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## The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario 1923-1957

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# Book Reviews

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C. Ian Kyer and Jerome E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario 1923-1957*. University of Toronto Press, 1987. ISBN 0-8020-3986-3. Price \$40.00.

In the dozen years after the end of the Second World War, long-standing conflicts about the nature of education for the legal profession in Ontario became especially acute. Fortunately, climax and successful compromise came in 1957. In that year the Law Society of Upper Canada, which had controlled legal education and admission to practice from the early days of the Colony of Upper Canada, gave up its monopoly of legal education and conceded an equal position in this respect to Ontario universities willing and able to enter the field. Several were, and promptly did so. Indeed the University of Toronto was already there. For many decades it had been teaching law, but the Law Society refused proper recognition to the University of Toronto law degrees for purposes of admission to the legal profession in the Province.

Under the compromise agreement of 1957, the Law Society continued its own separate school, the Osgoode Hall Law School, as in effect a university law school, with the same power to grant the degree of LL.B. as that just assured to certain of the Ontario universities, including of course the University of Toronto. A standard full-time three-year curriculum was agreed upon for the degree of LL.B. After the degree, wherever obtained, the Law Society then required for all graduates a year of full-time service in a law office, followed by several months of a practice-oriented Bar Admission Course given by the Law Society itself at Osgoode Hall in Toronto. Certain examinations were based on this last period of instruction and success in them completed requirements for admission to the Bar of Ontario. This seems a relatively straightforward result, but it was a very long time in coming in Canada's most wealthy and populous province.

The various roots of present day legal education for Ontario, and equally for the other Provinces of Canada, go back to earlier times in the history of England, France and the United States of America. Until the publication in 1987 of the book here under review, we have been without a thorough, systematic and scholarly account of these roots, and of how they nourished and shaped modern controversies and developments in Canadian legal education. Now, we do indeed have just such an account, thanks to the joint efforts of C. Ian Kyer and Jerome E. Bickenbach. This is one of the most valuable features of their book.

Who are the authors, and how did they come to write this book? They answer themselves in their Preface:

“This book is the product of chance discoveries, happy coincidences, and a working partnership. When Ian Kyer came to the University of Toronto Law School in 1977, he felt he was leaving his historical pursuits behind. When Jerome Bickenbach entered the School the next year, he too feared that he would have little time to think or write about the philosophy of law. Though we had both earned doctorates in our respective disciplines [history and philosophy], we turned to law because employment prospects seemed so much better there.” [Preface — ix]

Kyer and Bickenbach were interested in the compromise of 1957 of which they were beneficiaries. Also, their interest was stimulated when by chance they discovered in odd corners and closets of the University of Toronto Law Buildings several boxes containing files which turned out to be the accumulated papers of Cecil Augustus Wright, for the period 1927-57. Dr. Wright was a brilliant scholar, having graduated in Arts from the University of Western Ontario and later from the Osgoode Hall Law school, with the gold medal for heading the class each time. He then went on to graduate work at the Harvard Law School and secured his doctorate. He was hired as a teacher at the Osgoode Hall Law School in 1927, and continued to teach law in Ontario until his death in 1967, but not at the Osgoode Hall Law School the whole time. Though he was made dean there in March of 1948, he had a confrontation shortly after with the Benchers of the Law Society. At this juncture he resigned and moved to the Faculty of Law at the University of Toronto where he was made dean. For the thirty years from 1927 to 1957 Wright was the chief and most aggressive advocate of the reform of legal education in Ontario. He wanted, for Ontario and for Canada, what he called “an honest to God law school”, on the model afforded by Harvard University Law School, with the students in full-time attendance for three academic years. At the Law Society’s Osgoode Hall Law School, students were very much part-timers at law school lectures, spending most of their days in service at Toronto law offices.

In this crusade, Dr. Wright had allies and enemies. Incidentally, he was never called “Cecil”; to friends and foes alike he soon became known as “Caesar”. His principal opponents were the Benchers of the Law Society of Upper Canada. They were elected by their fellow lawyers in Ontario as the governing body of the profession, and were themselves distinguished and able lawyers in practice. Moreover, most of them were deeply convinced that the best way to train students for the practice of law was as apprentices for most of the day in the law offices of Toronto. The Benchers controlled the Osgoode Hall Law School and hired the very few law teachers who did lecture there to the students early in the morning and late in the afternoon. The Benchers also controlled conditions for admission to the Bar of Ontario. Their model was the

traditional and contemporary system of legal education in England, centred as it was on the apprenticeship of students in the chambers of practicing barristers (the Inns of Court) and the offices of practicing solicitors.

The Kyer-Bickenbach book puts the Harvard-Osgoode differences in a broad context, and there are three main features to the perspective the authors thus provide. In the first place they give us a penetrating biography of Caesar Wright in all aspects of his professional life — as scholar, writer and teacher of law and as law school administrator. Donald Creighton, a great Canadian historian, has said that history is the story of the encounter between character and circumstances. Caesar Wright is the principal character of this story. Secondly, as I have already said, the authors provide in thoughtful detail a unique comparative historical account of the development of legal education in England, France, the United States of America, and British North America before and after Confederation in 1867. Here is the broad background of circumstances to which Creighton alluded. Finally, the authors trace in detail the specific differences and developments in the period 1927-57 between Caesar Wright and his allies on the one hand and the Ontario Benchers on the other hand. In Creighton's terms, this was the encounter leading finally to the compromise of 1957. It is not possible or desirable to rehearse all the details of the thirty-year contest between Caesar Wright and the Benchers. The authors do this with great care, but it takes up half the book. Also, they identify and explain the nature of the main issues concerning legal education, and this does warrant a reviewer's attention.

On the one hand, the Benchers and their supporters preferred the apprenticeship system, the main feature of which was the daily employment of students in Toronto law offices, with some lectures at the Osgoode Hall Law School for an hour or so at the beginning and the end of each day. In fact the law office tasks took most of the students' time, and their attention to lectures was quite secondary. Moreover, the Osgoode Hall Law School stood almost alone in Canada as a professional school governed by the Law Society. It was not part of a general institution of higher learning as were the law faculties of major universities like Harvard. In them the law students gave full-time attention to their studies and their professors for three co-ordinated academic years. Nevertheless, the Benchers were confident that their way was best, following as it did the manner in which barristers and solicitors were qualified in England. Caesar Wright had experienced the Benchers' system and had indeed done very well at it. But then his time at Harvard convinced him that the university way was definitely superior to the Osgoode way.

Historically, as the authors point out, there is a paradox about the English example. Famous English legal scholars had been speaking out in favour of University-centered legal education for admission to practice since the eighteenth century. Their voices were heard in the United States of America and what they advocated came to prevail there. But to this day the English legal profession adheres to the apprenticeship system separate and apart from the English universities for purposes of qualification to practice as a barrister or a solicitor.

The English voice heard most clearly in America was that of Sir William Blackstone, who started teaching English law at Oxford in 1753. (Before this, only Roman Law was taught at Oxford.) Over the next few years, Blackstone's lectures were expanded and published as his famous "Commentaries on the Laws of England". More copies of them were sold in the British American Colonies (soon to become the independent United States) than were sold in England herself.

Kyer and Bickenbach summarize and comment upon Blackstone's views on legal education as follows:

In the first volume of his *Commentaries*, Blackstone strongly criticized the apprenticeship approach to legal education. He found it astonishing that an area of knowledge of such importance was not taught systematically. The notion that students could acquire knowledge of the law in the service of an attorney or barrister Blackstone dismissed as ludicrous: 'If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him.' How, Blackstone asked, could we allow the interpretation and enforcement of the law that vitally affects our property, liberty, and lives to fall into the hands of illiterate men? The only hope for the profession, he argued, was to make an academic education a prerequisite to legal study, and to make legal study part of a university education.

