Annual Survey of International & Comparative Law

Volume 15 | Issue 1 Article 9

2009

Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke

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BOOK REVIEW

CONTEMPORARY ISSUES ON PUBLIC INTERNATIONAL AND COMPARATIVE LAW: ESSAYS IN HONOR OF PROFESSOR DR. CHRISTIAN NWACHUKWU OKEKE

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Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke[2] *is* a Liber Amicorum in which writings by international law scholars from around the globe have been compiled to honor Prof. Christian Nwachukwu Okeke: scholar, law professor, mentor, father, and husband.

The honoree, Dr. Christian Okeke, is still a relatively young man whose scholarship and contributions to International Law have yet to reach their apogee. Why then a Liber Amicorum which is often compiled post mortem or as one approaches the gentility of senility? Because this

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2. CONTEMPORARY ISSUES ON PUBLIC INTERNATIONAL AND COMPARATIVE LAW: ESSAYS IN HONOR OF PROFESSOR DR. CHRISTIAN NWACHUKWU OKEKE (Chima Centus Nweze, ed., Vandeplas Publishing, 2009).

Annual Survey of International & Comparative Law, Vol. 15 [2009], Iss. 1, Art. 9

honoree, the contributors maintain, is so remarkable that to postpone their paeans is to unnecessarily deprive him of the affection and respect he so richly deserves.

The book's Foreword evidences the friendship and esteem borne for Dr. Okeke by the Honorable Abdul G. Koroma, Judge of the International Court of Justice. It was my privilege, not too long ago, to have had witnessed the mutual admiration and affinity of these two international law giants that was forged some four decades ago while they were classmates at Kiev State University. Judge Koroma's words exhibit the enduring nature of that relationship.

Judge Koroma's writing is followed by that of the Hon. Chima Centus Nweze, Justice of the Nigerian Court of Appeal, who chronicles the extraordinary life of Dr. Okeke: from his upbringing in Nigeria, to his education in the former USSR, to his doctoral studies at the Free University of Amsterdam, to his return to Nigeria to commence an academic career in law. And what a distinguished career indeed! Dr. Okeke became the first and only African scholar to guide the establishment of two successful faculties of law in his Nigerian homeland.

All in all, there are twenty seven chapters in this scholarly tome. Unlike other Liber Amicorum, there is no leitmotif dominating the book. Given the breadth of Dr. Okeke's academic scholarship, however, it is fitting that the book's content is sweepingly broad.

In addition to sharing the background of Dr. Okeke, Judge Chima Centus Nweze also penned an engaging chapter, *The Evolving Jurisprudence of Contemporary International Criminal Tribunals: Implications for the Definition of the Core Crimes in the ICC Statute.* In compelling terms, Judge Nweze describes the characteristics and sources of international crimes. He notes the conflation of international criminal law and the protection of human rights by characterizing Chapter Twenty-Seven of the Rome Statute of the International Criminal Court as, a "...most breath-taking development..." whereby the International Criminal Court jurisdiction *ratione personae* eliminates pleas of immunity assuring that "The ultimate beneficiary is the protection of human rights."[3] He posits that the increased emphasis on human rights coupled with an expanded enumeration of international criminal crimes forebodes well for the downtrodden in decolonized states against whom inflictions will no

3. *Id.* at 163.

longer be hidden under "...immunity and the *ancient* concept of national sovereignty."[4] (Author's emphasis)

Dr. Remegius Chibueze provides intellectual buoyancy to the more comprehensive definition of "legal personality" in his chapter, "*The Legal Personality of Non-State Entities in International Law: A Settled Issue?* Who possesses international legal personality, Dr. Chibueze contends, is shifting from the historically absolutist notion that international legal personality applied only to states to a more inclusive embrace of non-state actors, as well. Writing with a legally deft hand, Dr. Chibueze justifies his support of this more capacious incorporation, but, wisely, recognizes that although the notion of international legal personality has seen progressive shifts and developments, it is, he maintains, still premature to call the matter settled.

From legal personality in general to legal personality in specific, Mr. Samuel Ogbu-Nwobodo in *Pluralism in the Nigerian Constitutional Framework: a Comparative Study of the United States of America and Republic of India* explores his country's constitutional issues. Relying on the U.S. and India as points of reference, Mr. Ogbu-Nwobodo, challenges Nigerian lawmakers to think anew about the role of government in carrying out the promises of equality embodied within the Nigerian constitution. Even in the face of a history of military dictatorship and a lack of federal constitutional practice, Mr. Ogbu-Nwobodo is hopeful that the Nigerian judiciary will break with the past and bravely approach the constitutional needs of Nigeria's complex society.

