps left by conventional law and develops a ‘new’ humanitarian law applicable to armed opposition groups. In this context she points to a trend in international practice to diminish the distinction between international and internal armed conflicts. The author looks upon this development favourably, although she opposes a full equation of the two types of conflict, mainly for pragmatic reasons. The status of ‘combatant’ and ‘prisoner of war’ and the concomitant immunity from prosecution are unlikely to be accepted by states with regard to members of armed opposition groups. She submits that, as an alternative, rules and principles should be adopted which are relevant to the specific context existing in internal conflicts and to the parties to such conflicts.

The normative gap is also felt with regard to international human rights law. The author is critical of international practice applying human rights law to armed opposition groups. Only with regard to armed opposition groups acting as *de facto* governments can the traditional dichotomy in human rights law of individual versus state warrant an extension of human rights law beyond the relationship

2. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995, para. 99.

3. I. Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (2002), 15.

between the established government and the governed. International criminal law is equally of no avail with regard to armed opposition groups. In Nuremberg the collective criminality theory of Colonel Bernays provided the basis for the concept of criminal organizations, which led the Tribunal to declare criminal the SD, the SS, and the Gestapo.<sup>4</sup> Current international criminal law, however, does not concern legal entities. The strongest suggestion that this concept belongs to the past is its absence in the Statute of the International Criminal Court (ICC). According to the author this lies in the reluctance to stigmatize armed opposition groups and prohibit rebellion against the state. More importantly, it seems that the concept of legal entities caused division between the states drawing up the ICC Statute because of its contentious status in national criminal law.

Having settled the question of applicable law, the author embarks on an analysis of the substantive obligations of armed opposition groups. These obligations can be put under two headings: humane treatment of prisoners and the protection of civilians. Armed opposition groups have a duty to respect elementary norms of humanity and are prohibited from killing outside combat, torturing, or inflicting inhuman treatment. Moreover, uniform and consistent international practice prohibits attacks on civilians or civilian objects. The author points out that international bodies have rarely indicated which measures armed opposition groups must take to comply with their obligations. Applicable norms have been formulated in terms of 'prohibitions'. In her view international practice does not regard armed opposition groups as responsible actors, exercising political and military authority over other persons. By having their duties limited to a duty to abstain, armed opposition groups seem to occupy a position similar to that of individuals under international criminal law.

The second part of the research is entitled 'The Accountability Gap'. The author distinguishes three levels of accountability and analyses them in separate chapters. The first level concerns the leaders of armed opposition groups. The second level relates to the accountability of armed opposition groups as such. The third level looks at the responsibility of states for acts committed on their territory by armed opposition groups. The author's analysis of the accountability of group leaders turns on the concept of command responsibility. The Yugoslavia and Rwanda tribunals have developed this concept into a well-established principle of individual criminal responsibility. Based on three basic principles (superior-subordinate relationship, knowledge of subordinates' crimes, the duty to prevent and punish) evolving around effective control, and extending to both *de facto* and *de jure* superiors, the concept has a broad scope. It applies to military and non-military superiors and is therefore a suitable basis for constructing the criminal liability of leaders of armed opposition groups, as was indeed the case in the trial of Aleksovski before the ICTY. To the author's mind the use of the word 'person' rather than 'stage agent' in provisions relating to command responsibility implies the extension of these provisions to members of armed opposition groups. Her concern with the wording of these provisions is,

4. See B. F. Smith, *The American Road to Nuremberg. The Documentary Record 1944-1945* (1982), Doc. 16, at 33-7.

however, unnecessary since it contradicts the nature of superior responsibility in not applying equally to state and non-state superiors. It is for this reason that the command responsibility concept of the ICC Statute in Article 28, which is framed in two distinct standards, should be faulted. Contrary to the author's submission that this distinction is formal rather than material, and that both standards are 'very similar' (p. 120), it appears that the 'should have known' standard for military superiors and the 'knew, or consciously disregarded' standard for non-military superiors differ substantially. The distinction between these two knowledge standards corresponds to the distinction between negligence as the requisite mental element for military superiors and recklessness as the requisite mental element for non-military superiors. It is perhaps a pity that the author, when discussing the accountability of leaders of armed opposition groups, does not elaborate on this distinction. Bearing in mind that she deduces from international practice 'a general tendency in which the formal position of a superior, state or non-state actor, military or civilian, has lost some of its relevance' and that 'instead the emphasis is on the person's actual power over subordinates' (p. 230), the distinction in Article 28 of the ICC Statute should be critically assessed.

The author's submission that conflict classification is irrelevant with regard to the doctrine of superior responsibility is warranted. She takes this from the trend in international practice of reducing the distinction between international and internal armed conflict. Until recently the issue had never been explicitly addressed by either of the tribunals, but in a recent decision the ICTY affirmed this trend and clearly pronounced on the matter. The ICTY Appeals Chamber in *Prosecutor v. Hadžihasanović et al.* settled the matter once and for all when it held that command responsibility was 'a part of customary international law in its application to war crimes committed in the course of an internal armed conflict'.<sup>5</sup>