Blackstone's views on the nature and aims of legal education formed the basic creed of those who were to argue for the university law school for the next three centuries: law can be systematically taught, not merely as a body of practical rules but as a science; as a science, law can be taught only in a university setting surrounded by teachers and students of the other sciences. This being so, the argument went, professional law teachers must be skilled both in the practice of the law and in the science of the law and what we would regard today as the kindred social sciences. In addition, legal education needed a literature, the product of specialized legal scholars able to assess and recommend changes in the law. As we shall see, the university setting, the professionalization of legal academics, and the development of legal scholarship formed the core of demands made by the crusaders for university law schools.

Blackstone's aspirations for legal education for 'gentlemen of all ranks and degrees' came to an abrupt end in 1766. Exasperated by the conservatism of the legal profession, itself mostly untrained in the learned

study of the law and unconvinced of the need for such training, Blackstone resigned his post at Oxford. The system of office apprenticeship continued, and, in England at least, the only marks left by Blackstone were the volumes of his *Commentaries*, which the student simply added to the short list of books he was required to master on his own. (p. 8-9)

Concerning Blackstone's influence in America, our authors quote the Harvard law professor James Bradley Thayer, speaking to the American Bar Association in 1895. "We, in America, have carried legal education much farther than it has gone in England. There the systematic teaching of law in schools is but faintly developed. Here it is elaborate, widely favoured, rapidly extending. Why is this? Not because we originated this method. We transplanted our English root, and nurtured and developed it, while at home it was suffered to languish and die down". (p. 13)

Surveying legal education in the various Provinces of Canada after Confederation, we find that while Ontario had followed the English apprenticeship system, Nova Scotia followed the university model. The Dalhousie University Law School, founded in 1883, with the full support of the provincial Bench and Bar, followed the example afforded by Harvard in nearby New England. Likewise, in 1892, the Bench and Bar of Saint John, New Brunswick, established a three-year full-time law school in that city as part of the provincial university. Moving west to Quebec, we find that, from about the middle of the Nineteenth Century, law schools were part of the Universities. This was so in France and continental Europe generally, and the civil law of Quebec was French. Hence the University model was followed in the cases of the Universities of Laval, McGill and Montreal. In the 1920's and 1930's between World War I and World War II, Manitoba, Saskatchewan and Alberta founded law schools as parts of their respective provincial universities, as did British Columbia just after World War II. West of the Great Lakes, the Dalhousie-Harvard model prevailed.

However, the contrast between the Osgoode Hall Law School and the university law schools should not be too sharply drawn, important though it was. Until after World War II, there were very few full-time law teachers at each of the university law schools or at Osgoode. Many if not most of the subjects were taught by practicing lawyers and judges from the city where the law school was located. The few full-time professors taught the remaining subjects, carrying heavy teaching loads in so doing. Except for Osgoode Hall, the teachers, whether part-time or full-time, did have the opportunity to educate full-time students in a university context.

Also, in the Provinces with university law schools, practical training by service in law offices was not neglected. A period of it was required by the respective provincial legal professions, and frequently some final Bar

examinations as well, before admission. But, such apprenticeship was not concurrent with the university academic years. As our authors tell us, Caesar Wright was not opposed to practical training as such, but he was against the Osgoode concurrency.

Wright was realistic enough to know that the complete abandonment of practical training would never be acceptable to the Canadian law societies. Moreover, he was strongly of the opinion that legal education could not ignore practice completely. Ironically, despite the prevailing belief among the benchers that Wright was wholly academically minded, he was not a true academic in the sense of being a detached theoretician. He was not a deep, abstract thinker, but rather a pragmatic, practice-oriented teacher fully convinced of the necessity of practical training. His primary goal was to expose students to rigorous and socially relevant legal training uninterrupted by their law-office apprenticeship. Although he acknowledged the value of practical training, Wright thought that the apprenticeship scheme was a failure. In addition, he was greatly concerned that Canada was not producing legal writing of any sustaining value, and believed that only legal academics, devoting their full time to teaching and research, could fill that glaring need. (160-61)

When Wright became dean of the Osgoode Hall Law School in 1948, he had reasonable grounds to believe that the Benchers would agree to changes making Osgoode in effect a university law school. But it was not to be, not yet. On January 20, 1949, the Benchers, in confidential session, rejected Wright's proposed full-time law school and fully re-affirmed the concurrent system. Wright first learned of this the next day when he read the press release about it in the Toronto newspapers, as did the other full-time members of the Osgoode teaching staff — namely, Bora Laskin, John Willis and Stanley Edwards. All four of them submitted their resignations forthwith, and held a press conference to announce them. Very public and very bitter controversy then ensued.

On March 10, the University of Toronto announced that Wright, Willis and Laskin were joining the University's law faculty, and that Wright was to succeed W.P.M. Kennedy as the dean there, Kennedy being ready to retire. Sidney Smith, the President of the University of Toronto, was a former dean of the Dalhousie Law School. Both he and Kennedy were very much on Wright's side and against the Benchers' position of discrimination against University of Toronto law graduates. Thus, the Law Society found itself facing the school year 1949-50 without a dean or any full-time professors for the Osgoode Hall Law School. Nevertheless, in time for September, 1949, they managed to hire the Dean of the University of Birmingham faculty of Law, C.E. Smalley-Baker. Smalley-Baker was a Canadian, and brought with him a very able English member of the Birmingham law faculty, David L. Smout. In 1950, full-time staff of the Osgoode Law School was brought up to

strength with the appointment of two more highly qualified Canadians, H. Allan Leal and Donald B. Spence.

There was some reduction in the concurrency of apprenticeship with lectures made in the Osgoode School system, but much of it remained, and University of Toronto graduates continued to face an extra year compared to Osgoode graduates in achieving admission to the Bar. For a time, the Benchers remained intransigent about conceding anything to the University of Toronto, and deadlock continued.

But, soon the future changed in favour of university legal education, due to emerging new factors beyond the control of the old contending parties. The authors tell this story in their Chapter 10, entitled "The Road to Compromise". In Ontario after World War II it became apparent that there would be an enormous increase in the demand for legal education as part of greatly expanded enrollments for higher education generally. The necessity for much increased public finance of this, both capital and current, was evident. Osgoode Hall Law School was a private monopoly professional school whose sources of revenue were student fees and fees paid by practicing lawyers to the Law Society of Upper Canada. The simple fact was that the Law Society alone could not afford to maintain their monopoly of legal education and meet the legitimate demand for legal education that was building in Ontario. Nor could the Government of Ontario be expected to finance the Law Society's monopoly school with public funds, especially when there were grave and public doubts about the merit of the Osgoode system anyway. If the Osgoode Hall Law School was to survive and to share in public finance, it would have to be as one law school among several in the Province. Only the University of Toronto and some of the other Ontario universities could provide those other law schools.

But, the few other universities in Ontario which were interested could not be expected to cooperate unless there was a new deal, as the University of Toronto people had been insisting there should be. There had to be a level playing field. It could not be made level for the newcomers unless the discrimination against the University of Toronto law graduates was terminated. Moreover, the interested universities would not accept the concurrency of office apprenticeship and teaching that was the heart of the Law Society's system. So, at last, such concurrency was doomed. As the authors tell us: "Pushed finally by the fiscal realities of modern mass education, the Benchers decided that it was time to assess the possible role of the universities in legal education in Ontario" (249). They took the initiative, and a special committee of Benchers met with representatives of the Ontario universities. The date was April 30, 1955. The negotiations continued to a fruitful result, about two years later.



For all the details, read the book. Suffice it to say here that the details amount to a fascinating lesson in negotiation and diplomacy. The compromise agreement outlined at the start of this review was reached and ratified by all parties by February 15, 1957. In ordinary circumstances, the President and Dean of Law of the University of Toronto would have led the negotiation on behalf of the universities, but the circumstances were not ordinary. By 1955, relations between Caesar Wright and the Benchers were very bitter, and the latter were also dubious about Sidney Smith. However, Queen's University was quite firm in its desire to have a law faculty on the Harvard model as soon as possible, and had not been involved in the Toronto controversy. So, the managers of the negotiations for the interested Ontario universities were, by agreement, W.A. Mackintosh and J.A. Corry, respectively the Principal and Vice Principal of Queen's. Caesar Wright and Sidney Smith trusted them, and so did their counterparts in the other universities concerned. So, also, did the Benchers of the Law Society, headed by Cyril Carson, Q.C. Moreover, J.A. Corry had been a professor of law at the University of Saskatchewan for ten years before he came to Queen's as professor of political science in 1936.