Mr. Ogbu-Nwobodo will, undoubtedly, find inspiration in Prof. Chris Anyanwu's: *The Future of the Modern Nation State-Challenges for the Decolonized States*. Prof. Anyanwu penned not only a strong thesis for the unequivocal, basic rights of all under the law but was equally strong in his belief in the African ability to design truly democratic republics.

Once, while a first year law student, I and my classmates were jolted to hear one of our colleagues breathlessly proclaim that "the law" trumped "everything" in society since "there was nothing above the law." Fortunately for the legal academy, my former colleague realized (or was caused to realize) that vapidity had little place in the study of law. For ill or for evil, surely there are few societal warrants more derivative than law. And, Ming-Woei Chang's chapter comparing the exclusionary rule

4. *Id.* at 169.

Annual Survey of International & Comparative Law, Vol. 15 [2009], Iss. 1, Art. 9

in Taiwan, where he is a Professor of Law, with the right of confrontation in the United States is a fine example of comparative law wherein societal prescriptions and societal proscriptions come to bear in each country's criminal justice system.

In *The New Exclusionary Approach to the ROC Criminal Justice System: Lessons from the United States,* Prof. Chang examines the hearsay rule in both Taiwan and the United States concluding that within the U.S. accusatorial system, "...the criminal justice practice is more party-influenced or party-oriented than the hierarchically controlled criminal justice system in Taiwan."[5] Notwithstanding recent reforms, it would be impossible, Dr. Chang relates, to restrain a court in Taiwan from hearing inadmissible evidence (by U.S. standards) even if such evidence were to reveal a material truth. Dr. Chang does not leave the matter as a postulation but attempts to explain why such differences occur, "...it is apparent that the versions of the rule in Taiwan and the United States evolved from different cultures and historical experiences."[6] As time goes on will the Taiwanese civil system be any better at finding the truth that the common law accusatorial system? Dr. Chang suggests that while it is difficult to predict, it is likely that the differences between the two countries' approach to the exclusionary rule will diminish over time.

The highly controversial topic of the U.S. involvement in Iraq is forthrightly addressed by Dr. Zakia Afrin in *The Transnational Authority in Iraq: Legitimacy and Governance under International Law.* Even though, early on, one can sense her predisposition to her ultimate conclusion, Prof. Afrin's writing rises above the frequently encountered legal partisanship when discourse on Iraq occurs. She more than competently tackles the highly charged subject of whether or not the Iraqi Transnational Authority was legally legitimate; questioning first the authority of the United Nations to delegate occupying powers. Dr. Afrin puts forward a very powerful thesis that, in fact, the post-Iraq war occupying force not only exceeded whatever mandate was conferred but "...left behind a legacy of gross human rights' violation [sic], prison abuse, extrajudicial killing together with awarding immunity for the multinational force."[7] Notwithstanding her persuasive scholarship, Dr. Afrin's positions will, likely, not convert those whose sympathies are antithetical to hers. Regardless, she is to be commended and read for the substantive arguments she presents and for the well grounded convictions she displays.

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5. *Id* at 447.
6. *Id.* at 451.
7. *Id.* at 272.

As Prof. Afrin did with the U.S. involvement in Iraq, Mr. Willy Mamah in *Self Defence in an Era of Non State Actor Terrorism: Is the Paradigm Shifting or Twisting* takes umbrage with the proposition that Security Council 1373 of Sept. 28, 2001 authorized America's use of military force in Afghanistan. Absent such authorization, Mr. Mamah writes, the unilateral use of force by the U.S. ran counter to any of the U.N.'s Chapter VII security exceptions and authorizations. In a second article, *Is Humanitarian Intervention a Pseudonym for Aggressive Unilateralism?*, Mr. Mamah propounds the notion that humanitarian intervention, using the NATO intervention in Kosovo as the exemplar, does not exist. Rather, intervention, when conducted under the guise of humanitarianism, is nothing more than a surrogate for, what Mr.Mamah calls, a "collateral political agenda." by which the rich nations exercises their self appointed messianic destiny for greed and their thirst for power.

