BOOK REVIEWS

The Principle of Legality in International Human Rights Institutions: Selected Legal Opinions, by B.G. Ramcharan (Ed.), Martinus Nijhoff Publishers, The Hague, 1997, ISBN 90-411-0299-X, 393 pp., US$ 140/UK£ 88/Dfl. 225.

This publication brings together and makes accessible more than a hundred legal opinions drafted in the United Nations Secretariat in connection with a great variety of issues which arose over the years in human rights organs of the United Nations. The editor, Dr B.G. Ramcharan, served for many years as the special assistant of three successive directors of human rights of the United Nations. Thanks to him, a large amount of legal opinions, which were scattered in files and in documents, have now been made readily available and accessible. A few opinions were published earlier in *UN Juridical Yearbooks* but the vast majority of the opinions, all in the public domain, have never been published before in a systematic manner. Ramcharan was eminently qualified to prepare this selection and compilation not only because, as a key adviser, he possessed the oversight and the insights of the UN human rights programme over an extensive period, but also because he was the drafter of many opinions. He has demonstrated great craftsmanship and skills in that capacity. Of course, all the work done within the UN Secretariat falls ultimately under the authority of the Secretary-General on the basis of Chapter XV of the UN Charter, but this reviewer, who was the director of the human rights programme in the years 1977-1982, sees no inconvenience in revealing Dr Ramcharan's substantial input in helping to devise policies and in providing the legal framework for that purpose.

As is amply illustrated in this compilation, a good deal of interaction and inter-consultation takes place between the leadership of the human rights programme in Geneva and the Office of Legal Affairs at the UN Headquarters in New York. The opinion of the Office of Legal Affairs is particularly sollicited on the kind of legal issues which arise across the board in the UN system, such as the relationship between a parent organ and a subsidiary organ, privileges and immunities, credentials, membership questions, the status of observers, voting rights, the drafting of final clauses in treaties, etc. Legal issues related to special features of the human rights programme, such as the competence of human rights organs, the implementation of human rights procedures (good offices, fact-finding, direct contacts), and the role of non-governmental organizations in reporting human rights violations, were only occasionally referred to the Office of Legal Affairs for opinion and advice, mainly for the purpose of strengthening the hand of the human rights

secretariat in the face of repressive state interests. Certain states consistently seek to narrow down and to diffuse the powers of human rights independent expert organs and procedures and to contest, or even to discredit, the role and the contributions of non-governmental organizations. However, in many such instances, which beg for legal guidance, the human rights secretariat relied on its own legal insights and opinions without asking the Office of Legal Affairs for a confirmation or endorsement of these opinions.

A good deal of the legal opinions selected and compiled by Ramcharan speak for themselves. However, quite a few of the opinions can only be fully understood and appreciated if one is sufficiently aware of the political factors at stake which underscored the need for solid legal arguments as a requirement of sound human rights policy. For instance, certain repressive regimes known for their involvement in systematic and gross violations of human rights, such as the military dictatorships in Argentina and Chile, were strongly arguing against special human rights mechanisms and procedures established by the UN Commission on Human Rights in order to investigate and to report on those violations. These special mechanisms and procedures became increasingly effective and embarrassing for those regimes. For that reason they consistently sought to undermine and to confuse the special mechanisms and procedures, in particular Special Rapporteurs and Working Groups, by playing them against other procedures such as the confidential procedure based on ECOSOC Resolution 1503 (XLVIII) of 27 May 1970, and the procedures provided for under human rights treaties. Legal opinions prepared by the human rights secretariat advanced a wide range of arguments in favour of the independent and distinct status, the broad scope and the integrity of these special mechanisms and procedures (*see* p. 92, p. 95, p. 101, p. 104, p. 359, and p. 369). During the period when these opinions were written, the work of these country-specific and thematic mechanisms and procedures was heavily contested and their existence was fragile. Since then they have become a substantial and indispensable part of the UN human rights programme, but this *acquis* would have been less certain if their legal basis had not been properly expounded and defended.

Another target for repressive regimes from various quarters was and is the role of non-governmental organizations (NGOs). For a long time they were prevented, in oral and written submissions to the Commission on Human Rights and its Sub-Commission, from publicly citing concrete cases of violations of human rights on the pretext they would abuse their consultative status "by systematically engaging in unsubstantiated or politically-motivated acts against Member States of the United Nations contrary to and incompatible with the principles of the Charter."[1] Legal opinions of the hu-

1. *See* UN Doc. E/RES/1296 (XLIV) of 23 May 1968 on Arrangements for consultation between the Council and non-governmental organizations.

man rights secretariat, made available to presiding officers of human rights organs and interested delegates, provided arguments based on the history of relevant resolutions and on particular precedents (derived from such areas as the elimination of racial discrimination and the struggle against *apartheid*), to strengthen the input of NGOs and to widen their freedom of expression (*see* pp. 333-355). Again, these matters, notably free speech for NGOs, now belong to the *acquis* of the UN human rights programme but without the role of the human rights secretariat the political forces, against NGOs would have been more persistent.