With regard to the second level of accountability relating to armed opposition groups as such, the author argues that not every armed opposition group can qualify as a subject of international law and that a certain threshold needs to be met. International practice is far from uniform as to this threshold. The author takes as a starting point the minimum conditions for accountability of armed opposition groups under Common Article 3 identified in the *Tadić* appeal case, stipulating that armed opposition groups must be able to carry out protracted hostilities and should be organized. She is critical of the lower threshold applied by the Security Council and the International Committee of the Red Cross (ICRC), and wonders whether the humanitarian cause is served by a wide application of the norms of Common Article 3. Moreover, she points out that greater weight should be attached to the views of the Yugoslavia and Rwanda tribunals than to those of the Security Council since the tribunals were established specifically to apply international humanitarian law. This view deserves support, since it maintains the credibility of international humanitarian law while at the same time not diminishing the protection of victims of anarchic conflict. The requirement of minimum organization and control does not

5. *Prosecutor v. Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, A.Ch., Case No. IT-01-47-AR72, 16 July 2003, para. 31.

preclude the prosecution of individuals engaged in armed conflict as members of armed bands that do not meet these conditions. The author submits that although international practice is ambiguous, there is some authority for the proposition that armed opposition groups can be held accountable under human rights law. This is only the case when they can be regarded as quasi-governments. According to the author this requires an 'authority effectively controlling territory and persons' (p. 149). The threshold for the applicability of human rights law should therefore be higher than the threshold for the applicability of international humanitarian law. Looking into the issue of what conduct may be attributed to armed opposition groups, the author applies by analogy the International Law Commission's Draft Articles on State Responsibility. However, as she admits, this is of no avail with regard to armed opposition groups that lack a clear organizational structure and do not qualify as *de facto* governments. Another problem to be dealt with when considering the accountability of armed opposition groups as such is the lack of a supervisory mechanism. Currently no forum exists where a claim can be brought against these groups. The author's proposal to establish an 'international humanitarian law committee' that is competent to receive and examine individual complaints is therefore laudable.<sup>6</sup> Whether such a committee will ever function remains to be seen. Even the author is sceptical of its viability. She admits that 'holding armed opposition groups accountable for humanitarian law violations is considered to be incompatible with the fundamental right of the state to preserve its existence and to remain the only authority' (p. 163).

Bearing in mind the limited prospect of further development of the accountability of armed opposition groups as such, the author turns to a more traditional concept of international law which is capable of filling the accountability gap. This brings her to a discussion of the responsibility of states for the failure to prevent or suppress acts of armed opposition groups on its territory. A large part of this chapter is dedicated to the obligations of a state to take action. These obligations can be deduced particularly from human rights law. International practice distinguishes three specific obligations: the obligation to protect civilians from armed opposition groups through legislation, the obligation physically to protect civilians from armed opposition groups, and the obligation to prosecute acts of armed opposition groups prohibited under the applicable treaties. With regard to the circumstances under which this accountability exists, the author submits that the absence of a government or lack of effective control over territory precludes such accountability. This is pertinent with regard to armed opposition groups and situations of internal armed conflicts where the central government is sometimes weak or absent and local authorities control a part of a state's territory.

The author's quest for accountability seems to encounter most problems at the second level, with regard to armed opposition groups as such. According to the author this is, however, the most appropriate level of accountability in responding to abuses committed by armed opposition groups. It is doubtful that this should stand as a

6. See also J. Kleffner and L. Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law', (2000) 3 *Yearbook of International Humanitarian Law* 384.

general statement. After all, this type of accountability is only relevant with regard to groups that meet a certain threshold as to organization and territorial control. In any event, a comparison of the first and second levels of accountability is revealing in that the measures to be taken by armed opposition groups in protecting civilians go further at the group level than at the individual level of accountability. With regard to state responsibility – the third level of accountability – the author submits that the groups themselves cannot be required to take measures to protect the civilian population. International practice considers the prosecution and punishment of abuses a typical state task. Moreover, the responsibility of states for acts of armed opposition groups is limited to the most serious abuses.

The concept of accountability of armed opposition groups as such is fraught with difficulties. For the moment, the more established concepts of state responsibility and individual criminal responsibility are more promising routes to accountability. It is arguable that the latter route deserves closer attention than the author seems prepared to allow. In supporting her argument that criminal responsibility in international law should extend to legal entities, the author points to the collective nature of international crimes. She argues that such crimes are not effectively dealt with by punishing individuals. A marginal note is appropriate here. The concept of joint criminal enterprise and the doctrine of common purpose, developed in ICTY jurisprudence and laid down in Article 25(3)(d) of the ICC Statute, seem to offer the requisite tools for prosecuting crimes committed by a collective, possibly an armed opposition group.

Zegveld's book can be recommended as a thorough and thoughtful analysis of the accountability of armed opposition groups in the fluid and dynamic jurisprudence of international law.

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Philip Allott, *The Health of Nations: Society and Law beyond the State*, Cambridge, Cambridge University Press, 2002, 452pp., ISBN 0521016800, £19.99 (pb), ISBN 0521816556, £55.00 (hb).

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When Philip Allott first published his seminal work *Eunomia* in 1990,<sup>1</sup> the walls of the world order were crumbling. His diagnosis of the world situation culminated in the observation that

governments, and the human beings who compose them, are able to will and act internationally in ways that they would be morally restrained from willing and acting internally, murdering human beings by the million in wars, tolerating oppression and starvation and disease and poverty, human cruelty and suffering, human misery and human indignity, of kinds, and on a scale, that they could not tolerate within their internal societies. Interstatal unsociety is a realm of unmorality.<sup>2</sup>

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1. P. Allott, *Eunomia* (2001).

