

## BOOK REVIEWS

Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Cambridge, Polity Press, 2002, ISBN 0745629954, 284 pp., £18.00 (pb).

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This book is a normative treatise on global inequality. The statistics are well known: the poorest 46 per cent of humankind have 1.2 per cent of the global income, while the richest 15 per cent have 80 per cent. Moreover, every day 50,000 people – of whom 34,000 are children – die due to poverty-related causes that could easily be prevented by better nutrition, safe drinking water, and appropriate medicines. Thomas Pogge starts by asking why we, citizens of affluent democratic societies, do not find it morally troubling that half of humankind lives in severe poverty, despite our enormous economic and technological progress and the fact that the world is dominated by our enlightened liberal values (p. 3). The question is whether we have a responsibility towards the globally worst-off, and the literature provides us with three kinds of answers. Peter Singer and Peter Unger present a moral argument: there are people in serious need and we can help them without making serious sacrifices so we should help them, regardless of whether we are responsible for their plight or not. John Rawls defends the view that, although we might have a duty to assist ‘burdened societies’ to overcome their ‘unfavourable conditions’, we have no responsibility for poverty in many developing countries because it is caused by the incompetence, corruption, and tyranny entrenched in their governments, institutions, and cultures.

Pogge gives a third possible answer and presents a committed defence that Western governments and their citizens have a negative duty to relieve the deplorable situation of the globally worst-off. Although he does not deny the responsibility of the rulers and elites in developing countries, he primarily focuses on our responsibilities towards the globally worst-off. He argues that our governments impose a coercive global order that perpetuates severe poverty for many who cannot resist this imposition: ‘we and our governments participate in [a global order] depriving them of the objects of their most basic rights’ (p. 23).

*World Poverty and Human Rights* is a collection of Pogge’s essays on global justice written between 1990 and 2001. The argument in the book can be divided into three main parts. The first two chapters discuss foundational issues: a conceptualization of human flourishing, a defence of a minimal conception of justice in terms of basic goods, and a description of the concept of human rights as used throughout the book. In the second part Pogge emphasizes the lack of correspondence between

the minimal moral standards of any coercive national order and those standards we use in discussions on global justice. In three chapters he refutes three different arguments that deny the responsibilities of Western affluent societies towards the global poor. The last three chapters present policy proposals that, so Pogge argues, provide feasible institutional changes that will improve the lot of the globally worst-off. Chapter 6 defends measures that support fledgling democratic governments by constraining the power of previous undemocratic rulers to incur debts in their country's name. Chapter 8 describes a proposal in which governments must pay a small part of the revenues of using or selling the natural resources extracted from their territory to a 'global resources dividend' (comparable to the Tobin Tax). These revenues are redistributed to the globally worst-off to ensure that they can meet their own basic needs with dignity (pp. 196–7).

The chapters discuss a large variety of issues, but the central thought can be summarized as follows: we, the governments and citizens of affluent democracies, have a negative duty, namely a duty not to uphold a global structure that violates human rights (pp. 67, 145, 172). Pogge's position can be characterized as 'moral institutional cosmopolitanism'. Let me elaborate this characterization by explaining the constituting parts. First, Pogge explicates a moral instead of legal notion of human rights (p. 53). His defence is inspired by the Universal Declaration of Human Rights, especially Article 25 – claiming that everyone has the right to a standard of living adequate for health and wellbeing – and Article 28 – claiming that everyone is entitled to a social and international order in which the rights and freedoms of the UDHR can be fully realized. Second, Pogge understands human rights not in an interactional but in an institutional way:

On the interactional understanding of human rights, governments and individuals have a responsibility not to violate human rights. On my institutional understanding, by contrast, their responsibility is to work for an institutional order and public culture that ensure that all members of society have secure access to the objects of their human rights . . . By postulating a human right to X, one is asserting that any society or other social system, insofar as this is reasonably possible, ought to be so (re)organized that all its members have secure access to X. (pp. 64–5)

Pogge explicitly understands human rights in an institutional way: human rights are primarily claims against coercive social institutions and secondarily claims against individuals who uphold (and benefit from) such institutions. Finally, Pogge's defence is a cosmopolitan one, centring 'on the fundamental needs and interests of human beings and *all* human beings' (p. 178, emphasis in original) and emphasizing 'that every human being has a global stature as an ultimate unit of moral concern' (p. 169).