Last but not least, those legal opinions should be highlighted that provide a dynamic interpretation of the mandate and the role of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, a sub-organ of the Commission on Human Rights which, unlike the Commission itself as a governmental body, is composed of independent experts. While in practice the independence of several members of the Sub-Commission may be questioned, the Sub-Commission occasionally appears to go well beyond the limits set by its parent body and by state interests. It also happens that certain states unduly try to influence members of the Sub-Commission or even physically restrict their movements (as was the case with the Special Rapporteur, Mr Mazilu from Rumania). Ramcharan has selected many legal opinions which purport to outline in a broad sense the competence of expert bodies, including the Sub-Commission, as essential components of the international human rights protection system (p. 27, pp. 41-74, p. 88, and p. 92) and which defend the independent status of members of expert bodies as a matter of principle (p. 135, p. 139, p. 140, p. 145, p. 146, p. 147, p. 149, p. 156, and p. 158). Here the principle of legality must be upheld as an imperative need for the defense of human rights. It is incumbent upon the UN Secretariat to do so without compromise or inhibition.

This reviewer is not a detached observer. As a former director of the UN human rights programme, he was heavily involved in certain matters dealt with in the present book. For several dozens of the collected legal opinions he had the responsibility, under the ultimate authority of the Secretary-General, to advance and to defend them. He did so in close association with Dr Ramcharan who invested much of his legal skills and his dedication in this work and who has now put together a valuable selection of opinions which, as the publication announcement put it, reflect the vision of those who wish "to see international human rights law triumph over partisan politicking in international organizations".

In conclusion, one word of criticism should be voiced. In some instances the editor included in the book a well-reasoned request for a legal opinion from the Office of Legal Affairs (p. 149 and p. 199), but the reader remains ignorant as to any reply to such request. Should the reader assume that the

Office of Legal Affairs concurred with the reasoning? If so, the reader is entitled to know.

*Theo van Boven**

Leading Cases of the European Court of Human Rights. R.A. Lawson & H.G. Schermers (Eds.). Ars Aequi Libri, Nijmegen 1997, ISBN 90-6916-251-2, xl and 788 pp., Dfl. 69.

The European Court of Human Rights, which came into being in the late 1950s, had a slow start; very few cases were adjudicated by the Court in the 1960s, and the number of cases was still rather small in the 1970s. Since then, however, the flow of cases has increased considerably, during the last decade almost dramatically. As a result, the Court's case-law has gradually become quite extensive and varied. This case-law provides an indispensable material to anyone who wishes to have a thorough understanding of the scope and impact of the 1950 European Convention on Human Rights.[1] It is indispensable because the provisions of the Convention in themselves often give insufficient guidance; they are mostly drafted in general terms and can therefore also be interpreted in different ways. It is only through the Court's judgments that they get a more precise meaning.

The editors of this rather voluminous book which is the subject of this review are both specialists in the area of European human rights law. Henry Schermers is professor of human rights studies at Leiden University and has been a member of the European Commission of Human Rights for more than a decade. Rick Lawson, a lecturer in the Department of Public International Law, also at Leiden University, is a human rights law specialist. In this book they have selected 58 judgments of the European Court of Human Rights which they considered to be, as the title of the book indicates, 'leading cases' and which are, therefore, of special general interest. These judgments have been reproduced in the book almost *in extenso*. Only some formal parts of the judgments setting out, for instance, the procedure before the Court, have been excluded.

Timewise the reproduced judgments extend over a long period of some 35 years. They cover nearly all the substantive articles of the Convention but, as could be expected, there is special emphasis on Articles 5 (the right to personal freedom), 6 (the right to a fair trial), and 8 (the right to respect

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1. 1950 European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 221 (1955).

for private and family life), these being the most frequently applied provisions of the Convention.

The only judgment from the Court's first decade which we find in the book, concerns the *Lawless* case.[2] This judgment was given in 1961 and concerned the application of certain emergency legislation directed against terrorism in Ireland. Several decades later, the *Lawless* judgment is still important case-law as regards both the question whether certain types of detention for the protection of the public can be accepted under the Convention and the question of the conditions on which a state may, pursuant to Article 15, depart from its normal obligations under the Convention.

The book includes a limited number of judgments from the next decade, the 1970s; those which have been included are *Golder*[3] (regarding the right of access to a court), *Handyside*[4] (regarding freedom to publish views and information which may be perceived as harmful to the readers), *Tyrer*[5] (regarding corporal punishment), *Klass*[6] (regarding telephone tapping), *Marckx*[7] (regarding the family rights of children born out of wedlock), *Airey*[8] (regarding the right to legal aid in family law cases), and *Winterwerp*[9] (regarding detention of mentally ill persons). The large majority of the reproduced judgments stem from the 1980s and the 1990s, which should not cause any surprise in view of the sharp increase of cases brought before the Court during these decades. The last judgment in the book is the *Aksoy* judgment,[10] given in December 1996 and relating to a case of torture in South-East Turkey.