The compromise agreement was worked out in detail by three people: Alex Corry for the universities; and John Arnup and Park Jamieson, two of the leading benchers of the Law Society. They met for the purpose in the Royal York Hotel, Toronto, on January 18 and 19, 1957. When Corry phoned Caesar Wright on January 19 to give him news of what had been agreed, Wright could hardly believe his ears. After his thirty years of advocacy, crusade and controversy, at last the university model for law schools was to be followed for legal education in Ontario.

The fruits of the Law Society of Upper Canada — Ontario Universities Agreement came quickly. Osgoode Hall Law School converted to the new basis forthwith, and the University of Toronto Law School immediately became more attractive to applicants. In September, 1957, Queen's University opened a law school, and in the same year the University of Ottawa did likewise, adding a Common Law side to its law faculty which was already teaching the Civil Law of Quebec. In September, 1959, the University of Western Ontario Law School started operations. In 1967, the University of Windsor established a law faculty.

On July 1, 1968, the Osgoode Hall Law School of York University officially came into existence. This was the transfer of the three academic years of the Law Society's school to York University as the latter's faculty of law. The Bar Admission Course for all Ontario universities remained downtown under the Law Society's auspices in accordance with the agreement of 1957.

Also, the agreement of 1957 was in time to facilitate Ontario's full participation in a great increase in numbers of full-time law teachers in Canada involving all Canadian university law schools. In Ontario in 1950, there were ten full-time teachers of law. As 1990 opens, the six Ontario law schools have a total of 250 full-time professors. Most of the curriculum planning and teaching is in their hands. Nevertheless, over 200 practicing lawyers and judges still function in Ontario as part-time teachers in the law schools. The picture is generally the same in the other Provinces.

All those interested in the history, nature and quality of legal education in our country owe a vote of thanks to C. Ian Kyer and Jerome E. Bickenbach. And the same people owe it to themselves to read this book.

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Jutta Brunnée, *Acid Rain and Ozone Layer Depletion: International Law and Regulation*, New York: Transnational Publishers Inc., 1988. 302 pp.

Although international customary and conventional law have addressed aspects of transfrontier pollution problems for decades,<sup>1</sup> the regional and global environmental degradations which have come to the forefront in the 1980s and 1990s — acid rain, ozone depletion, and global warming, to name but three — represent new challenges to existing international law institutions and concepts. In a sense, the world has over the past two centuries gone through a period of what could be called “technological adolescence”, as individuals and corporations, largely from industrialized nations, exploited the earth’s resources with little if any concern for the immediate and long-term implications of their actions. In the face of ever-mounting and ominous evidence of the seriously ill health of the planet, there has been growing recognition that there are limits to what the earth can provide as well as responsibilities associated with the use of its resources. The as yet unanswered question is whether the structures and concepts of international law developed to this point are or will be adequate to contend with the serious threats to the world’s environment which lie ahead.

Jutta Brunnée’s book *Acid Rain and Ozone Layer Depletion: International Law and Regulation*<sup>2</sup> could be described as an attempt to answer this question by examining legal treatment of the two most significant forms of long range transboundary air pollutants (LRTAP) which have arisen to date. Originally a thesis prepared at Dalhousie Law School, Brunnée’s text follows in the footsteps of a similar, earlier Dalhousie Law School effort, van Lier’s *International Law and Acid Rain*, published in 1981.<sup>3</sup>

After making a detailed analysis of the international response to acid rain and ozone depletion up to 1987, Brunnée arrives at a cautiously optimistic conclusion concerning the ability of contemporary international legal regimes and concepts to deal with global atmospheric pollution problems. In essence, her position is that existing rules of international environmental law provide only broad directions, but cannot evolve quickly enough or respond with sufficient precision to

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1. With respect to customary law, see, for example, the *Trail Smelter* Arbitration, (1938, 1941) III U.N.R.I.A.A., (1949); as to its limitations, see discussion *infra*. For an early example of treatment of pollution matters in a major multilateral convention, see the International Convention for the Prevention of Pollution of the Sea by Oil, London, May 12, 1954.

2. Brunnée, *Acid Rain and Ozone Layer Depletion: International Law and Regulation* New York: Transnational Publishers Inc., 1988.

3. Irene van Lier, *Acid Rain and International Law* (Toronto: Bunsel, 1981).

handle problems such as acid rain and ozone depletion.<sup>4</sup> What is needed, according to Brunnée, is a preventive “management approach” to be added to international environmental law.<sup>5</sup> For Brunnée, this approach is well illustrated by the work of the United Nations Environmental Program (UNEP), which resulted in the Vienna Convention for the Protection of the Ozone Layer<sup>6</sup> and the subsequent Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>7</sup> The two approaches — the reactive, traditional international law system, and the preventive management *modus operandi* — are complementary and mutually reinforcing, since the traditional approach provides the foundation and framework for the specific management regimes created to respond to particular environmental problems.<sup>8</sup>

In the experience of this reviewer, it is all too often that legal-environmental commentators, in their haste to delve into detailed analysis of points of law, leave the reader in the dark by not providing sufficient background information concerning how the problem originated and why it developed in a way it did. In reality, legal analysis of complex issues, such as those surrounding environmental problems, usually only makes sense in light of this broader context. Brunnée does an excellent job of bringing the reader “up to speed” by canvassing the historical, scientific, and economic underpinnings to acid rain and ozone depletion.

Chapter II of the text is devoted to the descriptoin of the scientific aspects of atmospheric pollution. Here, the reader is made aware of, among other things, the impacts (and potential impacts) of acid rain and ozone depletion on human health, lakes, groundwater, fish, soil, forests, crops, wildlife and structures.<sup>9</sup> The lack of conclusive evidence concerning who causes what damage to whom has represented a practical and legal barrier preventing easy resolution of the problem, while at the same time providing a convenient excuse for those nations less enthusiastic about swift clean-up action.<sup>10</sup> Brunnée observes that up to half of the current sulphuric emissions are thought to be natural in origin, a factor which must hamper scientists in their efforts to find parties responsible for damages.<sup>11</sup> In light of such factors, the 1979 Economic

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4. Brunnée, *supra*, note 2, at p. 141.

5. *Ibid.*

6. UNEP/IG 535, March 22, 1985, reprinted in (1987) 26 *I.L.M.* 1516. (hereinafter also referred to as “the Vienna Convention”).

7. UNEP, Final Act, September 16, 1987, reprinted in (1987) 26 *I.L.M.* 1541 (hereinafter also referred to as “the Montreal Protocol”).

8. Brunnée, *supra*, note 2, at p. 268.

9. *Ibid.*, at pp. 14-24; 43-47.