Pogge's claim that we are not merely failing to help the global poor but are actually harming them needs an additional argument establishing our responsibility for their fate. Central to this argument is the existence of a global order in which all national governments participate, along with international and supranational institutions such as the United Nations, the European Union (EU), NATO, the World Trade Organization (WTO), the World Bank, and the International Monetary Fund

(IMF). To show how this global world order generates injustices Pogge presents three disjunctive arguments, addressing the adherents of three different strands of Western political thought. First, shared institutions: states are interconnected through a global network of market trade and diplomacy. This shared institutional global order is shaped by the better-off, and imposed on the worse-off. We impose a global institutional order that foreseeably and avoidably reproduces severe and widespread poverty. This order is unjust if there is a feasible institutional alternative under which such severe human rights deprivations would not persist (pp. 199–201). Second, uncompensated exclusion: the better-off enjoy significant advantages in appropriating wealth from our planet, such as the use of a single natural resource base like crude oil. The worse-off are largely, and without compensation, excluded from the gains of this appropriation (pp. 201–3). Third, violent history: the inequalities in the social starting positions of the better-off and the worse-off have emerged from a single historical process that was pervaded by massive, grievous wrongs, such as a history of conquest and colonization with oppression and enslavement (pp. 203–4).

Pogge concludes that poverty in developing countries cannot be seen as disconnected from our affluence. The existing global order, and the injustices it generates, implies that we violate a negative duty not to harm the global poor, that is, not to violate their basic human rights. This negative duty implies that Western governments should not impose an institutional order under which, foreseeably and avoidably, individuals lack secure access to some of the objects of their human rights. Pogge criticizes the foreign policy of Western societies, and especially their policies that shaped the global order, for having pushed their self-interest to the extreme. He gives some examples: the negotiation of the UN Convention on the Law of the Sea (p. 125) and the WTO regime (pp. 15–19), and concludes that

Our new global economic order is so harsh on the global poor, then, because it is shaped in negotiations where our representatives ruthlessly exploit their vastly superior bargaining power and expertise, as well as any weakness, ignorance, or corruptibility they may find in their counterpart negotiators, to shape each agreement for our greatest benefit (p. 20).

His complaint against the WTO regime is not that it opens markets too much, but that it opens our markets not enough and thereby gains for us the benefits of free trade, while withholding them from the global poor (p. 19). The idea that we might only have a humanitarian duty is thus beside the point. We are harming the global poor by imposing an unjust global order, in which Western societies close their markets by protectionist policies, massively subsidize the local agriculture, and introduce anti-dumping measures in many of the sectors where developing countries are best able to compete, such as agriculture, textiles, and clothing.

The existing global institutional order is neither natural nor God-given, but shaped and upheld by the more powerful governments and by actors they control, such as the EU, NATO, the WTO, the Organization for Economic Co-operation and Development, the World Bank, and the IMF. The current global order produces a stable pattern of widespread malnutrition and starvation, and there are alternative regimes possible that would not produce similarly severe deprivations (p. 176). It is

the negative duty of Western governments to aim for a global order under which basic human rights are not violated, that is, a global order in which all individuals are able to meet their basic social and economic needs. Of course, national governments primarily focus on the interests of their own citizens, but they should not do so at the expense of gross human rights violations abroad. Indeed, they can improve the circumstances of the globally worst-off and meet the demands of justice without becoming badly off themselves.

In sum, the negative duty of Western governments consists in forgoing optimum results for themselves in international negotiations as far as this generates human rights violations. In theory this sounds very convincing; however, it remains unclear what this implies in actual negotiations. Which proposals are reasonable and which proposals will, in the end, violate basic human rights?

The negative duty of individual citizens in affluent democracies consists in making reasonable efforts towards promoting institutional reform. They bear a collective responsibility for their governments' role in designing and imposing this global order and for their governments' failure to reform it towards greater human-rights fulfilment (pp. 172–3). Again it remains implicit in Pogge's argument what this negative duty actually implies for individual citizens: when can one be sure that one has made reasonable efforts towards promoting institutional reform? More generally one could conclude that Pogge expends more energy in defending the claim that Western governments and citizens have a negative duty towards the global poor than in fleshing out what this duty implies in actual situations.