2. *Ibid.*, at 248, para. 13.105 (16).

The main cause of this situation did not reside in the East–West conflict, but could be found in the separation between the domestic and the international spheres, between domestic and international morality, domestic and international law.

Instead, Allott proposed a general and universal theory of society and law changing ‘the fundamental conceptions of international society itself and, in due course, the very substance of the international social process’. He wished to contribute to ‘the illumination of . . . a spiritual horizon, the horizon of the interdependence of the human spirit, as human societies and human beings everywhere at last begin to take moral and social responsibility for the survival and prospering of the whole of humanity’. The renewal would engender an international law which served the world society rather than the narrowly defined ‘national interests’ of individual states. Allott did not quote Hegel, but his ‘owl of Minerva’ seemed to be on a steady course, bringing change in its wake, and Allott provided the corresponding philosophy of international law.<sup>3</sup> The rise of the UN Security Council to something akin to a world executive, the new ‘communal’ treaty regimes from Rio and Kyoto to Ottawa and Rome, the emergence of an international criminal law creating a direct relationship between individual wrongdoing and international prosecution, could all be understood as confirming Allott’s insistence that a changed consciousness would bring about a radical transformation. Even a US president named Bush invoked a ‘new world order’.<sup>4</sup> Setbacks such as the Iraqi annexation of Kuwait or even the genocide in the former Yugoslavia were dealt with by the ‘international community’, one of the favourite phrases of the time.<sup>5</sup> Allott was not claiming an ‘end of history’, of course, like neo-Hegelians such as Alexandre Kojève and Francis Fukuyama,<sup>6</sup> but there was a strong sense of direction in his work: the values of domestic democracy and society should, and could, finally be transferred from the domestic to the international sphere.

In his follow-up book under review here, Allott elaborates many of the themes of *Eunomia* and situates them in both the history of philosophical thought and contemporary political practice. Most of the chapters contained in *The Health of Nations* were published separately elsewhere, but have been revised for the present volume. The result is a book which may contain certain repetitions but, unlike most collections of essays by one author, it is a whole and not a collection of diverse parts. It is regrettable, though, that the remarkable preface to the second edition of *Eunomia* (which otherwise remained unmodified) is not included here, which relates subsequent developments to the theory elaborated in the book, from the

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3. B. Simma, ‘From Bilateralism to Community Interest in International Law’, (1994–VI) 250 *Recueil des cours* 221, paras. 1–5.
  4. Allott, *supra* note 1, at vii. For George Bush Sr’s remarks, see President’s Address before a Joint Session of the Congress on the State of the Union, 1991 Pub. Papers 74, 79 (29 Jan. 1990); President’s Address before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict, 1991 Pub. Papers 218, 221 (6 March 1991).
  5. See A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* 45 et seq. (2001); R.-J. Dupuy, *La communauté internationale entre le mythe et l’histoire* (1986).
  6. See F. Fukuyama, ‘The End of History’, (1989) 16 *National Interest* 3; *idem*, *The End of History and the Last Man* (1992). For his relationship to Kojève, see R. Howse, ‘Kojève’s Latin Empire’, (2004) 126 *Policy Review* 41, available at <http://www.policyreview.org> (visited 25 Aug. 2004).

'psychic liberation' from the Cold War ideology<sup>7</sup> via national identity<sup>8</sup> to 'economic fundamentalism'<sup>9</sup> and the emergence of the 'environment'.<sup>10</sup>

If we believe in Allott's theory, we would expect that the emergence of a new universalist consciousness would lead to a communalization of international law. At times, he seems indeed to believe this to be the case: '[W]ords help to form conceptual horizons, and such phrases, with their unavoidable universalist overtones, maybe the outward signs of a real change in the axiomatic foundations of intergovernmental relations as understood by the governments themselves'.<sup>11</sup> Alas, as September 11 amply illustrates, this has not been the case. Even before that date, the insistence of the Bush II administration on national prerogatives could not be ignored, and it is hardly surprising that this development has continued ever since. Although *The Health of Nations* was largely written before this infamous day, it reads, in some respect, like an explanation why the moment of salvation needs to be postponed. The optimism of *Eunomia* has waned. The book is full of criticism of the new international institutions – from the criminalization of international law to the bureaucratization of international institutions. Nevertheless, the present volume testifies to the author's continual belief that only the emergence of a new world consciousness may finally lead to redemption, in spite of considerable frustration about the apparent wrong turn of history, back to nationalism and parochialism.