10. See further discussion of this in the context of U.S.-Canada acid rain negotiations *infra*.

11. Brunnée, *supra*, note 2, at p. 11.

Commission of Europe (ECE) Convention on Long-Range Transboundary Air Pollution<sup>12</sup> defines LRTAP as air pollution with origins in one state and adverse effects in another state “at such a distance that it is not possible to distinguish the contribution of individual emission sources. . .”<sup>13</sup> Here we see an example of how the physical characteristics of acid precipitation necessitate a move away from the classic international tort situation where victim and wrongdoer are clearly discernible (eg., the *Trail Smelter*<sup>14</sup> incident), in favour of a more cooperative approach. The difficulty is that as long as some states do not participate in the cooperative scheme<sup>15</sup>, the likelihood of success is greatly diminished.<sup>16</sup>

In the course of the chapter, a number of interesting and little known facts about LRTAP are presented. For example, many might not have been aware that acid rain has been a recognized *local* phenomenon since the 1800s, but that its international consequences only became apparent in the late 1950s.<sup>17</sup> In Canada, the construction of the Inco “superstack” in 1972 in effect transformed a domestic pollution problem into one with transfrontier dimensions.<sup>18</sup> Emerging from this discussion the reader gains an appreciation for another distinctive characteristic of much transfrontier air pollution which makes legal control difficult: there is no easily discernible line between acceptable and unacceptable LRTAP. Although, in international law, it is accepted that state responsibility lies for activities defined as wrongful and therefore subject to prohibition (eg., international crimes), the situation is considerably less clear where injury results from activity not so prohibited.<sup>19</sup>

Brunnée also looks at scientific aspects of the ozone problems. In contrast to the fairly long history and generally well accepted nature of acid rain, the theory that ozone depletion was caused by certain manmade chemicals was not even proposed until 1974.<sup>20</sup> while the

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12. T.I.A.S. No. 10541, Geneva, November 13, 1979, reprinted at (1979) 18 *I.L.M.* 1442 (hereinafter also referred to as “the ECE LRTAP Convention”).

13. Article 1 (b), discussed by Brunnée, *supra*, note 2, at pp. 136-137.

14. *Trail*, *supra*, note 1, discussed in greater detail *infra*.

15. For example, the United Kingdom and the United States have held out, refusing to sign the sulphur protocol passed pursuant to the ECE LRTAP Convention; discussed in greater detail by Brunnée, *supra*, note 2, at p. 185.

16. On this problem, see discussion by Brunnée, *ibid.*, at pp. 53-54; see also p. 140.

17. *Ibid.*, at p. 9.

18. *Ibid.*, at p. 13.

19. See, for example, the evolving work of the International Law Commission concerning “International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law”, discussed briefly by Brunnée, *ibid.*, at pp. 114-115.

20. *Ibid.*, at p. 34.

phenomenon of ozone depletion and its causes are now widely accepted, the extent of the long term effects of such ozone depletion are still a matter of considerable debate.<sup>21</sup> This points to another distinctive characteristic of some of the new global pollution problems which makes their legal control difficult: essentially, the international community is required to respond *in advance* to future, anticipated damages of a speculative nature, *before* they materialize.<sup>22</sup> Again, this supports Brunnée's basic thesis that a cooperative, management approach must be undertaken, that a piecemeal response will not be sufficient to address problems of this magnitude and nature. Moreover, the international response must be swift: it is estimated that, due to the extremely stable state of CFC 12 (a major identified ozone depleting chemical) and the fact that CFCs take years to accumulate in the atmosphere, an immediate 85% reduction in emissions is necessary just to keep current atmospheric ozone concentrations stable.<sup>23</sup>

The third chapter introduces the reader to economic aspects of environmental protection of the atmosphere. Brunnée does an admirable job of synthesizing an enormous range of material here, from theoretical concepts, such as Pareto optimality, market failure, public goods, externalities, and the polluter pays principle<sup>24</sup>, to a more practically-oriented examination of the costs of pollution control compared to the costs of environmental damage.<sup>25</sup> Emerging from this discussion is recognition that it is extremely difficult to attribute specific effects to a particular pollutant, this in turn making prescription of abatement measures problematic since the measures adopted might not solve the problem. Brunnée concludes her remarks on the economic aspects of acid rain by observing some of the limitations of cost-benefit analysis when applied to this area: "... even if the costs for reducing emissions are higher than those of the damage caused to another country it cannot be an excuse for causing that damage on another country's territory. Therefore, what is required is a diplomatic and political rather than an exclusively economic approach to the transboundary problem."<sup>26</sup> In effect, then, economic analysis reveals some of the causes for the current problems, but does not provide the immediate solutions.

Against this backdrop, the international law context as it applies to acid rain and ozone depletion is explored in Chapter IV. In attempting to

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21. *Ibid.*, at pp. 43-47.

22. Observed by Brunnée *ibid.*, at p. 270.

23. *Ibid.*, at p. 38.

24. *Ibid.*, at pp. 52-60.

25. *Ibid.*, at pp. 70-79.

26. *Ibid.*, at p. 77.

describe the principles of international law relevant to LRTAP, Brunnée has taken on a daunting and complex task. Publicists have devoted their entire careers (and countless articles) to the articulation and development of principles of state responsibility and liability pertaining to international environmental degradations.<sup>27</sup> Some of the fundamental principles at play here, such as those relating to liability for injurious consequences arising out of acts not prohibited by international law (i.e., as is arguably the case with cumulative low impact insults to the environment those causing acid rain and ozone depletion) are still in the process of being worked out.<sup>28</sup> Brunnée's basic position is that, by itself, the traditional approach, with its cause-effect requirements and "rule-infringement-responsibility-remedy" system, lacks the ability to respond with adequate swiftness and precision to problems such as acid rain and ozone depletion.<sup>29</sup> It is apparent that Brunnée's objective in this chapter is to survey the major international law principles involved in a manner which lends support to her basic position, and not to portray the current body of international law from a particularly reform-minded perspective. For Brunnée (and for many others), the traditional approach has not in itself been sufficient to meet the challenge: the future lies in internationally cooperative activities and agreements which "flesh out" the general rules. Readers looking for a more aggressive and in-depth assessment of the prospects of traditional international law concepts to respond to the new global environment threats would be best advised to examine some of the many sources Brunnée cites in her footnotes to the chapter.

Main topics of discussion in the chapter are the substantive<sup>30</sup> and procedural<sup>31</sup> rules of international law applicable to long range transboundary air pollution, state responsibility,<sup>32</sup> and the use of national systems.<sup>33</sup> After noting the tension produced by the competing notions of territorial sovereignty (the right of nations to exploit resources within their jurisdiction) and integrity (the obligation of nations not to exploit

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27. The most notable example is probably Professor Gunther Handl. Major articles by him include Handl, "Territorial Sovereignty and the Problem of Transnational Pollution," (1975) 69 *Am. J. Int'l L.* 50; Handl, "State Liability for Accidental Transnational Environmental Damage by Private Persons" (1980) 74 *Am. J. Int'l L.* 525; Handl, "International Liability of States for Marine Pollution" (1983) *Can. Y.B. Int'l L.* 85; Handl, "National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered" (1986) 26 *Nat. Resources J.* 405.

28. See footnote 19, *supra*.

29. Brunnée, *supra*, at p. 141.

30. *Ibid.*, at pp. 83-103.

31. *Ibid.*, at pp. 103-112.

32. *Ibid.*, at pp. 112-121.

33. *Ibid.*, at pp. 124-132.

their resources in such a manner harmful to others), Brunnée then examines the substantive rules applicable. She reduces the major principles involved in “good neighborliness”<sup>34</sup> and “equitable utilization”.<sup>35</sup>

Although aware of the fact that the concept of good neighborliness is a much broader notion and consequently has more general application than merely to environmental situations,<sup>36</sup> Brunnée employs it as shorthand to describe the duty of states to not cause serious damage beyond their territory. Her concepts of the principle as it pertains to environmental contexts is based on a combination of sources, from the Roman law maxim *sic utere ut alienum non laedas*,<sup>37</sup> to the *Trail Smelter* arbitrations,<sup>38</sup> Principle 21 of the Stockholm Declaration,<sup>39</sup> and the preamble of the U.N. Charter,<sup>40</sup> among others. Building on *sic utere* and *Trail*, she starts from the initial (and conservative) position that states cannot cause serious harm to other states. Principle 21 is used by Brunnée<sup>41</sup> to broaden this limited state-to-state obligation to the more comprehensive duty to not cause harm to “areas beyond the limits of national jurisdiction”.<sup>42</sup> Synthesizing the foregoing with the *Corfu Channel* case<sup>43</sup> (state obligation not to allow knowingly its territory to be used contrary to the rights of other states<sup>44</sup>), the *Palmas* cases<sup>45</sup> (state obligation to protect within the territory the rights of other states<sup>46</sup>) and the *Alabama* decision<sup>47</sup> (state obligation to use all due care in the

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34. *Ibid.*, at pp. 87-98.