I have given here only a sketchy presentation of Pogge's arguments; his full presentation is inevitably more persuasive. The strength of the book is the result of three elements: philosophical rigour, a compelling and provocative style, and much relevant factual support. The book is written in a non-technical style and is very accessible to non-philosophers. Even those who are usually not convinced by normative arguments will be fascinated by the many different ways in which Pogge defends his claim. Even those who do not embrace his final conclusion will be compelled by many of his examples, analogies, and arguments.

Nevertheless, I expect that *World Poverty and Human Rights* will not persuade most readers of the LJIL as legal scholars. Pogge's focus on moral rather than legal arguments, and his emphasis on individual needs and interests instead of relations between states, might not be convincing. The final chapters, defending 'practical' proposals, might even strike them as straightforwardly unrealistic. Finally, one could argue that his emphasis on the global world order as the main source of global inequality is a one-sided judgement. For one thing, the possibly unjust legacy of colonialism (the violent history argument) only concerns the countries involved, and does not have to be dealt with on the scale of a global institutional order, but should be addressed on a bilateral level. Moreover, recent empirical research supports Rawls's thesis that by far the most important determinant of economic prosperity of countries is the quality of local institutions, such as the rule of law, stable property rights, and so on. Since good institutions are to a large extent local products, local determinants might be more important than Pogge judges them to be.

At the same time, however, I do expect that *World Poverty and Human Rights* will affect readers of the LJIL as human beings, concerned with the fate of the worst-off in the world and interested in ways of alleviating their plight. In this sense, the book might be less naive than it seems at first sight. As Rawls argues, a major task of political philosophy is to extend what are ordinarily thought of as the limits of practical political possibility. Peter Singers's *Famine, Affluence and Morality*, published more than 30 years ago, was widely read and appreciated in academia. However, although his argument that we fail to help the global poor might have generated NGOs like OXFAM, it did not generate any political change. If a plea based on positive duties does not affect people, it is worthwhile to attempt to formulate our responsibilities in terms of negative duties. Moreover, the emerging dominance of globalization and global governance is a good indication that the global institutional order more and more becomes a subject of normative importance. *World Poverty and Human Rights* is neither the first nor the final formulation of such a defence of negative duties, but it surely marks a major step forward for a political–philosophical discussion of global justice. As such it is not only an academic achievement. Pogge is quite right when he claims that ‘whether or not we accept such a negative duty in regard to the justice of our global order makes a momentous moral difference’ (p. 133).

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Daniel Fitzpatrick, *Land Claims in East Timor*, Canberra, Asia Pacific Press, 2002, ISBN 0731536886, 246 pp.

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East Timor is the world's newest state and one of its poorest. Measuring approximately 14,600 sq. km, with a population of about one million people of various ethnic origins, it became independent in May 2002 after almost three years of administration by the United Nations (1999–2002), 24 years of Indonesian control (1975–99), and close to three centuries of Portuguese colonialization. These days East Timor is grappling to establish the legacy left by these regimes, and one of the important areas in that respect is land claims.

In early 2000 Daniel Fitzpatrick spent three months working with the Land and Property Unit of the United Nations Transitional Administration in East Timor (UNTAET). In 2002, when his book on land claims in East Timor, drawing substantially on this period, was published, the urgent questions he considered were still unanswered. By 2004 the situation has only marginally improved, since no comprehensive regime is yet in place. Yet, as Fitzpatrick notes, the dilemmas of allocating land in East Timor are not academic, but of immediate relevance to everyday life, from homeless people's ability to find housing, to entrepreneurs' ability to raise funds for commercial development.

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In *Land Claims in East Timor* Fitzpatrick examines legal regimes that may apply to land claims in the new state. The difficulties of resolving land claims in East Timor are manifold. Some obstacles are the result of the country's turbulent political past; claims today are variously based on traditional rights held prior to Portuguese colonization, on rights established under Portuguese law, and on rights purportedly established under Indonesian control. Mass flight and displacement following the violent events of 1999 consequent on the referendum vote for independence created a new category of claims, those based on actual possession. As if these claims were not difficult enough to reconcile, there are serious practical obstacles, such as the nearly total destruction of land records in 1999, allegedly by the Indonesian militias.