## 1. SOCIETY AND LAW

The book is divided into three parts, representing three themes: 'Society and Law', 'European Society and its Law', and 'International Society and its Law'. In the first part, Allott introduces his theory of the relationship between society, theory, and law. In the first chapter, 'The Will to Know and the Will to Power. Theory and Moral Responsibility', his diagnosis of the current conceptualizations is clearly negative: '[T]he obvious means of making a better human reality are not available' (p. 32, para. 1.61), whether in religion, science, or philosophy. Indeed, common sense has succumbed to 'a form of thinking which is dehumanising, degrading and self-destructive' (p. 33). We are living in 'false consciousness' because our ideologies fail to conform to contemporary reality (p. 30, n. 73).<sup>12</sup> Thus Allott argues for nothing less than a reconceptualization of human reality 'to make a new human world and unmake an old human world' (p. 33, para. 1.65). On the one hand Allott decries the 'false consciousness' of today's academic philosophers, accusing them of 'a masochistic and misanthropic ecstasy of human self-denying' (p. 20, para. 1.34). His particular scorn is reserved for relativist philosophy, from Quine to Rorty, accusing it of denying 'the possibility of human self-transcending' (p. 20, para. 1.36). On the other hand, however, Allott displays a remarkable optimism as to 'theory as the

7. Allott, *supra* note 1, at x.

8. *Ibid.*

9. *Ibid.*, at xii.

10. *Ibid.*

11. *Ibid.*, at xiii.

12. For the notion of false consciousness, Allott refers to Karl Mannheim, *ibid.*, at 30, n. 37.



capacity of the human mind to create and to re-create the human world' (p. 34, para. 1.65).

Allott takes issue with what he regards as the practical consequences of modern and postmodern philosophy. 'All this in a century which saw war, genocide, oppression, exploitation and the physical and mental degradation of human beings on an unprecedented scale, all in the name of ideas' (p. 26, para. 1.49).<sup>13</sup> As ideas have the potential to change the world, the philosophers espousing them must not escape responsibility for their outcomes. For Allott, saving philosophy from modern relativism and materialism is the first step to enabling it to acquire knowledge and power to change the world for the better. It may appear a little unfair to accuse relativism of being responsible for events which may also – if not better – be understood as results of materialist totalitarianism, whether Nazi (Hitler), fascist (Mussolini, Franco, Saddam), (pseudo-)communist (Stalin, Pol Pot), or other. But relativism represents a formidable challenge to Allott's theory: his project, the revolutionizing of reality by reconceptualizing consciousness, depends on the unity of consciousness. If consciousness is radically subjective, the change of your consciousness will practically be without effect on mine. Only if a grand collective consciousness – in other words, a more objective form of consciousness – is possible, might it change the world.

In 'Globalisation from Above' Allott heavily criticizes, again, the dualism between domestic law and the inter-state order. 'The risk now facing humanity is the globalising of all-powerful, all-consuming social systems, without the moral, legal, political and cultural aspirations and constraints, such as they are, which moderate social action at the national level' (p. 93, para. 3.49). He demands an idealist reconceptualization from the viewpoint of the common good, 'the survival and prospering of all human beings with a natural habitat shared by all' (p. 96 para. 3.54).

It is interesting, however, that he apparently regards such reconceptualization as the business of an intellectual elite rather than as a popular movement from below. Similarly, the recent emergence of international criminal law is met with fierce resistance as being, at best, premature:

The introduction of international criminal jurisdiction into the present state of international society is a crude extrapolation of the most primitive, the least efficient, and the most morally dubious of systems for socialising human beings, namely, the criminal law. International criminal law might follow, but cannot precede, the establishing of the idea of the international rule of law, including international administrative law, to control directly the abuse of power and the anti-social behaviour of governments and public officials. (pp. 65–6, para. 2.70)<sup>14</sup>

Only a society which has clearly established its own value system can convincingly punish breaches of its order. In a pluralist world order, however, that cannot agree on a common base of values and authority, the outlawing of certain acts only legitimizes the existing order instead of providing for change. His is not an ideology of NGOs,

13. For an all-out indictment of science and philosophy since the middle of the 19th century, see p. 275, para. 9.31 *et passim*.

14. However, Allott allows for the conclusion that the emergence of international criminal law testifies to 'a new maturing of the moral sense of the public mind' (p. 68, para. 2.78).

but of public intellectuals, of academics acting with the right consciousness rather than of popular figures representing the people.

In similar fashion Allott regards the emergence of the nation state as the product of intellectuals, not of the people. In 'The Nation as Mind Politic' he retraces the development of the nation from the philosophy of the Enlightenment after 1789 as the bringing together of nation and state in the mind politic (p. 120 para. 4.55). Alas, in international relations theory, nations have become reified objects, acting as sterile power maximizers, rather than being subject to conscious human agency. For Allott, Nazi Germany was the apotheosis of such insanity. He suggests, on the contrary, that we 'find in the nation . . . all the possibilities of the whole human personality, of that subjective totality which is the integrated product of mind and which integrates us with the whole of the universe beyond our own locus in space and time' (p. 115 para. 4.44). The criteria for the 'health' of a nation, according to Allott, are not formal arrangements such as democracy,<sup>15</sup> but the happiness of the people – the health of nations rather than their wealth (p. 131, para. 4.86). In the end, Allott hopes for a contagion of sanity rather than madness – the European Union as a response to the aberration of Nazi madness. For this to happen, however, Allott demands the establishment of 'a genetic European nation' (p. 131, para. 4.85), becoming the harbinger for the 'reconceiving of the human society as a self-transcending nation of all nations, a reconceiving of the reality-for-itself of a humanity at last made sane by the age-old madness of nations'.