35. *Ibid.*, at pp. 98-103.

36. See, e.g., opening discussion at p. 87; at p. 88, Brunnée describes *Trail* as a decision which “confirmed and specified the rather broad notion” of good neighborliness; at p. 90 she refers to good neighborliness as a “general principle” occurring in the preamble to the U.N. Charter which underscores the determination of states to live together in peace with one another as good neighbors.

37. *Ibid.*, at p. 87.

38. *Trail, supra*, note 1. Brunnée is careful to note its well recognized limitations, such as the fact that Canada had admitted liability prior to submitting the case to arbitration (see, e.g., p. 89), but nevertheless relies on it substantially.

39. U.N. Doc. A/Conf. 48/14, reprinted in (1972) *I.L.M.* 1416 (hereinafter referred to as “Principle 21”, and the “the Stockholm Declaration”). Discussed by Brunnée at pp. 89-90.

40. See note 36, *supra*.

41. Brunnée is careful to note its limitations — most obviously its non-binding nature, and the fact that principle 22 indicates a lack of consensus with respect to the question of liability: see Brunnée, note 2, *supra* at pp. 89-92.

42. *Ibid.*, at p. 89; see also at p. 136.

43. (1949) *I.C.J. Reports* 4.

44. Brunnée, *supra*, note 2, at pp. 94-95.

45. P.C. Arb. 1928 No. XIX in 2 *R.I.A.A.*

46. Brunnée, *supra*, note 2, at p. 95.

47. *Alabama Claims* case summary by P. Seidel, *Alabama Case in R. Bernhardt, ed., Encyclopedia of Public International Law*, instalment 2 (1983) at 11, 12.



performance of international obligations<sup>48</sup>), Brunnée builds a preventive component into her obligation not to cause environmental harm.<sup>49</sup> She confirms her formulation by citing a number of examples of treaty provisions and state practices consistent with it.<sup>50</sup>

The principle of good neighborliness is of such a broad nature that some commentators have gone so far as to suggest that it encompasses the concept of equitable utilization.<sup>51</sup> Although Brunnée loads a great deal into her version of good neighborliness, she treats equitable utilization as separate and distinct. The extension of the principle of equitable utilization from the context in which it was originally articulated (shared water resources) to regional air sheds (eg., continental acid rain) is discussed, as are its limitations.<sup>52</sup> Later, Brunnée notes the particular relevance of this principle to ozone depletion as an instance of the “global commons” phenomenon, given that, as with water basins, the ozone layer has a limited assimilative capacity and discernible boundaries.<sup>53</sup> The relationship between equitable utilization and the obligation to not cause significant harm is also examined, with Brunnée concluding that a utilization which causes significant transboundary harm would be considered inequitable in the absence of exceptional justifying circumstances.<sup>54</sup>

Brunnée relies on the combined principles of “[t]he ‘good neighborliness’ of nations sharing natural resources”<sup>55</sup> as the well-spring for many procedural obligations of considerable importance of the problem of long range air pollution. The obligations of states to cooperate, notify and inform, consult and negotiate are all surveyed.<sup>56</sup> Brunnée rightly emphasizes that resolution of the acid rain and ozone depletion problems, given their magnitude and nature, depends heavily on states fulfilling these procedural obligations.<sup>57</sup>

Determining the appropriate rules of state responsibility applicable to transboundary pollution has occupied the attention of the international legal community for many years. Problems arise when attempts are made

48. Brunnée, *supra*, note 2, at p. 95.

49. *Ibid.*, at pp. 94-96.

50. *Ibid.*, at pp. 96-98.

51. Eg., Goldie, “Development of an International Environmental Law — An Appraisal” in J. Hargrove, ed., *Law, Institutions, and the Global Environment*, Oceana Publications, Dobbs Ferry, N.Y., 1972, 104-165 at pp. 130-131.

52. Brunnée, *supra*, note 2, at pp. 98-103.

53. *Ibid.*, at p. 140.

54. *Ibid.*, at p. 103; pp 137-138.

55. *Ibid.*, at p. 103.

56. *Ibid.*, at pp. 103-111.

57. *Ibid.*, at p. 138, 140.

to translate the general obligations to prevent harm into specific and practicable rules resulting in liability. Thus, while Principle 21 of the Stockholm Declaration is evidence that state responsibility to avoid transboundary harm is generally accepted, the same Declaration also noted that international law regarding liability and compensation for victims needs to be developed (principle 22).<sup>58</sup> Issues yet to be conclusively resolved, which are discussed by Brunnée, include liability for acts, such as air pollution, which are not prohibited in international law, but which nevertheless cause harm,<sup>59</sup> the threshold level of harm necessary to attract liability,<sup>60</sup> and what standard of liability is appropriate<sup>61</sup>. Still, the author notes a number of potentially promising lines of attack: first, as a starting point, there is the long accepted rule established in the *Chorzow Factory* case<sup>62</sup> that “the breach of an engagement, involves an obligation to make reparation in an adequate form”.<sup>63</sup> While the precise terms of the “serious harm” threshold are still debated and thus likely to continue to pose problems in the case of substantive obligations,<sup>64</sup> Brunnée correctly notes that with respect to procedural obligations to cooperate, inform and consult “the effects of LRTAP have crossed the threshold of ‘serious impact’ activating the duty as such.”<sup>65</sup>

In spite of the fact that problems of acid rain and ozone depletion are quintessentially international in scope, an important role can and has been played by national legal systems on these types of issues. After noting the problems associated with use of national courts, Brunnée discusses the progressive “Nordic Convention”,<sup>66</sup> which gives any person located in the contracting state and affected by environmentally harmful activities of another contracting state the right to bring an action (including proceedings for compensation for damages) to the same extent and on the same terms as a legal entity of the state in which the activities are being carried out.<sup>68</sup> The U.S. *Clean Air Act*<sup>68</sup> — Canadian *Clean Air*

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58. *Ibid.*, at p. 113.

59. Briefly discussed by Brunnée, *ibid.*, at pp. 114-115.

60. *Ibid.*, at pp. 115-116, and 136-140.

61. Brunnée concludes that, in spite of the move towards strict liability for ultrahazardous activities, a fault (due diligence) standard is appropriate for LRTAP situations: *ibid.*, at pp. 117-119.

62. (1928) *PCIJ* Ser. A. No. 17 21.

63. Brunnée, *Ibid.*, at p. 112.

64. *Ibid.*, at p. 116, 136,140, as confirmed by Handl, 1986, *supra*, note 27, at p. 412.

65. *Ibid.*, at p. 139.

66. 1974 Convention on the Protection of the Environment, reprinted in (1974) 13 *ILL.M.* 591.

67. Brunnée, *supra*, at pp. 126-127.

68. 42 U.S.C.

*Act*<sup>69</sup> reciprocal treatment provisions, and problems associated therewith are also summarized.<sup>70</sup>

In light of the limitations of the traditional international law approach, with its broadly worded obligations, its emphasis on serious damage and causation, as well as its slowly evolving nature, Brunnée concludes that the existing international law system is inadequate by itself, but provides the foundation upon which a preventive management approach must be added.<sup>71</sup> In this stance, Brunnée could be accused of exaggerating the limitations of the existing international law system, and expressing undue faith in the "management approach": in the final analysis, even the preventive regimes she discusses depend for their proper functioning on their being clearly established and accepted obligations and rules of liability. In this respect, some of the more progressive aspects of international law, such as the ongoing but as yet incomplete work of the ILC on liability for harm arising from acts not prohibited in international law and the move towards acceptance of strict liability as the acceptable standard for cases of environmental harm are perhaps not here given the attention they deserve.