Against this background, reviewed in chapter 1, Fitzpatrick tries to put some order in and make sense of the plethora of claims. Chapter 2 describes the land and its people, focusing on the customary tenure which forms the basis of traditional rights. Chapter 3 considers the legal context of claims based on Indonesian titles. Fitzpatrick suggests that in view of the illegality of Indonesia's purported annexation of East Timor in 1975–6, its 24 years of administration should be regarded as belligerent occupation. He finds that under this interpretation, any title granted by Indonesia could hold at most during that occupation, but no longer. He then examines the implications of such a finding for claims regarding public and private property. Fitzpatrick notes that under UNTAET's regime Indonesian law was the transitional applicable law and therefore cannot be completely disregarded. In chapter 4 he describes Indonesian land law and its deficiencies, as well as possible claims based on Indonesian titles and land administration. Despite his argument that, in principle, Indonesia had the status of a belligerent occupant, he cautions against total rejection of any claims based on Indonesian titles. He examines a number of options to give effect to that law in a modified form, and calls for the accommodation of claims based on bona fide reliance on such titles. Chapter 5 continues the examination of Indonesian changes to the land regime, this time through dispossession of various kinds: military confiscation, so-called voluntary sales for public and private development, forced resettlements, corrupt allocation of land, and conversion of Portuguese titles into Indonesian ones. Chapter 6 describes the Portuguese legal regime, post-colonial title to land, and the specific nature of Portuguese titles in East Timor, which were concentrated in the hands of a small number of privileged elite holders. As he does with regard to Indonesian claims, Fitzpatrick investigates the merits of a general rule upholding or rejecting Portuguese titles, and again suggests qualified recognition, to accommodate later changes to land for public purposes, bona fide reliance on Indonesian acts, and current possession in good faith. Chapter 7 considers the final category of land claims in East Timor, those based on traditional rights to land. It draws on the experience of other countries in acknowledging such rights, while pointing out the special characteristics of the East Timorese situation, particularly the seriousness of land conflict. This chapter puts emphasis on the institutional mechanisms required to implement effectively a system relying on customary law. Finally, chapter 8 brings together the four layers of claims – traditional, Portuguese, Indonesian, and current claims of actual possessors – and suggests various types of

balances between them (assuming that they all receive some kind of recognition and validation).

Although there is no separate chapter addressing possessory claims, particularly those following the Indonesian invasion in 1975 and the mass displacement in 1999, the book is based on the argument that a land claims framework should include a fundamental bias in favour of bona fide current occupiers of land. The justification for this bias is largely practical, in order to avoid large-scale processes of eviction.

Fitzpatrick's work is valuable from a variety of aspects. First, it sets out an empirical account that has not been made available before. This is particularly true with regard to Indonesia's acts within East Timor, which, unlike the much-discussed international aspects of its denial of East Timorese self-determination, have received very little legal attention until now. While post-colonial land status and traditional land rights have been discussed in legal literature, Fitzpatrick provides the East Timorese context for those, again including a rare empirical account. Second, Fitzpatrick does not stop at listing the different components of the problem, but puts them together, weighing the legal and political considerations in balancing them, and offering tentative examples of these balances. As a result he is able to provide guiding principles in resolving some, if not all, land disputes. He thus presents the reader with an admirably complete picture – a doctrinal analysis combined with potential implications.

About half of the book is dedicated, justifiably, to the status of Indonesian titles. Not only is the Indonesian administration of East Timor, in theory and practice, less known to readers in English, but it is also the problematic and unique characteristic of the East Timorese problem. As Fitzpatrick suggests, models exist for resolution of land disputes – post-internal-conflict, post-apartheid, post-communism, post-colonial and post-Nazi. Yet none of these provides a framework for the East Timorese case, which concerns an international conflict in which belligerency, or at least non-recognition of sovereignty, is a prominent feature. Potential precedents for such situations, such as the independence of Namibia and the reversion to independence of the Baltic states, moved along different routes, primarily post-apartheid and post-communism.

Against this background, advocating the adoption of a legal regime based on Indonesia's status as a belligerent occupant might require further elaboration. Although theoretically this is a straightforward choice, it should be noted, as Fitzpatrick demonstrates, that such a choice is not obvious. During the period of Indonesia's control over East Timor, the international community, while refusing to regard Indonesia as sovereign in the territory, did not regard it as a belligerent occupant either. Similarly, the Turkish presence and the administration set up under its protection in northern Cyprus are considered illegal and invalid, but have not been addressed in terms of belligerent occupation.<sup>1</sup> On the other hand, the Baltic states, following their reversion to independence, declared the former Soviet regime to

1. Responsibility for the acts of the 'Turkish Republic of Northern Cyprus' have been imputed to Turkey as a result of its extraterritorial jurisdictional responsibility under the European Convention of Human Rights, and not under the laws of war. *Loizidou v. Turkey (Preliminary Objections)*, (1997) 23 EHRR 513.

have been an illegal occupation and implemented legal consequences of such a status,<sup>2</sup> even though until then it had not been explicitly regarded as such by the international community. The alternative approach to 'belligerent occupation' is 'non-recognition', which was adopted with regard to Namibia until its independence, is currently adopted towards northern Cyprus, was partially adopted towards the Baltic states, and was vaguely adopted towards East Timor. Compared with this policy, whose meaning is far from established, belligerent occupation has the advantage of being a clearly defined regime with clear legal consequences.