Of course, opinions could vary on which of the Court's judgments are the most important ones and which would be the most appropriate selection to be made in a book aimed at giving a general survey of the Court's case-law. On the whole, however, the choice that has been made by the editors seems a good one. The selected cases often concern matters of general importance and involve issues of principle. Many of the judgments have had a significant impact on the development of the law and have given rise to legislative changes in one or more Convention states. As examples could be mentioned the *Marckx*[11] and *Johnston*[12] judgments, both landmark decisions

2. Lawless *v.* Ireland, Judgment of 1 July 1961, Eur.Ct.H.R. (Ser. A) No. 3.
3. Golder *v.* the United Kingdom, Judgment of 21 February 1975, Eur.Ct.H.R. (Ser. A) No. 18.
4. Handyside *v.* the United Kingdom, Judgment of 12 December 1976, Eur.Ct.H.R. (Ser. A) No. 24.
5. Tyrer *v.* the United Kingdom, Judgment of 25 April 1978, Eur.Ct.H.R. (Ser. A) No. 26.
6. Klass *v.* Germany, Judgement of 6 September 1978, Eur.Ct.H.R. (Ser. A) No. 28.
7. Marckx *v.* Belgium, Judgment of 13 June 1979, Eur.Ct.H.R. (Ser. A) No. 31.
8. Airey *v.* Ireland, Judgement of 9 October 1979, Eur.Ct.H.R. (Ser. A) No. 32.
9. Winterwerp *v.* the Netherlands, Judgment of 24 October 1979, Eur.Ct.H.R. (Ser. A) No.33.
10. Aksoy *v.* Turkey, Judgment of 18 December 1996, Eur.Ct.H.R. (not yet published).
11. *See* Marckx case, *supra* note 7.
12. Johnston *v.* Ireland, Judgment of 18 December 1986, Eur.Ct.H.R. (Ser. A) No. 112.

about the family relations of children born out of wedlock, and the *Winterwerp* judgment,[13] which sets out fundamental legal guarantees for persons deprived of their freedom on grounds of mental illness. Another important judgment is the *Soering* judgment,[14] in which the Court confirms the principle – already adopted much earlier by the European Commission of Human Rights – that the removal of a person to another country may constitute inhuman treatment in view of the risks to which the removed person will be exposed in that country. The *Castells*[15] and *Jersild*[16] judgments, which also appear in the book, illustrate the scope of freedom of expression by making it clear that even insulting or offensive statements may have to be tolerated when they serve the purpose of informing the public of matters of general importance. It may seem surprising that the *Lingens* judgment,[17] the leading judgment regarding insulting remarks made about politicians, has not been chosen by the editors.

In collections of Dutch case-law, such as the *Nederlandse Jurisprudentie*, there is a tradition to publish judgments accompanied by short annotations or commentaries written by specialists on the subjects at issue. This practice has been followed by the editors in the present book as well. After each of the 58 judgments, we thus find under the heading "comment" a number of remarks, often of considerable interest. In these comments the editors give their personal explanations of the Court's reasoning and place each judgment in a larger perspective by referring to other related case-law. The comments also contain remarks about procedural issues arising in the case and sometimes give information about what effects the judgment has had on the law of the state concerned.

In general, these comments are easy to read and they facilitate the understanding of the judgments and the cases. They are particularly useful to readers who are not already well acquainted with the Court's case-law. Some cases are taken as a point of departure for statements on general issues relating to the interpretation of the Convention. There are, for example, in regard to several cases remarks about the state's 'positive obligations' inherent in the protected rights, and there are explanations about the Convention as a 'living instrument', the interpretation of which may vary over time. The concept of the state's 'margin of appreciation' is elucidated, and the requirement that a person has *locus standi* only if he or she can claim to be a 'victim' of a violation of the Convention is explained in connection with cases where it could at first glance seem doubtful whether that condition was

13. *See* Winterwerp case, *supra* note 9.
14. Soering *v.* the United Kingdom, Judgment of 7 July 1989, Eur.Ct.H.R. (Ser.A) No. 161.
15. Castells *v.* Spain, Judgment of 23 April 1992, Eur.Ct.H.R. (Ser. A) No. 236.
16. Jersild *v.* Denmark, Judgment of 23 September 1994, Eur.Ct.H.R. (Ser. A) No. 298.
17. Lingens *v.* Austria, Judgment of 8 July 1986, Eur.Ct.H.R. (Ser. A) No. 103.

in fact satisfied. Views on the implementation of the Convention in monist and dualist states are also to be found in relation to some cases.

This book thus covers a wide area of Convention issues. An extensive subject index at the end makes it easier for the interested reader to find the places where specific questions are dealt with. There are also, in relation to each case, useful indications of other books and articles which should be consulted by those readers who wish to study a particular matter more in depth.

The book is, as explained in the preface, intended primarily for students, but the editors express the hope that it will also prove useful for practising lawyers and for courts and tribunals. Moreover, the editors mention researchers as a category which could benefit from the book. The fact that not only the judgments but also the comments are in English will make it possible also to use the book outside the Netherlands, for instance in university education elsewhere in Europe.