In Chapter V, the early development of the cooperative, management LRTAP approach is set out, particularly as it applies to the acid rain problem. Discussion begins with a description of the United Nations Environmental Program in the early 1970s, and its use of Action Plans.<sup>72</sup> Also examined are the efforts of regional or limited membership organizations, including the Council of Europe, OECD, and U.N.'s Economic Commission for Europe as well as the Economic and Social Commission for Asia and the Pacific, the Nordic Council, the European Economic Community, the various bilateral arrangements.<sup>73</sup> Brunnée's survey reveals some of the strengths and weaknesses, and varied institutional responses to LRTAP provided by the international community. The major subjects of discussion in the chapter are the ECE LRTAP Convention,<sup>74</sup> and the ongoing Canada-U.S. acid rain negotiations.<sup>75</sup>

The impetus for the 1979 ECE LRTAP Convention are traced back to a statement made by President Leonid Brezhnev of the Soviet Union at

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69. S.C. 1970-72, c. 47; now *Canadian Environmental Protection Act*, S.C. 1988, c 22.

70. Brunnée, *supra*, note 2, at pp. 130-132.

71. *Ibid.*, at p. 141.

72. *Ibid.*, at pp. 143-149.

73. *Ibid.*, at pp. 150-223.

74. *Ibid.*, at pp. 175-186.

75. *Ibid.*, at pp. 190-210.

the 1975 conference, calling for international approaches to the pan-European problems associated with energy, transport, and the environment.<sup>76</sup> Norway and Sweden seized on the ECE's unique East-West membership, and the conference's recommendations for greater cooperations with respect to fuel desulphurization and control of NOX as an opportunity to forge an LRTAP agreement.<sup>77</sup> Negotiations began in 1977, culminating in the adoption of the treaty in 1979 and ratification in 1982.<sup>78</sup>

The provisions of the convention are examined in some detail by Brunnée.<sup>79</sup> While critical of the lack of hard commitments for action and innumerable qualifiers contained in the Convention and protocols, she also provides valuable insights as to why the somewhat motherhood nature of the Convention was inevitable, given the diversity of interests and countries represented.<sup>80</sup> In spite of its many weaknesses, Brunnée views the Convention as a positive contribution toward resolution of the LRTAP problem, emphasizing in particular the flexibility of the framework approach for dealing with an issue the subject of scientific debate and significant economic implications.<sup>81</sup>

The multi-state activities of the ECE which culminated in the LRTAP conventions and protocols are constructively contrasted by Brunnée with the bilateral Canada-U.S. acid rain negotiations.<sup>82</sup> That most European countries are both polluters and victims is described as a fact conducive of regional cooperation, whereas in the North American situation, the accepted victim-polluter (i.e., Canada U.S.) relation has made solutions less obvious.<sup>83</sup> On the other hand, the long tradition of cooperation between Canada and the United States is considered by Brunnée to be an important motivating factor for negotiated resolution of the problem.<sup>84</sup> The author analyzes the role of the IJC as a long respected institutional mechanism used to address Canada-U.S. border resource conflicts.<sup>85</sup> The development of the International Joint Commission's role in environmental matters is set out.<sup>86</sup> As to why the IJC has not played a central role in resolution of the acid rain problem, Brunnée realistically suggests

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76. *Ibid.*, at p. 76.

77. *Ibid.*

78. *Ibid.*, at pp. 176-177.

79. *Ibid.*, at pp. 177-186.

80. *Ibid.*, at pp. 184-186.

81. *Ibid.*

82. *Ibid.*, at pp. 190-210.

83. *Ibid.*, at pp. 190-191.

84. *Ibid.*, at p. 191.

85. *Ibid.*, at pp. 192-198.

86. *Ibid.*

that the ecological, economic and political dimensions of the issue are of a national scale, and that it is perhaps too much to expect the governments to relinquish control over such decisions to an independent body.<sup>87</sup>

Negotiations between the two countries outside the IJC framework are also examined, including the 1978 exchange of notes which established a research consultation group,<sup>88</sup> and the signing of a Memorandum of Intent in 1980.<sup>89</sup> Brunnée points to the coming into office of the Regan administration in January 1981 as a turning point in Canada-U.S. relations over acid rain.<sup>90</sup> U.S. manipulation of the scientists appointed to the working groups lead to questionable quality of work and criticisms of its objectivity, eventually resulting in the Americans adopting a frustrating (for the Canadians) “go slow, more research needed” position.<sup>91</sup> When negotiations subsequently broke down, Canada began unilateral reductions.<sup>92</sup> In a continuing effort to reduce some of the scientific uncertainty, in 1983 a tracer experiment agreement was signed between the two countries,<sup>93</sup> and in 1985 special envoys were appointed by the respective governments,<sup>94</sup> who recommended (among other things) a multi-million dollar commercial technology demonstration program in the U.S.<sup>95</sup> Brunnée’s account of the development of the management approach to address the acid rain problem amply demonstrates that behind every bilateral agreement, memorandum of intent, or multi-lateral convention on acid rain lies a complex interplay of institutional, legal, political, scientific and socio-economic factors. Understanding such factors enhances our ability to respond through appropriate legal and institutional measures to future environmental threats.

Brunnée then looks in detail at the conception and development of the Vienna Convention on the Protection of the Ozone Layer and subsequent Montreal Protocol in Chapter VI. Given that the Convention and Protocol represent the first example of a truly global management approach to an environmental problem addressed by countries from a variety of ideological and economic backgrounds, and given that the

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87. *Ibid.*, at p. 208.

88. *Ibid.*, at p. 199.

89. *Ibid.*, at p. 200.

90. *Ibid.*, at p. 202.

91. *Ibid.*, at pp. 202-203.

92. *Ibid.*, at p. 204.

93. *Ibid.*, at p. 205.

94. *Ibid.*

95. *Ibid.*, at p. 206.

agreements were reached in record time (as mentioned earlier, the problem of ozone layer depletion was not even scientifically recognized until 1974), it is not surprising that this approach is presented as the prototype upon which other agreements could be patterned.

In the course of her analysis, Brunnée reveals some of the substantive and procedural weaknesses as well as the strengths of the Convention and Protocol: for example, the probable insufficiency of the agreed upon CFC reductions,<sup>96</sup> and the fact that there is no mandatory procedure for dispute settlement<sup>97</sup> are two continuing problems (others have gone much farther in criticizing the terms of the Convention and Protocol.)<sup>98</sup> Brunnée sets out the integral role played by UNEP in initiating and promoting the drafting of the agreements and also describes the widely diverging interests of the parties which became evident during the negotiation phase preceding the drafting of the agreements.<sup>99</sup> Rifts between the EEC and the U.S. developed over whether or not limits should be placed on production or on consumption,<sup>100</sup> as well, the unique position of developing countries, who have not been significant contributors to the problem in the first place and did not want their ability to develop compromised by the agreement, also had to be recognized in the terms of the agreement.<sup>101</sup> Interestingly, Brunnée attributes some of the aggressiveness in which the U.S. pursued the negotiation of the agreement to a domestic legal action against the federal Environmental Protection Agency.<sup>102</sup> As with her evaluation of the acid rain agreements, Brunnée here indicates her support for the use of a framework agreement approach to address controversial issues marked by scientific uncertainty.<sup>103</sup>

Throughout the book, Brunnée compares and contrasts the differences between acid rain and ozone depletion, and between the positions of the developed and developing nations to good effect. As a result, the reader gains an appreciation for how the legal form of international pollution agreements is in large part determined by such factors as whether the environmental problem is perceived as a regional threat (eg., acid rain) or

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96. *Ibid.*, at p. 251.

97. *Ibid.*, at p. 235 and 267.

98. See, eg., P. Tourangeau, "The Montreal Protocol on Substances that Deplete the Ozone Layer: Can It Keep Us All from Needing Hats, Sunglasses, and Suntan Lotions?" (1988-1989) 11 *Hastings Int'l and Comp. L.Rev.* 509, esp. at pp. 519-540.