Regarding the human rights aspect, Fitzpatrick attaches great importance to the developing international right to housing, and on the prohibition of eviction. He thus suggests giving primacy to the protection of current occupiers where they have no other primary place of residence. This protection would not by itself extend to granting formal rights.

To the international lawyer, the chapter on traditional rights may seem excessively elaborate. After all, almost every newly independent state emerging from colonial rule in Africa and Asia was beset by the need to reconcile traditional rights with foreign-imposed ones. However, in other cases, the transition from colonialism to independence was direct, often immediate, and in many cases even smooth. Not so was the case of East Timor, where the transition itself was both violent and disruptive of every aspect of life, and indirect, through a long period of UN administration which has effected many changes, some irreversible. Accordingly, the significance of colonial acts was possibly reduced in the case of East Timor, so that more attention needs to be called to the specifics of traditional rights underlying the various institutionalized ones. Moreover, it should be noted that the book attempts to provide a comprehensive account of the land problem not only from an international legal perspective. Since traditional rights are an important part of this analysis, their significance must be addressed. Fitzpatrick should be credited with presenting this complicated topic and its relationship with the institutionalized system with clarity, making the whole issue accessible even to readers who are not particularly familiar with either land or customary law issues.

Two years on, Fitzpatrick's assessments are still relevant, since not much has been done in East Timor to regulate property rights. During the period of UNTAET's administration no permanent measures were adopted, since UNTAET considered that such measures should be adopted by the sovereign regime in due course. Land transactions by non-resident Indonesians were prohibited and unenforceable,<sup>3</sup> and all allocations were, in principle, temporary. The constitution which entered into force on 20 May 2002 provides that 'the State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law' (Article 2(4)), and guarantees the individual's right to private property 'in accordance with the law', but restricts the

2. E.g. the Latvian Declaration on the Renewal of Independence, adopted on 4 May 1990, declaring acts of the Soviet government as non-representative of the Latvian state, and the Estonian Persons Repressed by Occupying Powers Act (RT I 2003, 88, 589), which penalizes acts carried out by occupying powers, such as deportation outside the occupied territory and compulsory military conscription.
3. UNTAET Regulation 2000/27.

right to ownership of land to national citizens (Article 54). Those are persons born in East Timor to at least one parent born in East Timor (or born outside East Timor to a parent who is East Timorese under the same rules). Together these last provisions reduce the scope of potential claims, particularly the problematic ones based on Indonesian title, by excluding the ownership rights of most Indonesian-originated claimants. The East Timorese Ministry of Justice, entrusted with most aspects of land administration, decided to address those issues of least controversy first and gradually build up a constituency for further legislative initiatives. Law no. 1/2003, which entered into force in March 2003, contains the first part of the juridical regime of immovable property, and regulates the status of state property, *inter alia* by declaring invalid any purported changes to title to state property from the beginning of the Indonesian administration until the independence of East Timor in 2002. This reflects, albeit in a limited manner, Fitzpatrick's proposal to consider invalid those changes to land titles purportedly carried out by the Indonesian administration. However, tough choices are still looming as more controversial cases begin to arise.

*Land Claims in East Timor* is a valuable work for anyone wishing to understand the complexity of East Timor's legal choices in the near future, specifically with regard to land but not exclusively. It might also be instructive regarding other processes of transition from regimes whose legal status is dubious at best. The book is written in a simple and straightforward manner, making its various components – human rights, international law, and land law – accessible to all readers.