*Hans Danelius**

Transboundary Environmental Interference and the Origin of State Liability, by R.J.M. Lefeber. Kluwer Law International, The Hague/ London/Boston (1996), ISBN 90-411-0275-2, xii and 365 pp., US$ 119/UK£ 70/Dfl. 225.

International environmental law is one of the newest areas of international law and perhaps the area that has undergone the fastest developments in recent years. Within international environmental law the topic of state liability plays a prominent role. Many problems arise in this field; the main ones concern: the origin of state liability (from wrongful act and/or from lawful activities); the nature of the primary obligations concerning the protection of the environment and therefore the standards or forms of liability (fault-liability, or strict liability, or absolute liability); the relationship between damage and liability; the consequences of the wrongful act, the concept of injured state and the standing to enforce liability, and the relationship between international and civil liability. Since the beginning, these problems have been at the core of the debate among writers about international environmental law. However, such debate is far from exhausted, because many problems have not been resolved in a clear way and because the continuous developments of international environmental law raise new problems.

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Furthermore, the scholarly debate has so far concentrated mainly on some specific aspects of liability. There are very few far-reaching studies that try to give a systematic and theoretical organization to the general topic of state liability for environmental harm. Even the ILC works on liability, being divided into two different projects of codification, one concerning state liability for wrongful acts and the other concerning state liability without a wrongful act,[1] do not succeed in furnishing an overall and unitary picture on the topic of state liability for environmental harm.

The book written by Lefeber, which is here under review, fills those gaps and represents a very useful attempt to give a general picture of state liability for environmental harm. In fact, this book is very far-reaching and covers all the most important aspects of the topic. It is true that the scope of the book is restricted to *transboundary* environmental interference and to the *origin* of state liability. However, since the book adopts a wide definition of transboundary interference, it ends up by dealing with most of the cases of environmental interference. On the other hand, also the limit concerning the *origin* of liability does not restrict the research much since the book deals with the obligations of prevention (Chapter 2) and with the consequences of liability as well (Chapter 4.5). Moreover, one should also consider that the most important and characteristic aspects of liability for environmental harm concern the origin rather than the consequences of liability. Finally, one should note that the book deals not only with international liability but also, to a certain extent, with civil liability (*see* especially Chapter 7).

The book is divided into eight chapters. Chapter 1 is of an introductory nature. The author, after having indicated that the book will focus on the reparative function of liability, briefly describes the historical development of international liability and then clarifies the terminology adopted in the book. The clarification of the terminology is very appropriate, because a certain

1. I am referring to the ILC works on "State Responsibility" and to those on "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law". In response to General Assembly Resolution 799 (VIII) of 7 December 1953 requesting the ILC to undertake the codification of the principles of international law concerning state responsibility, the ILC started its project on "State Responsibility" in 1955. It continues to be on the agenda of the ILC. For the full text of the Draft Articles on State Responsibility as adopted by the ILC on first reading, *see* Report of the ILC on the Work of its Forty-Eighth Session, 2 May – 26 July 1996, GAOR Fifty-First Session, Supplement No. 10, UN Doc. A/49/10 (1996) at 121-124 *et seq*. In response to General Assembly Resolutions 3071 (XXVIII) of 30 November 1973 and 3315 (XXIX) of 14 December 1974, requesting the ILC to undertake the codification of the principles of international law concerning international liability for injurious consequences arising out of acts not prohibited by international law", the ILC started its project on this topic in 1974, *see* 1974 YILC, Vol. II (Part One), at 305. The project on liability continues to be on the agenda of the ILC.

confusion in the terms has often made the scholarly debate on state liability for environmental harm rather obscure.[2]

Chapter 2 deals with the primary obligation to prevent and abate transboundary environmental interference. According to Lefeber, such an obligation now exists not only in numerous treaties but also in general international law. And one should completely agree with this view. Moreover, with regard to the content of that obligation, Lefeber maintains that it is a compound obligation, which involves a series of more specific obligations of a substantive and procedural character that cover all the life cycle of the activities which may cause environmental harm. These obligations are specified with great precision in the book. However, in my view, one might perhaps have some doubts about the fact that a single rule of general international law may contemplate such a complex obligation as the above-mentioned compound obligation of prevention. It seems more realistic to think that customary international law has a rule that imposes a substantive obligation of prevention and a different rule that imposes a procedural obligation of cooperation, materializing in various duties of consultation, negotiation, information, notification, and assistance. All the more so, if one considers that the substantive obligation of prevention is a due diligence obligation while some procedural obligations of consultation, information, and notification are absolute obligations.