99. Brunnée, *supra*, note 2, at pp. 226-229.

100. *Ibid.*, at pp. 240-249.

101. *Ibid.*, at pp. 238-239.

102. *Ibid.*, at pp. 249-250.

103. *Ibid.*, at pp. 250-251.

as global in nature, and whether the problem is perceived by the actions of (and therefore primarily the responsibility of) the industrialized nations, as opposed to that of developing states.<sup>104</sup>

Although Brunnée's account ends with discussion of events as of late 1987, the story is far from over. While the Vienna Convention entered into force September 22, 1988, and the protocol on January 1, 1989, some of the potentially most difficult components of the agreements have yet to be agreed upon: for example, procedures for determining incidents of non-compliance with Protocol terms have not yet been worked out, nor is there yet a procedure for deciding on the treatment of non-complying nations. On the acid rain front, U.S. President Bush's recent *Clean Air Act* legislative amendment initiatives could, if they survive Congress scrutiny intact, prove to be a major step toward Canada-U.S. agreement on this problem.

The atmospheric pollution issue which has now moved to centre stage in the international community is global warming. The March 11, 1989 Declaration of the Hague<sup>105</sup> calls for the development of new institutional authority, either by strengthening existing institutions or by creating an institution with "new and more effective decision-making and enforcement mechanisms" to address the global warming issue.<sup>105</sup> Decisions of the proposed authority are to be subject to review by the International Court of Justice at the Hague.<sup>107</sup> Twenty-four nations originally signed the declaration, and another nine signatories were announced following a meeting in Paris on May 9-10, 1989.<sup>108</sup> Signatories represent developed and developing countries, including Australia, Brazil, Canada, Czechoslovakia, Egypt, France, Hungary, Japan, India, Indonesia, Italy, the Ivory Coast, New Zealand, Senegal, Sweden, Venezuela, West Germany and Zimbabwe.<sup>109</sup> French Prime Minister Michel Rocard is reported to have invited nations that have not yet signed the declaration to become involved at the earliest possible time, so as to protect their interests before the regulations and enforcement mechanisms are finalized.<sup>110</sup>

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104. On this subject, India has recently demanded that developed countries compensate it to the tune of \$2 billion to entice it to sign the ozone protocol: "India Wants \$2 Billion From Others to Sign Ozone Protocol", *BNA International Environment Reporter*, August, 1989, p. 389.

105. 12 INER 176, text reprinted in *International Digest of Health Legislation*, 1989, 40 (3) at pp. 122-724.

106. *Ibid.*, preamble.

107. *Ibid.*, principle (c).

108. Per "Meeting strengthens Hague Accord; Nine More Nations Sign Declaration", *BNA International Environment Reporter*, June, 1989, p. 287.

109. *Ibid.*

110. *Ibid.*

If, in their call for an international agency with new and effective “enforcement” mechanisms, the signatories to the Hague initiative envisage more than simply the trade sanctions and “dispute settlement mechanisms” in existing conventions, then it would seem self-evident that what is being considered is the establishment of an international environmental regime which is considerably more powerful than anything currently in place, several steps beyond the management approach described in the Vienna Convention and Montreal Protocol. Clearly, for such an institution to materialize, nations must first agree to relinquish significant aspects of sovereignty. In the opinion of this reviewer, one weakness of the Brunnée text is the apparent reluctance of the author to explore the possibility of such a global environmental authority (and its practical and legal implications) in the context of her discussion of the ozone depletion management approach. Perhaps even as late as 1987 the likelihood of a world environmental enforcement agency seemed beyond the realm of possibility, although calls for such an entity have been made since at least 1970.<sup>111</sup>

A final note on the general readability of the text is in order. It has been said that a thesis or dissertation is only rarely publishable as a book, and even more rarely as a good one.<sup>112</sup> Brunnée’s book is obviously one of the rare successes. It is eminently readable, well organized and thoroughly documented up to late 1987. It builds substantially on the earlier work of van Lier.<sup>113</sup> There are limitations to the book: the lack of detailed discussion of the new developments in state responsibility and liability, lack of aggressive criticism of the ozone pact, and a failure to explore beyond the currently used approaches to international environmental problems. But these are inevitable deficiencies to be expected in a text which attempts to provide an overview of the issues. Anyone wishing to gain an understanding of this fast-developing area of international law would be well advised to start by obtaining a copy of this book.

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111. See, eg., G. Kennan, “To Prevent a World Wasteland: A Proposal” (1970), 48 *Foreign Affairs* 401-413.

112. E. Harman and I. Montague, eds., *The Thesis and the Book* Toronto: U. of T. Press, 1978.

113. van Lier, *supra*, note 3.



*William C. Gilmore, Newfoundland and Dominion Status. Toronto, Calgary, Vancouver: Carswell, 1988. Pp. XX, 271. (\$48.00)\**

The relationship between Canada and Newfoundland was under stress for a number of different reasons during the eighties. There was a dispute over off-shore mineral rights<sup>1</sup> as well as concern over French fishing rights.<sup>2</sup> For those interested in the relationship, Dr. Gilmore's book, *Newfoundland and Dominion<sup>3</sup> Status*, subtitled *The External Affairs Competence and International Law Status of Newfoundland, 1855-1934*, therefore provides a useful historical background as well as fascinating information about the constitutional development of Newfoundland. This may be of interest as well to constitutional and international scholars generally as well as to Newfoundland's neighbours in the Maritimes.

The author is aware of the practical significance of his work. For instance, he refers to the recent disputes between the federal government and Newfoundland over the Continental Shelf.

In February 1983, the Newfoundland Court of Appeal held that the province of Newfoundland had both property rights in and legislative jurisdiction over the mineral resources of the territorial sea to three nautical miles from the baselines, but that the federal government and parliament possessed the appropriate rights and powers in respect of the Continental Shelf. In March 1984 the Supreme Court of Canada confirmed the position of the Canadian federal authorities in relation to the Continental Shelf. In this instance the question of the territorial sea was excluded but may well be the subject of separate judicial consideration in the future. In both of these constitutional references it should be noted that the pre-Confederation position of Newfoundland in international law was directly at issue and specifically addressed.<sup>4</sup>

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\*The reviewer would like to thank her colleagues Dianne Pothier and David Vanderzwaag for their assistance.

1. See the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3. For comments on the constitutional validity of the Atlantic Accord, see Rowland J. Harrison, "Jurisdiction over Offshore Installations in Canada", in Ian Townsend-Gault (ed.) *Offshore Petroleum Installations Law and Financing Canada and the United States*, International Bar Association, London, 1986, 39, at 67-68.

2. It is difficult to find an academic analysis of this, but see Douglas Day, "Defining Another Canadian Maritime Boundary: St. Pierre and Miquelon Dispute Goes to International Settlement" (1989), 7(3) *The Operational Geographer* 12.

3. The term "Dominion" does not have a very clear meaning. Gilmore quotes a 1930 internal Dominions Office memorandum as stating that dominion status is not co-extensive with all forms of responsible government. Rather it "would seem to connote a member of the British Commonwealth of Nations separately represented at the Imperial Conference, having full autonomy and having also a very advanced form of democratic government". P. 2. However, Newfoundland still seemed to be formally described as "Island" or "Colony". See p. 175, note 151.

4. Gilmore, at p. 4 (footnotes omitted). However, the pre-Confederation position was in the

The focus of the book is on the period 1855-1934, from the introduction of responsible government to the Commission of Government on 16th February 1934.<sup>5</sup> The story is one of the gradual evolution of Newfoundland's role in external affairs, during a distinctive period in her history. Part 1, based on extensive archival research, deals with the shift in power from London to Newfoundland, although the failure to seek or be granted membership in the League of Nations made the position somewhat confused. Part 2 deals with the legal status of Newfoundland and the question of whether it ever developed a separate international juridical personality.