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Luc Reydam, *Universal Jurisdiction. International and Municipal Perspectives*, Oxford, Oxford University Press, 2003, ISBN 0199251622, 288 pp., \$99.00 (hb).  
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Extraterritorial jurisdiction over criminal offences is an intriguing subject for academic research. Much literature and many documents published by governmental and non-governmental organizations present extraterritorial jurisdiction as an uncontroversial issue. The exercise of jurisdiction over offences committed abroad is seen as a sign that states take the prosecution of crimes with foreign elements seriously. Extensive jurisdictional claims seem to be considered as the state's normal duty in the fight against impunity. As a consequence, many international legal texts and documents encourage states to enact jurisdiction over offences committed abroad.

As far as universal jurisdiction – the widest extraterritorial claim possible – is concerned, the situation is no different. In the pursuit of punishment of crimes of which the seriousness is universally accepted, universal jurisdictional claims

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are considered as a useful and even necessary instrument. Who could possibly be 'against' universal jurisdiction?

Luc Reydams's book shows that the debate about extraterritorial jurisdiction in general and universal jurisdiction in particular deserves a more balanced discourse. Reydams rightly points out that universal jurisdiction has more dimensions than the impunity issue only. Universal jurisdiction is also a source of conflicts between states. Such a claim can coincide with other and sometimes stronger jurisdictional claims of other states. As a Belgian, Reydams knows well that the problems with universal jurisdiction are not just theoretical. The precise exercise of universal jurisdiction, as enacted in the Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law of 1999, was challenged by the Democratic Republic of the Congo (DRC) before the International Court of Justice (*Arrest Warrant Case*, February 2002). Although the discussion before the ICJ focused more on issues related to immunities, it was clear that the question of the legitimacy of the prosecution of crimes committed outside the territory by persons with no real connection to it was on the agenda as well. And this seems to be only the start. After Reydams's book was finished in 2003, the 1999 Belgian Act was amended and even repealed – though partially reintroduced in the Criminal Code – following considerable and open political and diplomatic pressure on the Belgian government after victims had filed complaints against prominent Israeli and US citizens (e.g. Ariel Sharon, Tommy Franks, and George Bush). The time when discussions about extraterritorial jurisdiction are illustrated by referring to the *Lotus* case, dating from the 1920s, is over. Reydams puts this case where it belongs: at the beginning of the story.

Reydams's book about the universality principle therefore comes at the right time and offers the overview and background necessary to understand the new and ongoing debate about universal jurisdiction.

Two main parts follow the introduction. The first deals with universal jurisdiction in international law, and the theoretical international law background of (universal) jurisdiction is discussed and an overview is given of its presence and form in international texts. This part and especially the chapters 'Working frame' and 'Doctrine' should be read by anyone interested in extraterritorial and universal jurisdiction, as it provides an excellent and clear analysis of the legal issues related to the subject. It is here (pp. 28–42) that Reydams rightly explains that the 'universality principle' can be – and is – understood in different ways. His proposal to distinguish between the *co-operative general universality principle* (subsidiary jurisdiction of the custodial state over all serious offences if extradition is impracticable), the *co-operative limited universality principle* (primary or subsidiary jurisdiction of the custodial state over international offences only) and the *unilateral limited universality principle* (the primary right to try international offences without regard to the offender's whereabouts) is useful and helps to avoid oversimplifications and confusion about the content or scope of universal jurisdiction. Practice shows that this confusion does exist and contaminates many discussions about the subject.

The chapter entitled 'International texts' provides a well-documented overview of the way in which the universality principle is implemented in multilateral

conventions, resolutions of intergovernmental bodies, and official drafts and studies. This analysis shows that not all forms of universal jurisdiction are accepted. Only co-operative forms of universal jurisdiction (*aut dedere, aut judicare*) seem to be the formula for international criminal law treaties.

The second part of the book discusses universal jurisdiction in municipal law by analysing the national legislation on universal jurisdiction of 14 states: Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, the Netherlands, Senegal, Spain, Switzerland, the United Kingdom (England and Wales), and the United States. The author argues that the choice of these countries is not accidental, since his selection was based on an initial survey of more than 50 countries. Unfortunately, no information is provided on the exact results of his primary study and the criteria for his selection (the existence of criminal statutes with universal application or cases of universal jurisdiction, representativeness of the major legal systems, and the dominant role played by some countries in shaping international law and policy) remain vague (p. 83). At first sight it is not clear why states such as Russia or China are not present in the survey or why the legislation of no eastern or central European country is analyzed.

For each country survey the same matrix is used. In a first section a *tour d'horizon* of the ambit of the state's criminal law is presented; this section also contains the standing of victims in criminal proceedings and the application of the principles of double criminality, *lex mitior* and *ne bis in idem*. The second section of each country overview deals with cases of universal jurisdiction or with judicial decisions in which the issue was raised.