## 2. THE EUROPEAN CRISIS OF CONSCIOUSNESS

As much as Allott welcomes the European project, he scorns the existing European Union. 'The attempt to re-brand liberal democracy as a system of enlightened paternalism must be made to fail' (p. 165, para. 6.9). The problem, for Allott, lies in the dominance of a bureaucratic vision of economics and the conceptualization of globalization as privatization of public power (pp. 174–5, para. 6.26). The world of 'governance' emerges as a counterpoint to the constitutionalization of Europe. At the heart of the failure lies the lack of a European consciousness, the fantasy of sovereignty still lying with the member states only (pp. 176–7, para. 6.31). On the contrary, '*The European Union is a union of European societies whose legal constitutions are integrated in the legal constitution of the Union*' (p. 179, para. 6.34 (emphasis in original)). Thus the Union is the outcome of a social contract, its member state organs are Union organs, the Union has common interests, ideals, a general will, and a history, and aspires to be the future of the world:

A European Union which is seen, at last, as a new and unique form of integration of the legal constitutions of its member states within a new and unique form of European society is a great achievement in the overcoming of the worst, and a surpassing of the best, in European history. (p. 181, para. 6.36)

15. For a more detailed critique of neo-Kantian ideas of a society of democratic nations see pp. 147–52.

It remains difficult, however, to follow the move from reality – the bureaucratic economism of the Commission – to Allott's ideal – a Europe imagining itself as a political project of world historical proportions. At least he might have tried to identify the specific features of European as opposed to American, or Asian, identity. Instead, in the chapter 'The Crisis of European Constitutionalism' he finds out that it is the very features he dislikes so much that keep the European project alive – the constitution of an economy rather than a society, 'a statist-capitalist diplomacy-democracy' (p. 204, para. 7.63; *ibid.* at 207, para. 7.67).<sup>16</sup> What is the alternative? Allott's suggestions remain as abstract as the institutional blueprints he criticizes. What should we understand by 'the reintegration of Europe's reunifying into the historical consciousness of Europe' (p. 226, para. 7.121)? Or the 'bringing back to consciousness of a public mind of Europe', or the 'instituting . . . of a transcendental debate in the public mind of Europe about the idea and the ideal of European integration' (p. 227, para. 7.124)? It is thus hardly surprising that his chapter on 'The Concept of European Union' begins with a rather disheartening observation: 'The European Union lacks an idea of itself' (p. 229).

In search of such an idea, Allott turns to history and philosophy. However, he has diagnosed since the nineteenth century an end of the great European philosophical traditions (p. 275, para. 9.31). 'It is a strange irony that we ended the twentieth century less certain than ever about what it is to be human, and what it might be' (p. 276, para. 9.32). Against the 'Washington consensus' combining capitalism and democracy,<sup>17</sup> Allott posits a 'distinctive European social consciousness' – the ethical state, the rule of law, the good life for all (pp. 277–8, para. 9.34).<sup>18</sup> But his proposals for the future of Europe are as much process – the constituting of a true European intellectual class, European universities, independence of the United States – as substance. Nevertheless, Allott presents a universal European mission: 'Europeans must help to ensure that international society is reconceived as the society of all-humanity, the society of all societies, with international law as the true legal system of a true international society' (pp. 284–5). The main ideology is constitutionalism, controlling the exercise of power by law:

Europeans must ensure that the idea and the ideal of constitutionalism is installed in international society to take power, in the name of the people and the peoples of the world, over an unaccountable global public realm acting in conjunction with an uncontrolled global economy. (p. 285)

Thus, in fact, the core of European identity does not seem to lie in its particularity, but in its universality.

16. For an attempt at forging a European identity around specifically European social values, see J. Habermas, 'Der 15. Februar – oder: Was die Europäer verbindet', in *idem, Der gespaltene Westen* (2004), 31–51. This attempt, however, fails to convince because it does not – and probably cannot – represent a consensual understanding of what Europe means – at least not consensual among the 25 member states of the European Union.

17. 'When democracy and capitalism are combined into a single system, so that democracy provides with perfect efficiency the law and administration required by capitalism, then the possibility of rising above the system, in the name of some higher ideal of judgement and purpose, becomes more or less impossible' (p. 277, para. 9.33).

18. Ironically, Allott cites none other than Adam Smith for considering law and government 'as defence of the rich against the poor' if they are only instituted for the security of property.

### 3. THE REMAKING OF INTERNATIONAL LAW

In Allott's dealing with international law, we find a similar pattern. His main charge against traditional international law is its differentiation between the domestic and the international spheres, and the concomitant lack of a global legal ethics, of a constitution expressing the common interests of international society (p. 295, para. 10.12). Allott regards international law as 'the self-constituting of all-humanity', comprising, in a hierarchical order, international constitutional law – the structure of legal relations – international public law, regulating the interaction between governments of states, and, finally, the laws of the individual nations. 'The international legal system . . . thus reconciles the respective common interests of all subordinate societies with the common interests of all human species' (p. 299, para. 10.24). Allott rejects the formation of international legal rules by state consent. Rather, it is a particular practice, the participation in international society and its legal relations, which makes customary law (*ibid.*, para. 10.26). Thereby Allott attempts to circumvent all doctrines relying on sovereignty, such as the persistent objector rule, or even *jus cogens*, because it presupposes such veto rights for 'ordinary' international law. For Allott, treaties are also more process than an expression of an actual consensus (indeed, sometimes the opposite), crystallizing common interests, but also gaining a life of their own, influencing the future without necessarily conforming to the will of their drafters. Nevertheless, in Allott's eyes, the system is also an expression of the 'unreality of traditional diplomacy'. He thus criticizes institutions such as the International Law Commission, 'which manages to combine the unreality of the academy with the unreality of traditional diplomacy' (p. 310, para. 10.51). Rather, Allott observes that 'international law finds its place at last, centuries late, within the self-constituting of international society, that is to say, as an essential part of the self-creating and the self-perfecting of the human species' (p. 315, para. 10.65).