The juxtaposition of the writings of Mr. Mamah with that of Prof. Kofi Quashigah makes for an interesting comparison of the virtue of humanitarian intervention. Prof. Quashigah discusses the notion of R2P in his chapter, *The Concept of "Responsibility to Protect" (R2P) Within the Proposed African Union Intervention System.* R2P is a concept, he explains, formulated to protect citizens against their government. Whereas the focus in humanitarian intervention is on intervention; the focus of R2P is on the responsibility to protect—and to protect not only militarily but through peace building efforts, as well. Mr. Mamah is quite critical of the intervention by the developed world. The African Union, Prof. Quashigah points out, permits such intervention under circumstances outlined in Article 4(h) of the A. U.'s *Constitutive Act.* How to reconcile each with the other would, if indeed reconciliation is necessary, make for fascinating future scholarship.

For those of us who are academically involved with international commercial arbitration, Prof. Andrew Chukwuemerie's chapter may be the first place to which we turn to learn what arbitral dish has been prepared. In *International Commercial Arbitration and Third Party Interests: A Call for Urgent Reform*, Prof. Chukwuemerie's offering does not disappoint.

When teaching law students about the upsides and downsides of commercial arbitration, a great deal of attention is, rightfully, paid to arbitration's mechanics and enforcement. Prof. Chukwuemerie's challenges us to go beyond the issues that deal solely with the arbitral disputants and to consider the legal ambiguity of third parties who have often have found frustration in arbitration since they, "...who, if

Annual Survey of International & Comparative Law, Vol. 15 [2009], Iss. 1, Art. 9

commercial commonsense rather than pure technical legal theory were to hold sway, had very good claims."[8]

Prof. Chukwuemerie's chapter deals with the principles of privity and consideration and the effect these principles may have to the detriment of third parties. For example in a contract drawn between A and B but for C's benefit, the principles of privity and consideration may work against the interests of party C. Prof. Chukwuemerie would require that statutory law and common-law principles are adapted so that the notion of "party" is given a much broader definition in order to consider and accommodate the legal stakes of third parties. Where permissible, he would like to see lawyers, on their own volition, frame their arbitration agreements to house third party interests. No shy school boy he, Prof. Chukwuemerie rails against excessive legal conservatism that would make, "...the law an ass, a mere body of technical rules to be applied whether the result is justice, fairness, and social good or injustice and oppression."[9]

What, one might ask, do stabilization contracts, sovereignty, and human rights have in common? The answer: they are topics examined in *The New Incarnation of the Stabilization Clause Controversy in International Investment*, a chapter written by Dr. Emeka Duruigbo of the Thurgood Marshal School of Law. A stabilization contract is an arrangement entered into between an investor (often long term energy provider) and a host state. The investor is guaranteed that, notwithstanding any prospective changes that might occur under domestic law that would otherwise deleteriously affect the negotiated arrangement, the arrangement as negotiated stands. Such guarantee may be for a fixed term or indefinitely.

With well executed academic precision, Prof. Duruigbo relates the tension that might occur over the terms of a stabilization contract between an enterprise from a developed county and the host developing country. For example, what happens when the host nation, for good and beneficent reasons, implements a policy or practice that might negatively affect the investor? On one hand, the investor propounds the tenet of *pacta sunt servanda*—the arrangement, as ratified, is to be honored. The host nation, on the other hand, unfurls the banner of national sovereignty and the shield of *rebus sic stantibus* to justify its derogation from the original stabilization contract.

8. *Id.* at 290.
9. *Id* at 315.

Prof. Duruigbo adds a bit more spice to the stew by pointing out the interest of the United Nations and its conferral of a mandate to its Special Representative of the Secretary General on Business and Human Rights to study stabilization contracts and their impact on human rights. He then adds a bit of conjecture suggesting that such lofty interest in stabilization clauses might very well bring together strange bedfellows such as human rights NGOs and those Western interests eager to slow down China's scramble for foreign energy sources.

Any interested observer of international law will be taken with Dr. Duruigbo's chapter. Though among the shortest offerings in the Liber Amicorum, his ability to meld seemingly diverse topics into tight legal prose is the mark of a master of his academic craft.

Separately, but in intellectual parallel, Dr. Ramesh Karky in *Globalization and Least Developed Countries* and Prof. Sunday Gozie Ogbodo in *The Evolving Roles of Certain International Financial Institutions in Developing Countries under International Law* each contend, in their own way, that in order for developed countries to achieve human rights and freedom, the world's international financial institutions must reorganize and become adaptive to the particular needs of developing countries. Dr. Chika Onwuekwe follows suit in his *Extending Habermas' Public Sphere into the WTO: Prospects and Challenges* wherein he urges heightened transparency by the WTO and increased public involvement (by NGOs, for example). Prof. Onwuekwe invokes the spirit of Jurgen Habermas, the erudite German sociologist, who lauded the bourgeois public sphere as a place where all voices are heard without discrimination thereby promoting trust among all participants.