Chapter 3 of the book is basically an introduction to the following chapters, which concern the various theories on the origin of state liability for environmental harm. Although it is a very brief chapter, it is very important from a theoretical point of view, because it introduces with great efficacy the concepts of liability for wrongful acts (liability *ex delicto*) and liability without a wrongful act (liability *sine delicto*). The brevity of the chapter, however, tends to create some simplifications. For instance, the problem of fault as a constitutive element of the wrongful act is much more complex than what appears from the text (pp. 48-50). The same can be said for the various theories (subjectivistic or objectivistic) on the very concept of fault. Also the differences between liability *ex delicto* and liability *sine delicto* are more numerous than those indicated in Chapter 3 (pp. 52-53). A deeper examination of those differences may be found in Chapter 5.

Chapter 4 of the book deals with liability *ex delicto* for environmental harm. This is a very accurate and important chapter, where the subjective and the objective elements of the wrongful act, the concept of injured state,

2. The choices of terminology adopted by Lefeber are very clear and unexceptionable from a conceptual point of view. I will make use of that terminology in the present review. However, I would have preferred the use of the terminology adopted by the ILC, especially for the distinction between "state responsibility" (state liability *ex delicto* for Lefeber) and "international liability" (state liability *sine delicto* for Lefeber). In fact, the terminology of the ILC is by now adopted by most of the international lawyers.

and the consequences of the wrongful act are examined. With regard to the subjective element (attribution of the wrongful conduct to a state), the criticism by Lefeber of the system worked out by the ILC concerning attribution is very interesting (*see* pp. 58-60).

Coming to the objective element of the wrongful act (breach of an international obligation), Lefeber carries out a study on the basis of two conceptual distinctions between different categories of international obligations. The first distinction is between due diligence obligations and absolute obligations. The present writer, who has carried out some studies on this distinction,[3] fully agrees with the substance of the brief but incisive analysis carried out by Lefeber on this topic (pp. 61-64 and *passim*). The second distinction made by Lefeber is the one, introduced by the ILC, between obligations of conduct and obligations of result.[4] The analysis carried out by Lefeber on the basis of this distinction with regard to environmental obligations is interesting (*see* pp. 74-82). However, at the end of this analysis, one is left with many doubts about the real utility of such distinction in international law.[5] Still with regard to the objective element of the wrongful act, the author deals also with the requirement of the significant harm and carries out a very precise study about the various kinds of harm, the threshold of harm, and the causal link. Afterwards, some pages are devoted to circumstances precluding wrongfulness.

Paragraph 4 of Chapter 4 deals with the topic of the injured state and the difficult problems of *erga omnes* obligations, international crimes, and the standing to enforce liability. Finally, paragraph 5 deals with the consequences of the wrongful act, with particular regard to reparation.

Chapter 5 is about liability *sine delicto stricto sensu*.[6] It starts with an important introductory paragraph of a conceptual nature. Afterwards, in paragraph 2, the elements of liability *sine delicto stricto sensu* are examined and the differences between liability *ex delicto* and liability *sine delicto* are

3. *See* R. Pisillo-Mazzeschi, "Due Diligence" e responsabilità internazionale degli Stati (1989); *Id.*, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 German Yearbook of International Law 9 (1992); *Id.*, *Forms of International Responsibility for Environmental Harm*, *in* F. Francioni & T. Scovazzi (Eds.), International Responsibility for Environmental Harm 15 (1991).

4. *See* Arts. 20 and 21 ILC Draft Articles on State Responsibility, 1977 YILC Vol. II (Part Two), at 11-30.

5. *Cf.* J. Combacau, *Obligations de résultat et obligations de comportement – Quelques questions et pas de reponse*, *in* Mélanges offerts à Paul Reuter – Le droit international: unité et diversité 181 (1981); J. Salmon, *Le fait étatique complexe: une notion contestable*, 28 Annuaire français de Droit International 709 (1982); and B. Conforti, *Obblighi di mezzi ed obblighi di risultato nelle convenzioni di diritto uniforme*, 24 Rivista di diritto internazionale privato e processuale 233 (1988).

6. By this term Lefeber refers to those theories in favour of liability *sine delicto* which found such liability on substantive conditions. On the contrary, by the term liability *sine delicto lato sensu* Lefeber refers to those theories, mostly developed by the ILC works on "international liability", which adopt a procedural approach to liability *sine delicto*.

clearly highlighted (pp. 148-159). In my opinion, a further difference, in addition to those indicated by Lefeber, should be pointed out. This difference concerns the possible standards or forms of liability: liability *ex delicto* can have the form of fault liability or strict liability or absolute liability, while liability *sine delicto* can only have the form of strict or (more often) absolute liability.[7]

Paragraph 3 deals with the sources of liability *sine delicto stricto sensu*. It is a very important paragraph, which examines international practice and concludes that, except for space activities, a general norm of international environmental law establishing liability *sine delicto* does not exist (pp. 177-187). In my opinion, this conclusion is certainly correct. However, I have some doubts of a methodological character about the fact that Lefeber, in examining the possible practice in favour of liability *sine delicto*, tries to find support for the abandonment not only of the no-act-of-the-state exemption but also of the due diligence exemption (pp. 159-187). In my view, the abandonment of the no-act-of-the-state exemption is certainly a distinctive element of liability *sine delicto*, but the same cannot be said for the abandonment of the due diligence exemption: because that abandonment could mean not only the acceptance of liability *sine delicto*, but also the acceptance of no-fault liability *ex delicto*. In other words, a possible abandonment of the due diligence exemption could mean the acceptance of absolute obligations to prevent transboundary environmental interference and, therefore, of no-fault liability *ex delicto* for the breach of those obligations.