A tall order, and history seems not to provide much hope. Indeed, in a great polemic against the international 'Hofmafia' which has hijacked the international realm, Allott purports to show the historical consequences of its power, and predicts its downfall (p. 398, para. 13.35):

For 250 years, a perverted, anti-social, anti-human worldview has allowed the holders of public power to treat social injustice and human suffering on a global scale as if it were beyond human responsibility and beyond the judgement of our most fundamental values and ideals. (p. 399)

The great developments in domestic society, democratization and socialization, have not reached the international realm: 'The social world of humanity has been neither democratised nor socialised because humanity has chosen to regard its international world as an unsocial world' (p. 407, para. 14.32). Nothing short of an international revolution will rid the world of evils such as unequal social development, war and armaments, governmental oppression, physical and spiritual degradation (p. 402, para. 14.7), caused by the structural disregard in a world of nation-states for people of foreign nationality (p. 405, para. 14.16). After a superb presentation of constitutionalism in intellectual history (pp. 351 et seq.), Allott retains hope that it will finally take hold: 'The more we know of how we have made ourselves what we are, the

better we are able to imagine a new kind of human being inhabiting a new kind of human society in a new kind of human world' (p. 341, para. 11.50). However, while he may have shown that some kind of international constitutionalism may indeed develop, he does not provide a blueprint for the content of a global constitutional form, nor does he describe a way in which to bring it about.

In conceiving society and law (Eunomia) and the human mind (Eutopia), the law plays an important role, namely as intermediary between human power and human ideas (p. 134, para. 5.7), offering both stability and the means for change:

As the emerging international society of the new century comes to be understood as a society . . . international law will at last be enabled to act, at the global level, as an effective agent of human self-empowering and self-perfecting, through the distribution of social power in the common interest of society and in accordance with society's high values. (p. 153, para. 5.62)

For the reconceptualization of international society, we also need a 'new philosophy' 'in which minds from all traditions and cultures across the world can contribute to a reunderstanding of what it is to be a thinking being' (p. 155, para. 5.65), a new, international consciousness beyond natural science. 'Both New Enlightenment projects – new society and new mind – are a call to humanity to be intelligent and courageous . . . It is a call to a human revolution, a revolution not in the streets but in the human mind' (p. 157, para. 5.73).<sup>19</sup>

The collection ends with three citations: Kant's invocation of hope as an error he does not want to avoid, Alexander Pope's *Essay on Man*, and the Book of Psalms: 'That thy way may be known upon earth, thy saving health among all nations'<sup>20</sup> (p. 422). The religious nature of these final words may be indicative of the prophetic nature of both the language and the contents of this book.

#### 4. CONCLUSION

There is little doubt that among all his contemporaries Philip Allott has presented the most challenging vision of the future of international law. The present book contributes to bringing it into the context of the European philosophical traditions, from Antiquity to Postmodernity. Allott's philosophy is unashamedly idealist and universalist.<sup>21</sup> There is little of the postmodern anxiety to put forward a comprehensive blueprint and to base it on universal values taken from the European tradition. Allott's vision turns out to be both conservative and progressive: he attempts to save the best of European universalism from the postmodern onslaught and to empower his contemporaries to embrace bold visions of the future without self-doubt and caveats. That is how one may understand the slightly odd title of the book: the present state of the global consciousness is diagnosed as an illness, and Allott provides the cure: the return to the great ideals of Kant and Hegel. It is as if the owl of Minerva is finally flying again, transforming the whole globe into a united polity.

19. Similarly at p. 421, para. 14.58.

20. Psalm 67, v. 2 (King James version, 1611) (cited by Allott as Psalm 65).

21. Allott, *supra* note 1, at xxxi.

But Allott's theory also shares the weaknesses of idealism: the boldness in prophecy is not matched by a recipe for bringing change about. The right consciousness, it seems, guarantees the right result. The fault is in the ideas, not in the reality: Vattel, not the French Revolution, made the modern nation-state; Allott, not Kofi Annan or George Bush, will bring about the new order. Allott even scorns his potential allies in non-governmental organizations and academia; indeed, none of their proposals, from the emergence of human rights to the International Criminal Court, appeal much to him. Instead, the future of his ideal world depends on no less than a 'global social consciousness'.

One may doubt, however, whether there is a way back behind the critical insights of modern and postmodern philosophy towards grand idealist designs. Not unlike his rationalist predecessors, Allott seems to underestimate the local resistance to such a globalization of consciousness. It is of little help that he does not provide for much of a repository of individual interests and customs in individualist rights, or for the political balancing of diverse interests. Postmodernism teaches us the inevitability of dealing with the incomplete, the relative, and the imperfect, and the lack of foundations for any comprehensive theory. One thus does not quite know whether Allott's idealism ends up in paradise or in hell. In addition, one may also doubt whether Allott's diagnosis of a crisis of consciousness is correct: there is no lack of universalist claims for action. Like every idealism, Allott's theory must be tested against reality, not just theory.