But can all voices he heard when, according to Prof. Chun Hung Lin, most radio suitable radio frequencies have already been allocated potentially threatening the future development of telecommunications. In his essay, *Comprehensive Review of Global Radio Communication and Spectrum Management under Radio Regulations*, Prof. Lin refreshes our memory as to the substantial impact radio has had on our lives and cautions that the radio frequency spectrum is a limited natural resource whose use knows no national borders. Rational use, sharing, and protection of this common resource require negotiation and consensus between governments on an international scale.

Further in the commercial vein, Alexander Biryukov, Professor of Law in the Ukraine, reminds the reader that a nation's bankruptcy law can project to the commercial world either a positive or negative image. Prof.

Annual Survey of International & Comparative Law, Vol. 15 [2009], Iss. 1, Art. 9

Biryukov in *Recent Bankruptcy Law Developments in the Ukraine: From Socialist Traditions to Market Oriented Format* maintains that a properly functioning bankruptcy system reveals a country within which foreign players can find comfort in knowing that the nation within which they are doing business will assure them equal rights with their domestic counterparts. In that vein, Prof. Biryukov comforts the commercial player interested in doing business in the Ukraine that his country has made dramatic progress in deadening the vestiges and traditions of socialist law.

From the commercial world of the Ukraine, the reader is transported to Africa and that continent's quest for justice and equality. Article Twenty-Two of the African Charter guarantees the right of peoples to economic, social and cultural development and proclaims that states have the duty to ensure that development. Obiora Chinedu Okafor in his *"Righting" the Right to Development: Socio-Legal Analysis of Article 22 of the African Charter on Human Rights* examines the normative strengths and weaknesses of Article Twenty-Two's right to development. He explores Article Twenty-Two's potential as the basis for a general global treaty dealing with development in human terms, i.e. an environment without discrimination giving rise to productive, creative, and rights based lives for all.

Prof. Chidi Anselm Odinkalu further explores the matter of human rights by examining the role of ECOWAS[10] in his article: *Forging New Frontiers: ECOWAS Court of Justice in the Protection of Human Rights.* Asserting that the ECOWAS Treaty embodies a mandatory recognition of human rights, Prof. Odinkalu then goes on to describe the ECOWAS Court and deems it to be a "new and potentially far-reaching" organization with the protection of human rights as intrinsic in its role to support the entire ECOWAS community.

Prof. Odinkalu is joined in his aspirations for Africa, specifically West Africa, by Dr. Ozonnia Ojielo in *Rethinking Peace and Security in West Africa.* In his commentary, Dr. Ojielo lays out his views on the security challenges facing West Africa in the twenty-first century. And, while transnational solutions would seem the likely path for the nations of West Africa to take, Prof. Ojielo sees only micro-nationalism and stereotyping on the horizon. But, this inward looking by the sub-regional states may be salutary. If the popular focus can be directed to the national election box then a new age might be ushered in consisting of

10. ECOWAS is an acronym for The *Economic Community of West African States.*

governments willing to take up the challenges faced by their citizens—all through other than military means.

From matters affecting West Africa to matters affecting so-called "French speaking" Africa are addressed by Salvatore Mancuso in his chapter, *The Renunciation to the State Sovereignty: Is it an Issue for the OHADA Treaty for the Harmonization of Business Law in Africa?*[11] Designed to foster economic growth by the implementation of a harmonized legal framework, the sixteen OHADA member states have faced the complex challenges of sovereignty through the establishment of an OHADA Council of Ministers and an OHADA Common Court of Justice and Arbitration. Interestingly, since not all member states are French speaking, how to ensure that a polyglot institution is established is a major issue now before the member states. Prof. Mancuso portrays OHADA as a group of nations who understand the vagaries of economic life and are bent on attracting investment by offering the commercial community a reliable legal and judicial environment.

But such economic aspirations may not be achieved given the pandemic proliferation of HIV/AIDS coupled with the misuse of human subjects as research subjects in developing countries. Prof. Simon Uche Ortuanya in *HIV/AIDS Vaccine Trials in Developing Countries: Uneven Justice and the Need for a Legal Regime for the Protection of Research Subjects* grimly reminds us of the evils inflicted on human subjects in the Nazi camps and during the Tuskegee Syphilis Research. While there are appropriate monitoring mechanisms in developing countries, no such regimes exist in the developing world. Indeed, there is a want of justice for those who are being used for drug testing and then callously discarded. Prof. Ortuanya cries out for justice. He demands that people in developing countries who are used for drug testing be treated no less equal than their counterparts in the developed world.