Chapter 6 of the book is about liability *sine delicto lato sensu*. In short, it describes and resumes with precision the substance of the ILC works on international liability for injurious consequences arising out of acts not prohibited by international law (pp. 189-193). From this description it is, actually, already clear that those works have not so far produced satisfying results. The most interesting part of Chapter 6 is paragraph 3, which deals with the sources of liability *sine delicto lato sensu*. The conclusion by Lefeber, which I entirely agree with, is that international practice does not support the procedural approach of the ILC to liability *sine delicto*.

Chapter 7 deals with the obligation to ensure prompt, adequate, and effective compensation to victims of transboundary environmental interference. This chapter is perhaps the most important of the book since it contains, and tries to demonstrate, Lefeber's main theory. This theory, in short, is the following: general international law has a rule according to which the source state is obliged to ensure that victims of transboundary environmental interference which caused significant harm receive prompt, adequate, and effective compensation. The source state is free to opt, *ex ante facto* or *post*

7. On this problem *see, e.g.*, J. Barboza, International Liability for the Injurious Consequences of Acts Not Prohibited by International Law and Protection of the Environment, 247 RCADI 291 (1994/III).

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facto, for a settlement on the basis of a civil liability regime, a state liability *sine delicto* regime, or a combination of them. If the source state decides to assume state liability *sine delicto*, it is free to choose between a state-to-state and a transnational settlement of the claims.

In Chapter 7 Lefeber develops his theory, examining the elements of the obligation to compensate, the sources of that obligation, and the integration between civil liability and state liability. The most interesting paragraph is that on the sources of the obligation, where we find an examination of state practice, especially made up of a series of special civil liability regimes at the international and national levels. According to Lefeber, one should infer from that practice the tendency of states to harmonize certain minimum standards of conduct concerning compensation. There are procedural minimum standards, which regard jurisdiction, applicable law, and recognition and enforcement of judgments; and substantive minimum standards, which regard the content of the obligation to compensate, such as the channelling of liability to a single person, the imposition of a standard of strict liability, the creation of special limitations to the liability, and the establishment of financial security to cover the liability.

This theory of Lefeber is very interesting and it is cleverly supported. However, in my opinion, some doubts still remain about the fact that the domestic legal systems may contain all these common legal principles on compensation, second, about the value of the conventional civil liability regimes for the purpose of reconstructing a general international norm, and about the feasibility that such a complex, sophisticated, and detailed norm could have established itself in customary international law, considering that such law usually contains general and simple rules. However, I think that Lefeber's theory should be seriously taken into consideration by the ILC in the perspective of a progressive development of international law.

Finally, in Chapter 8, dedicated to the general conclusions, the author resumes with great efficacy the specific conclusions which were reached in the preceding chapters.

In short, the book here under review is well-organized, is the fruit of a very accurate research, contains a deep analysis of the various legal problems, and generally suggests convincing solutions to these problems. The only critical remarks that can be made concern the fact that, in carrying out the research, little attention has been paid to the Spanish and Italian authors, writing in their native languages, who have a good tradition in the international law of state liability. Furthermore, at the methodological level, one may note that sometimes in the book, when the author tries to establish the content of a rule, the distinctions between general theory of law, conventional international law, and general international law are not very clear. But on the whole, the book written by Lefeber is a really remarkable and impor-

tant study, which constitutes an indispensable point of reference for any future research concerning state liability for environmental harm.

Riccardo Pisillo-Mazzeschi[*]

The International Court of Justice: Its Future Role After Fifty Years, by A.S. Muller, D. Raič and J.M. Thuránszky (Eds.). Martinus Nijhoff Publishers, The Hague/Boston/London, 1997, ISBN 90-411-0325-2, 433 pp., US$112/UK£ 70/Dfl. 207.

The fiftieth anniversary of the establishment of the International Court of Justice has triggered the publication of several remarkable contributions on the Court. Among these, the present volume of essays, published as a special issue of the *Leiden Journal of International Law* (noteworthy in itself because it is probably the only international legal periodical of European origin following the model of US student-run law journals), occupies an important place. This is due to the fact that the editors managed not only to win 16 prominent scholars as authors, but also to make the various contributions fit into a certain plan, as set out by the editors in their substantial introduction on pp. xxv-xxxiv. According to this plan, the essays were to analyze four different roles of the Court, namely the dispute settlement role, the supervisory role, the advisory role, and, finally, the legislative role.