Indeed, recent political events cast a long shadow over all attempts to transform the international legal system. In a letter to the *International Herald Tribune*, which is well known to the readers of this journal,<sup>22</sup> Allott regarded the opposition of many international lawyers to the US–UK invasion of Iraq as particularly unhelpful, because the task of lawyers consisted in placing the hegemon under the law to control it, rather than complimenting the US out of the international legal system. It is not the fault of the hegemon if it disregards international law; it is our fault for not seeing the potential of transformation in spite of the challenge. In that vein, the Iraq affair represents a lost chance to enlist the hegemon as an agent of change. Of course international law must take US scepticism towards it seriously.<sup>23</sup> However, a law without bite – that is, a law which does not make provision for, at times negative, answers to the unilateral disposal of military power – will serve no real purpose. Allott's position exemplifies the problems of the visionary in the real world: to maintain momentum in the absence of a practical blueprint, he must press reality into the straitjacket of his vision for the future.

22. P. Allott, 'Letter to the Editor', *International Herald Tribune*, 13 March 2003, 7; P. Allott and A. Dashwood, 'Conflict over Legality of Launching an Attack against Iraq', *The Times*, 19 March 2003, 23. Cf. M. Craven et al., "We Are Teachers of International Law", (2004) 17 *LJIL* 363, at 367.

23. See, e.g., J. Bolton, 'Is There Really "Law" in International Affairs?', (2000) 10 *Transnational Law and Contemporary Problems* 1; R. Perle, 'United They Fall', *The Spectator*, 22 March 2003, 22; cf. A. Paulus, 'The War against Iraq and the Future of International Law: Hegemony or Pluralism?', (2004) 25 *Michigan Journal of International Law* 1, with further references. The now infamous 'torture memos' are indicative of the practical effect of such stances towards international legal prohibitions; see J. Bravin, 'Pentagon Report Set Framework for Use of Torture', *Wall Street Journal*, 7 June 2004, A1; A. Lewis, 'Making Torture Legal', 51 *New York Review of Books*, 15 July 2004, available at <http://www.nybooks.com> (visited 1 July 2004).

Nevertheless, Allott has provided us with an impassioned plea for taking possession of the world. It is of tremendous importance how members of the international legal elite conceive of it. The true spirit of law in general, and international law in particular, does not lie in diplomacy-speak, in laws, or in court decisions, but rather in the acceptance of responsibility for what we make of them. As Immanuel Kant had already stated in the late eighteenth century, the increasing factual closeness in today's world has created new ethical responsibility.<sup>24</sup> Globalization thus calls for a universalization of consciousness. But does this necessarily imply one single, coherent, and all-encompassing legal system? Postmodern anti-foundationalism may suggest an alternative to such comprehensiveness: a pluralism of legal regimes, with common features, of course, but separated by their respective purpose and interpretation of the legal phenomenon, tailored to practical goals of regulation, with a view to common interests, certainly, but also with a deep sense of particularity.<sup>25</sup> A deeper understanding of the alternative between these world-order models may lead to a more accurate grasp of the future of international law and the fate of the globe at large. The concretization of Philip Allott's vision in this collection of essays constitutes an indispensable contribution.

*Andreas L. Paulus\**

Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, Cambridge Studies in International Relations, Cambridge, Cambridge University Press, 2003, 274 pp., ISBN 0521531799, £16.99 (pb), ISBN 0521824710, £45.00 (hb).

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Paul Keal's book on the rights of indigenous peoples in international society is worth reading solely for its fascinating and well-crafted historical chapter on dispossession and international law (pp. 84–112). The legal debate in the sixteenth century between writers who recognized the sovereignty of non-European peoples and those who did not is a startling and insightful study of the use of legal argument for political and economic ends – in this case, revealing how the debate later crafted legal definitions to dispossess indigenous peoples of their territory. Keal explains that it was fundamental to early international society

that its members were not obliged to treat non-members according to the norms that applied to relations between themselves. It was consequently a form of cultural imperialism that served to aid and to justify Europeans in subjugating non-Europeans and dispossessing them of their lands and other rights. (p. 84)

24. I. Kant, *Zum ewigen Frieden* (1795), 46.

25. For an exposition of such a view see A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal of International Law* 999; G. Teubner, 'Coincidentia oppositorum: Networks and the Law Beyond Contract and Organization' (Storrs Lectures 2003/04, Yale Law School) (manuscript in the possession of the author). For a brief critique see A. L. Paulus, 'The Legitimacy of International Law and the Role of the State', (2004) 25 *Michigan Journal of International Law* 1047.

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The overriding claim is not a fresh one, of course, but Keal's historical legal narrative of this period is a lively recounting of the arguments surrounding natural rights, distinctions between property, jurisdiction, and dominion, and the legal definitions of 'uncivilized humanity'. For example, Keal engages Richard Tuck's claim that 'Grotius endorsed for a state the most far-reaching set of rights to make war which were available to the contemporary repertoire. In particular he accepted a strong version of the international right to punish, and appropriate territory which was not being properly used by indigenous peoples'.<sup>1</sup> In contrast, three of the earlier writers from the first wave of colonial expansion – Las Casas, Sepulveda, and Vitoria – used precepts of natural law to concede sovereign rights to non-Europeans; 'the law of nations had no important role in their argument' (p. 108). Both Las Casas and Vitoria argued at the time that the Americas were inhabited by human beings who were equal to the Spaniards, that their land could not be regarded as unoccupied, and that 'it was neither lawful nor moral for the Spaniards to dispossess them' (p. 92).