In a second chapter, *Women and the Challenge of HIV/AIDS in Africa of Gender Stereotyping and Structural Inequality*, Prof. Ortuanya explains why HIV/AIDS in sub-Saharan Africa is said to have "a women's face" given the inequality between the sexes in the infection of this dreadful disease. Causes such as inheritance rights, domestic violence, education, lack of safe sex options have all contributed to making women "...in matters of HIV/AIDS become the endangered species in Africa."[12] Can

11. OHADA is an acronym for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*—The Organization for the Harmonization of African Business Laws.
12. *Id.* at 695

Annual Survey of International & Comparative Law, Vol. 15 [2009], Iss. 1, Art. 9

Africa respond? The challenges are enormous and irreversible unless those legal structural issues affecting women are faced four square.

In *Political and Economic Rights of Women: Contribution to World Peace,* Ms. Angela Otaluka, in unmeasured terms, lays, among other things, corrupt practices, dictatorships, and anarchy at the feet of men. "Men in power", she writes, "have exhibited the tendencies for dictatorship particularly the men in uniform, armed with ammunitions guarding their gullibility at the detriment of the nation's economy."[13] Whereas women have, "...to a greater degree exhibited a reputation for hard work, loyalty, commitment, honesty and selfless interests more than their male counterparts."[14]

If one can set aside the lack of adherence to the mandatory rigors of legal writing and focus on the viscera of the chapter, Ms. Otaluka suggests a number of ways in which women can well contribute to economic development and the quest for peace. No mere jeremiad, Ms. Otaluka's writing concludes with a number of concrete recommendations that governments around the world should embrace in order to better the lot of women in society.

In addition to disease and the plight of women, Mr. Nick Agbo in *The Scourge of Energy Production and Distribution in Nigeria with Particular Reference to Environmental and Human Rights Issues* points to another concern: the mandate of international and domestic law to protect the right of an individual to a clean environment. Using Nigeria as the focus of his research, Mr. Agbo chronicles the agitations between the Niger Delta residents and oil producers. The level of pollution and destitution wrought by oil extraction rivals that of the world's pollution leaders. Among his recommendations is a clarion call to Nigerian lawyers to rise to the occasion and utilize extant Nigerian and U.S. tort law so as to require that environmental tortfeasors are taught to "play by the rules."

From the broad umbrella of human rights, *Professor* Ignazio Castelucci takes us to the shores of the Red Sea and the more pointed focus of Eritrean family law in *Eclectic Legal Reforms in Africa and the Challenges of Reality: The case for Eritrean Family Law.* Starting with the Civil Codes enacted while Eritrea was still federated with Ethiopia to a 1991 transnational legal regime, Prof. Castelucci uses Eritrean family law to illustrate how a nation, by coupling the beneficences of customary

13. *Id.* at 680.
14. *Id.* at 681

law with the mitigation of government interference, can lead a multi-faceted country to create law respectful of gender equality and the nuclear family. The reforms enacted in Eritrean family law bode well, Prof. Castelucci believes, for positive future changes within the country.[15]

Lest one come to the conclusion that the accumulated writings in this book deal exclusively with the efforts of developing countries and their struggles on the path to modernity, Mr. Phil Cameron in *Travel and Tourism Law of Thailand*, provides the reader with an overview of Thai law that is especially useful to legal tourists. And while Mr. Cameron's subject matter is a bit "softer" than that of some of his co-writers, nonetheless, there exists within Thailand a need to continuously refresh its law, regulations, and enforcement in order to ensure its continued economic development.

As is evident, *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke* is an eclectic collection of international law writings that represents solid testamentary evidence of the honoree's contributions to the international legal academy. The compendium of writings contained within the book's seven hundred and eighty fives pages is nothing short of a transnational salmagundi sufficient to tickle the academic palates of both the tyro and the titan of international law. The buffet of legal repasts is impressive, elegant, and bountiful in both its presentation and its scope—as is the man to whom the book's contributors pay their respect.

Prof. Christian Nwachukwu Okeke can take pride from this book for within its covers are the efforts of eminent colleagues and friends who, through their words, have expressed their respect and admiration for a unique persona dubbed, by Judge Nweze, as *Osuofia* or pathfinder. Pathfinder, indeed.....

The editors and contributors deserve our thanks for their contributions to the ever expanding corpus of international law.

15. Eritrea gained its independence from Ethiopia in 1993.

Annual Survey of International & Comparative Law, Vol. 15 [2009], Iss. 1, Art. 9

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http://www.greenwood.com/catalog/C36210.aspx

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