The survey shows an enormous diversity between municipal laws providing for universal jurisdiction. Some states seem to be cautious and only have *aut dedere, aut judicare* provisions, while others have enacted (and exercise) unilateral universal claims even in *in absentia* situations. Although Reydams evaluates unilateral forms of jurisdiction as a *contradictio in terminis* and running counter to a rational distribution of competences among equal sovereigns (p. 224), such claims exist and are exercised by some states.

Reydams presents these findings as a part of his conclusions. Although this information is extremely relevant and answers the research question of the book, these conclusions could have been used as a stepping-stone to go beyond the description and comparison of international and municipal law and practice. The study of the question of *why* states – both common-law and civil-law countries – have been steadily expanding the ambit of their criminal law, and have enacted all kinds of (unlimited) universal claims, could also have been elaborated in the study by linking the evolution of application of other principles, in particular the protection principle, to the findings on universal jurisdiction law and practice.

Maybe more, or at least other, answers could have been provided if the author had made a clearer distinction between enacting jurisdiction (the legal basis for the claim) and exercising jurisdiction (the actual prosecution). With such an approach the interesting relationship between law, state practice, and international politics would have received more attention. Universal jurisdiction is not only about conflicts between states because of the overlap of their respective claims. The problem

with (unilateral) universal jurisdiction is that it – in most cases – does not work in practice. The fact that many states *can* prosecute does not seem to provide any guarantee that a real prosecution will take place. Practice even shows that universal jurisdiction can have perverse consequences, since states sometimes use the equal and shared responsibility to prosecute as a pretext for not prosecuting at all. Prosecuting persons accused of the world's most serious crimes (universal crimes) is not always a very tempting challenge for states. Universal jurisdiction is thus also about non-prosecution and about the choice of the forum for prosecution in the case of concurrent claims.

At the very end of his book Reydams suggests that the whole debate about universal jurisdiction may well be an aberrant intermezzo between Nuremberg and the International Criminal Court (ICC) (p. 226). I doubt it. Crimes with international elements and broad and even unilateral claims of jurisdiction will always exist, without ever being treated by the ICC. Reydams's excellent book will therefore remain relevant and a 'signpost' in any future debate on the national prosecution of international crimes.

Tom Vander Beken\*

Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge, Cambridge University Press, 2003, ISBN 052180464, 243 pp.

Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, ISBN 0199243379, 295 pp.

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Both these books are about humanitarian intervention, a topic that currently thrives in political, legal, philosophical, journalistic, and academic circles. Both books also offer accounts of the issue that are typical of their genre. Chesterman's book is a traditional legal treatise on humanitarian intervention while Orford offers a theoretical-critical approach to humanitarian intervention. In this sense, both books are conventional, safe, and predictable. Chesterman's book contains a competent and articulate legal analysis in the traditional mode in terms of both style and content. He examines the origins of the concept found in just war theories and the writings of the 'fathers' of international law, and then analyzes interventions on purportedly humanitarian grounds taking place in the nineteenth and early twentieth centuries. He concludes that both sources allow for normative 'lacunas' in relation to humanitarian intervention (pp. 42–4). The author then analyzes the prohibition on the use of force contained in Article 2(4) of the UN Charter. We are reminded for the umpteenth time that the prohibition contained therein is absolute and, after an analysis of post-Charter practice, that a right to humanitarian intervention does not exist in customary law (p. 87). He is also sceptical of the existence of a right to intervene to

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promote democracy (pp. 106–10). The next chapters deal with the activities of the Security Council in expanding the concept of a threat to international peace and in authorizing states to use force. Chesterman maintains that such activity is commensurate with the particular interests of the permanent members or of particular members of the Security Council, and that delegation represents a decline in the Charter paradigm compared with its League of Nations precedent (p. 218). This is a very interesting assertion that challenges the orthodox view of ascribing legality and legitimacy to such authorizations. In conclusion, the gist of Chesterman's argument is that '[humanitarian] intervention is illegal but that the international community may, in extreme circumstances, tolerate the delict' and that 'by reaffirming the prohibition of the use of force, recourse to military intervention is maintained as an extreme, and last, resort' (pp. 231–2). Of course such a position is neither new nor conclusive. The decision as to whether extreme circumstances exist is purely political and there is no independent mechanism to review its substance. The criteria that publicists often self-indulgently parade (see pp. 228–9) are equally vague and indeterminate. How a severe and immediate abuse of human rights is constructed by the decision-maker depends on political, social, religious, military, economic, and media interests. And what or who is the international community that will redeem the delict? Moreover, if humanitarian intervention is excused in 'extreme circumstances', will this affect the normative content of Article 2(4)? Will this lead to the creation of a customary rule which says that in extreme circumstances, states can intervene on humanitarian grounds?