Keal traces the way in which the expansion of colonialism would require an increased emphasis on international law as governing an exclusive society of states, eclipsing these earlier views of natural law and their more inclusive ideas of sovereignty and a moral universal order of mankind. Keal moves through several hundred years to the late-19th-century scramble for Africa that would require a legal standard of civilization. He considers the *Collected Papers* of John Westlake (pp. 104–7), especially the notion that 'essentially property was viewed as issuing from sovereignty, but that raised the question of the origin of sovereignty itself'. Two important implications of this issue become the focus of later chapters, 'that the establishment of a colony meant the inhabitants prior to the colonization were now contained within a state', and, as a result of international law, that they henceforth had 'no international personality and no sovereign rights other than as citizens of the state which now exercised sovereignty over them' (p. 105).

In starkest terms, Keal's moral indictment of international society is based on its historical manipulation of international legal definitions to steal land and sovereignty – two basic components of historical self-determination – from indigenous peoples. Keal couples this historical wrong with the reluctance of current members of international society to redress these wrongs by granting indigenous peoples' quests for self-determination. The weakest link in Keal's argument is his claim that the West bears a collective moral responsibility for these historical injustices (pp. 156–84). The sustained ethical argumentation and logic required to support this claim is never offered, although the intuition of his moral claims resonates. For example, it is difficult to deny the power of Keal's claim that we have the capacity 'to bring about a fundamental change and it is by not doing so that we will be seen by future historians as sharing responsibility for historical injustices with those who have gone before us' (p. 165). He concludes that indigenous peoples should be recognized, by states and international society alike, as 'peoples' with the

1. R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999), 108 (quoted at p. 95). For a different reading of this period see E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002).



right to self-determination, both within constitutional law and emerging international law.

'Indigenous rights firmly grounded in law', says Keal, 'have the potential to positively affect between 250 and 300 million inhabitants of the globe' (p. 223). One of the more satisfying aspects of Keal's argument is that it attempts to offer at least a partial solution: adoption of the 1994 Draft United Nations Declaration on the Rights of Indigenous Peoples. Of course UN declarations are not binding on states, nor are they primary sources of international law, but Keal's point is that over time they can become accepted as international legal norms and representative of customary international law.

Ultimately, Keal's argument not only is one of legal norms, but also displays a social constructivist understanding of ethical norms, a point that links nicely with Neta Crawford's book on argument and change in world politics, published a year earlier in this same editorial series.<sup>2</sup> Crawford argues that the end of colonialism came primarily from a change of norms in the increasingly enlightened West, rather than imperial overreach or the struggles of the colonized. She discusses how ethical argumentation can succeed, how the processes and content of argument are constitutive of the world, and how ethical arguments can 're-make world politics'.<sup>3</sup>

The 'fundamental change' Keal offers for righting historical injustices against indigenous peoples, however, seems a drop in the bucket of economic exploitation currently legitimized by the vestiges of these colonial structures. To offer international legal rights to indigenous peoples as a 'fundamental change' feels paltry in comparison to the dispossession of territory by the colonial powers under the guise of this same international legal system. It suggests a myopic focus on the language of political rights that ignores global economic realities. Keal is aware of the vast economic discrepancies, mentioning them in passing in specific cases of the burdens many indigenous peoples bear, yet he spends only three full pages discussing land as a crucial element to be recovered, and then only because land is often linked to indigenous cultural practices. While uncoupling sovereignty and self-determination from the state is a worthy goal, and certainly a step in the right direction towards an international society closer to a universal moral order, the reader is left somewhat bewildered about what the consequences of changing these societal norms may mean in material or economic terms.

Perhaps this is by design. The inquiry of the book, in Keal's words, shows 'the expansion of international society involved in the domination and subordination of indigenous peoples with political theory and international law serving to justify dispossession and colonization' (p. 223). This claim is supported in detail and with great efficiency within his book. It is the second part of his conclusion that begs a more practical discussion: Keal says that 'the adoption of indigenous rights, including self-determination, would provide a set of standards supporting indigenous peoples in their claims against dominant peoples, redress the role of international society in

2. N. Crawford, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (2002).  
 3. *Ibid.*, at 2. See P. Owens, 'Theorizing Military Intervention', (2004) 80 *International Affairs* 355, for a discussion of the strengths and weaknesses of Crawford's argument.

their dispossession, and contribute to world order' (ibid.). What does this mean in material terms? How might these calculations enter into our understandings of collective responsibility?

Finally, parts of the book are marred by a 'clubby' tone often associated with international society scholars, formerly referred to as the English School, who typically spend a large amount of space quoting the insightful comments of their closest colleagues. That said, with the exasperating rigidity of realists on one side and the often self-righteous intonations of cosmopolitans on the other, perhaps a 'clubby' tone is a good alternative for meaningful discussion. Certainly the reader will leave this book with a distinct moral vision of the relationship between indigenous peoples, international society, and the function of international law, in particular the historical misuse of legal definitions to defend moral injustices.

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