Before this thread is pursued, and following a short preface by the President of the ICJ, M. Bedjaoui, an introductory contribution by Judge Shahabuddeen (pp. 3-21), attempts to determine the position of the Court at the turn of the century by addressing the question whether the Court's "somewhat retiring image undervalues its real importance to the international community which it serves" (p. 3). After surveying the representative character of the Court, its visibility and the issues of confidence and complacency, the author concludes with cautious optimism that current tendencies seem to be working in the direction of removing the discrepancy between the (growing) importance of the Court's work and its still low visibility.

With this, the book turns to the most important role assigned to the Court, that of settling specific disputes between particular litigants. No less than eight papers are devoted to this function, four of them dealing with issues involving states as litigants, and another four with the question of *ius standi* of international organizations and individuals.

In his article on *The Proper Work and Purposes of the International Court of Justice* (pp. 33-45) Judge (and former President of the ICJ) Sir Robert Y. Jennings draws a picture of the capacity of the Court actually to

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settle inter-state disputes which is as sober as it is sobering. He concludes that resort to the Court is not necessarily the right way to deal with politically dangerous disputes (without even mentioning the *Nicaragua* case[1]) and questions the widely-held view according to which the establishment of general compulsory ICJ jurisdiction is both feasible and desirable.

The next paper on *Judicial Settlement in Perspective* by A.O. Adede (pp. 47-81) reviews the activity of the Hague Court in the particular areas of delimitation of land and maritime boundaries as well as the specific perspectives of developing countries. It contains interesting background information on the *South West Africa*[2] and *Nicaragua*[3] cases as well as the observation that cases dealing with environmental matters and issues of international development should be submitted to the full Court rather than to a special chamber so that wide and comprehensive experience can lead to a consolidation of the jurisprudence in these fields. From this point of view, the recent judgment of the (full) Court in the *Gabčíkovo-Nagymaros* case[4] must appear as a missed opportunity.

In dealing with *The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes* (pp. 83-116), Ph. Couvreur points to the limitations of categorizing of disputes or circumstances in which the Court can be effective and *vice versa*. Rather, effectiveness of its decisions depends on the characteristics of each particular case.

Professor I. Sugihara analyses *The Judicial Function of the International Court of Justice With Respect to Disputes Involving Highly Political Issues* (pp. 117-138). In his view, the Court should abstain from exercising its function in sensitive disputes deeply charged in this regard, such a limitation flowing from self-restraint in the Court's judicial function proper. Again, it would have been interesting to see what this Japanese author would have made of the 1996 advisory opinion on *Nuclear Weapons*[5] in the context of his thesis.

The following contributions deal with the full range of aspects of the question of what role the ICJ can play in the settlement of disputes between international organizations, or between such organizations and states: J. Sztucki, *International Organizations as Parties to Contentious Proceedings Before the International Court of Justice?* (pp. 141-167); P.C. Szasz,

1. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14.
2. South West Africa (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Second Phase, Judgment of 18 July 1966, 1966 ICJ Rep. 6.
3. *See* Nicaragua case, *supra* note 1.
4. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, 1997 ICJ Rep. (not yet published). The full text can be found on the Internet: http:\\www.icj-cij.org/idocket/ihs/ihsjudgment/ihsjudcontent.html.
5. Legality of the Threat or Use of Nuclear Weapons (Request for Opinion by the General Assembly of the United Nations), Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226.

Granting International Organizations Ius Standi in the International Court of Justice (pp. 169-188); and I. Seidl-Hohenveldern, *Access of International Organizations to the International Court of Justice* (pp. 189-203). While Sztucki provides us with a brilliant and comprehensive survey of the questions arising in this regard, leading to the statement: "[i]t does not appear that opening the access to the Court's contentious jurisdiction for international organizations is likely to contribute to greater use of the Court" (p. 165), P. Szasz concludes his equally comprehensive listing of the *pros* and *cons* of such access and other technical questions with a proposal to grant certain organizations 'indirect' access by way of a manipulation of the advisory opinion procedure available to the UN General Assembly (pp. 187 *et seq.*). Professor Seidl-Hohenveldern calls such indirect access an 'abuse' (pp. 202 *et seq.*) and strongly pleads in favour of admitting international organizations both inside and outside the UN family as parties to the Court through straightforward amendments to its Statute.

The first part of this book ends with a paper by M. Janis on *Individuals and the International Court* (pp. 205-216) which is highly critical of the present role of the Court in view of its limitation to inter-state disputes. He suggests a comprehensive revision of its Statute opening it up to petitions by any person, non-governmental organization, or group of individuals claiming to be victims of a violation of international law, on the basis of an optional clause drafted along the lines of Articles 25 and 46 of the 1950 European Convention on Human Rights[6] (before Protocol No. 11). While such a proposal is not new, Professor Janis's contribution is interesting because he provides us with concrete amendments to the ICJ Statute to the desired effect. What is still missing, however, is, first, an analysis of the interrelationship of *locus standi* of individuals and the question of (the possible and desirable extent of) their international legal personality, and, second, the prerequisites of a violation of international law *vis-à-vis* individuals.