I feel that the book falls into circular arguments and unconsciously introduces what it wants to avoid. The decision to intervene in 'extreme circumstances' can be both discretionary and unilateral. In a nutshell, Chesterman offers an exceptionally skilful analysis and a solid legal exposition, but does his book offer any new insight? I doubt that it does. Most of the arguments and positions taken by the author have been rehearsed in countless other books, articles, pamphlets, or reports and are known even to non-cognoscenti due to the current media interest in this area. As I have already said, the book is engaging in its legal analysis and it is valuable as such. My feeling of disillusionment is more about the state of legal discourse concerning humanitarian intervention. After all, there may be nothing new that law can offer on this issue. If that is the case, Chesterman's book could be one of the best legal expositions.

If one is looking for new insights into humanitarian intervention and for different narratives one needs to look into other areas and combine law with politics, economics, and morality. Orford's book contains such a narrative by reading and 'misreading' traditional international scholarship on humanitarian intervention (pp. 38ff.). The current discourse on humanitarian intervention is moulded by the human rights revival in the post-Cold-War era and a renewed enthusiasm in promoting the 'internationalist spirit' (pp. 2ff.). Of course, as in Chesterman's narrative, behind such moves there are more sinister motives. These refer to power politics and antagonism as filling the vacuum left with the collapse of bipolarity. Orford reads in current humanitarian discourse a constructed image between, on the one hand, those mainly in the third world or the periphery that are in need of saving

and, on the other, the saviours, that is, the 'international community' (chapter 3). This 'imaginative geography' reinforces the other imaginative scheme of how the 'other' is constructed, paraded helpless on our screens as waiting to be saved by 'us'. Whether there is such a sinister conspiracy it is hard to say. The present reviewer tends to believe that people on a personal level feel some genuine concern. Orford tries to present the human suffering of those people as what it is, a real and genuine state of affairs irrespective of how it is constructed by us, but at the same time she is uncomfortable with 'our' humanity. Humanitarian intervention is, according to Orford's 'misreading', reminiscent of the colonial discourse. For Orford the 'international community' was always there in different disguises – political, social, economic – and it can even be responsible for humanitarian disasters (see in relation to Yugoslavia pp. 87–96). Therefore the posthumous intervention of the 'white knight' is rather hypocritical. Humanitarian intervention should, according to the author, respond to a different type of demand and include other than military measures. Orford offers a personal account of humanitarian intervention based on her own sensibilities and readings. Although the author is very candid in explaining the premises of her particular '(mis)reading', she does not even try to explain on what basis others may read humanitarian intervention differently or which are the texts that form the basis of her (mis)reading. The book indeed offers an insight, although personal, into how humanitarian intervention is experienced, but to the extent that one may disagree with certain of Orford's findings or arguments it would have been more judicious and would have contributed to informative dialogue if the premises of others' 'readings' were made explicit. Moreover, although we may get an inkling from the author's narrative of what other measures are required in order that humanitarian intervention may materialize, these are never made concrete.

As I said at the beginning, both books are examples of a different epistemic genre and exhibit the limitations of their tools and conventions. As to whether humanitarian intervention is an available option, the answers offered are nebulous. Chesterman says that, legally speaking, the answer is 'no', except in extreme circumstances where the answer is given by the political praxis, whereas Orford says that we need to rethink its matrix. I am convinced that human beings will continue to kill other human beings individually or collectively, that interventions on genuine or ostensible humanitarian grounds will continue to happen, and that legal arguments will still be split and politics will always cut the Gordian knot of legal indeterminacy. As informed commentators, we will continue to see in such actions ulterior and sinister motives or genuine emotions and feeling of compassion. The 'international community' will continue to be castigated for its failures since time immemorial or sanctified for its humanitarian spirit. The 'other' will continue to be patronisingly exonerated or treated as the sacrificial lamb. *Plus ça change, plus c'est la même chose.*

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