While the contributions on access to the Court by international organizations display considerable overlap, this is not the case with the following two papers dealing with the ICJ's supervisory role. M.N. Shaw takes up what by now is a *cause célèbre*, namely *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function* (pp. 219-259). The author proposes criteria according to which Security Council Resolutions may be divided into three types: determinations of threats to or breaches of the peace are within the widest discretion of the Council, those resolutions providing immediate responses to such threats or breaches are within a wide discretion, while decisions involving legal determinations rather distant from the need for instant action would fall within a somewhat

6. 1950 European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 221 (1955).

narrower range of discretion. This may affect how the Court may react (pp. 234 *et seq.*; and p. 258). The impending judgment in the *Lockerbie* case[7] will provide an opportunity to test this hypothesis, as well as the many more interesting ideas put forward in what certainly constitutes one of the most profound contributions to the issue of legal and judicial control of Security Council action.

In a short paper H.G. Schermers looks at *The International Court of Justice in Relation to Other Courts* (pp. 261-268). While conceding a certain pride of place to the ICJ, Professor Schermers rather demonstrates the lack of a unified legal system and the isolation of the growing number of international courts and tribunals in their respective jurisdictional turfs.

The third function of the ICJ, the advisory one, is treated by M. Pomerance's *The Advisory Role of the International Court of Justice and Its 'Judicial' Character: Past and Future Prisms* (pp. 271-323). In her essentially historical analysis, the author arrives at the conclusion that the Court has not been prone to adopting a philosophy of judicial restraint. She further disagrees with the view that the Court's advisory function adversely affects its judicial character. According to her, contrary to popular calls to extend the circle of authorized bodies, the Court's advisory jurisdiction has not suffered from under-availability, as much as from under-utilization and occasional abuse. Hence, the key to a constructive revival of the advisory function lies primarily with the Court's clients and only secondarily with the Court itself (p. 323). The two recent *Nuclear Weapons* opinions[8] seem to prove these points.

Two further articles are devoted to the function of the Court as a legislator. In her thought provoking paper on *Judicial Insights Into the Fundamental Values and Interests of the International Community* (pp. 327-366), V. Gowland-Debbas assesses the contribution of the Court, as well as of individual judges, to the formulation of the theoretical concepts in which the turn of contemporary international law from bilateralism to a consecration of community interest has found its expression, and by which, at the same time, it is carried forward. In my view, this is the most comprehensive and complete treatment of the Court's role in the genesis and development of the doctrines of fundamental norms of *ius cogens*, giving rise to obligations *erga omnes* and international crimes of states in the contemporary literature

7. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahariya *v.* United States of America), Preliminary Objections, Judgment of 27 February 1998, 1198 ICJ Rep. (not yet published). The full text can be found on the Internet: hhtp://www.icj-cij.

8. Legality of the Use of Nuclear Weapons in Armed Conflict (Request for Opinion by the World Health Organization), Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 66. *See also* note 5 *supra*.

(excluding the two very recent monographs by De Hoogh and Ragazzi).[9] It would have been interesting to see how Professor Gowland-Debbas views the Court's 1995 judgment in the *East Timor* case[10] which is not yet mentioned in her article. There, the ICJ put the concept of obligations *erga omnes* into the straight-jacket of *Monetary Gold*.[11] It is ironic that the very Court that spelled out the concept in the first place has now subjected it to the procedural rigours of traditional bilateralism. Apparently, the period in which the Court took an activist part in the progressive development of international law has come to an end (*see also*, p. 365).

Maybe things are a bit different in the more quiet waters of maritime delimitation to which J.J. Quintana draws our attention (pp. 367-381). The author propounds the thesis that in this area, the Court, in the past 50 years, has clearly created law as opposed to just applying it.

Two concluding articles are designed to strike a balance between the legal component of the present book and political realities; D.P. Forsythe's *The International Court of Justice at Fifty* (pp. 385-405) reviews the other contributions to the book in the light of what for political scientists would be common sense, while P.H. Kooijmans' *The International Court of Justice: Where Does It Stand?* (pp. 407-418) emphasizes once again the sometimes near-impossible juggling act with which the Court is entrusted: the balancing of 'legal necessities' with 'political realities'.

In conclusion, the present collection of essays is a remarkable achievement. It puts together a number of excellent essays to something approaching a coherent, systematic exposition. Its use will be essential for any future state-of-the-art treatment of the functions of the Hague Court. The *Leiden Journal* deserves to be congratulated on such a valuable birthday present to the Court and a contribution to the UN Decade of International Law.

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9. A.J.J. de Hoogh, Obligations *Erga Omnes* and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of International Responsibility of States (1996); and M. Ragazzi, The Concept of International Obligations *Erga Omnes* (1997).
10. East Timor (Portugal *v.* Australia), Judgment of 30 June 1995, 1995 ICJ Rep. 90.
11. Monetary Gold Removed From Rome in 1943 (Italy v. France, United Kingdom and United States of America), Judgment of 15 June 1954, 1954 ICJ Rep. 19.

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