Newfoundland achieved responsible government in 1855. Gilmore describes in Chapter 1 how in the early years of such government United Kingdom authorities believed in "complete colonial subordination in the field of external affairs."<sup>6</sup> He then traces the spheres of increasing autonomy, however, for example, in the area of commercial treaty-making. One focus of Newfoundland pressure for more power with respect to non-commercial treaties was on foreign fishing rights. In 1857, the Anglo-French negotiation on French fishing rights was concluded. The agreement was received with "considerable popular discontent" in Newfoundland and rejected by the Council and Assembly who insisted that "the consent of the community of Newfoundland . . . [was] the essential preliminary to any modification of their territorial or maritime rights".<sup>7</sup>

This show of defiance did result in some recognition of the principle of consultation.<sup>8</sup> Nevertheless the most important aspects of foreign policy remained under the control of the United Kingdom. Chapter 2 deals with the conduct of the first world war. The failure to consult the Dominions about the declaration of war caused considerable concern and led Lloyd George, when he formed a new government in 1916, to call a special War Conference of the Empire. Sir E. Morris, the Prime Minister of Newfoundland, was invited to this conference, which played a role in sweeping aside Dominion exclusion from decisions about war and peace and was part of a movement toward equality of status. Nevertheless,

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end not a deciding factor with respect to the continental shelf. See *Reference re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9 (Nfld. C.A.) and *Re Seabed and Subsoil of Continental Shelf Offshore Nfld.* (1984), 5 D.L.R. (4th) 385 (S.C.C.).

5. For a brief description of the status of Newfoundland during the suspension of responsible government, see *Re Seabed and Subsoil of Continental Shelf Offshore Nfld.*, *ibid.*, at pp. 403-406.

6. P. 15.

7. Gilmore cites the "Journal of the Newfoundland Assembly 1857", Appendix, p. 462.

8. Pp. 37-44.

Newfoundland, unlike the other Dominions, did not have separate representation at the Plenary Conference at the Paris Peace Conference and did not sign the Treaty of Versailles. (It seemed that a sense was developing that all Dominions were equal but some had more dominion than others.) More significant than the formality of a signature however, was Newfoundland's exclusion from original membership in the League of Nations. This was to contribute to the complexity of Newfoundland's status in later years, for instance, with respect to the mode of signature of international agreements.

Chapter 3 deals with post-war constitutional developments, including treaty-making and diplomatic representation. These were advances consistent with the recognition of equality of status. Newfoundland was relatively inactive in international affairs but interest continued to be shown in fisheries as well as in international communications and the regulation of postal matters.<sup>9</sup> However, it was possible for an official of the Foreign Office to state in 1923 that:

There are two types of British Dominion status: the major type, as exists in Canada, etc., whom the C.O. habitually consult before involving them in international commitments; and the minor of which hitherto Newfoundland has been unique . . . .<sup>10</sup>

The Balfour Declaration, 1926, is the subject of Chapter 4, which covers the period ending in 1934. Led by South Africa, there was a movement in favour of full recognition of equality of status. This issue dominated the Imperial Conference in 1926 and led to the Balfour Declaration. Newfoundland was not particularly keen on departing from a policy of working things out as they arose. The then Prime Minister spoke at the Conference, noting that he attended "as the representative of what we much prefer to call Britain's oldest colony rather than Britain's youngest Dominion".<sup>11</sup> In the end the agreed formula on equality of status recognised Newfoundland as equal whether she wanted to be or not.

Nevertheless, equal or no, uncertainty continued about Newfoundland's international status. With respect to the mode of signature of international agreements, Gilmore contrasts the view of the Dominions Office, which was that Newfoundland should be able to sign as a separate contracting government, with that of the Foreign Office. The latter was that Newfoundland had no separate international status at all and was

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9. Gilmore cites as an example the fact that an independent postal convention with the United States was concluded in 1926. P. 98.

10. P. 102.

11. P. 104.

based on lack of membership in the League of Nations. During this period, Newfoundland showed little interest in foreign affairs although it did create its own national flag in 1931.<sup>12</sup> Readers who would find pleasure in a story of the active assertion of equal status will not experience it in this chapter. Newfoundland was evidently willing to stand up for itself on particular issues such as fisheries, but did not value abstract declarations of equality which may have had little practical value given the population and resources of the island. Content to leave such matters largely to the United Kingdom, its status remained ambiguous.

The internal constitutional position was not crystal-clear either. Gilmore describes in Chapter 5 how the powers of reservation and disallowance fell into disuse and were finally abandoned. The complexities of the role of the Governor, given recognition of equal status, are discussed, as is the power of the United Kingdom to exercise direct legislative control. This was rarely used, although Gilmore provides an example in 1907, also relating to fish.

In 1907 the refusal of Newfoundland to accept a *modus vivendi* with the United States pending the settlement by arbitration of the issue as to fishery rights resulted in the overriding of the local law by an Order in Council . . . passed to enable the Crown to carry out the terms of the Anglo-American treaty of 1818.<sup>13</sup>

The Statute of Westminster did not exactly clarify the situation with respect to direct legislation. Gilmore notes, on p. 170, that the Preamble, which states the by-then conventional position of no legislation without consent, applied to Newfoundland. However, certain operative sections, including section 4, which gave statutory expression to the idea that no law should be made unless at the request and with the consent of the Dominion, did not, at Newfoundland's request, apply without independent adopting legislation. "No steps were taken prior to the introduction of Commission of Government in February 1934 to bring these sections into force."<sup>14</sup>

By the time a reader reached the analysis of whether Newfoundland achieved statehood prior to 1934, or some lesser degree of international personality prior to 1926, in the final chapter, she would be very well-informed. The relevant historical events, the legal concepts, the subtleties of the issues, and their significance with respect to off-shore mineral rights have been clearly discussed.

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12. P. 103.

13. P. 160, quoting A.B. Keith, *Dominion Autonomy in Practice*, Oxford University Press, London 1929, at 55. Keith called this an "extraordinary step".

14. P. 171. See generally on the Statute of Westminster, pp. 168-173.

In *Reference Re Mineral and Other Natural Resources of the Continental Shelf*,<sup>15</sup> Newfoundland argued that it possessed sufficient international personality to enjoy the rights of a coastal state over the seabed and subsoil. In addition it was argued that these rights remained with the province within the Terms of Union. Canada argued that Newfoundland lacked the status to acquire such rights and that Newfoundland was in much the same position as the other provinces. Scholarly opinion varied, although there is modern support for the idea that statehood was achieved.<sup>16</sup> This view was shared by the Newfoundland Court of Appeal.<sup>17</sup> Gilmore provides a closely-reasoned argument, based to a certain extent on Canadian views of when Canada achieved statehood, that the 1926 Balfour Declaration was the critical date rather than the Statute of Westminster. He also stresses the voluntary nature of the fact that Newfoundland left much of the conduct of its external affairs in the hands of the British.<sup>18</sup> This point can be used to illustrate a feature of the whole book. Based on extensive archival research, and displaying an impressive knowledge of the literature in the various fields covered, it is not intended to address the reality of political life in Newfoundland in the period in question. While it is an historical book it is not that kind of history. Thus it is possible for the author to say that Newfoundland acted voluntarily in not exercising its external affairs powers. While convincing on a legal level, this does not enable the reader to assess its plausibility on the level of reality. Did Newfoundland actually have the human and economic resources to do anything else? Is that relevant to a discussion of statehood or any lesser degree of international personality? The lack of enthusiasm with which Newfoundland greeted declarations of equal status sought by some other Dominions suggests that Newfoundland was not acting voluntarily in the sense of making a choice between two feasible alternatives. However, the book does no more than allow one to guess at this.

Gilmore reaches two conclusions. The first relates to statehood:

Although it thus constitutes the borderline case *par excellence*, the above analysis suggests that by the time of the 1926 Balfour Declaration

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15. (1983), 145 D.L.R. (3d) 9 (Nfld. C.A.).

16. P. 189, note 65.

17. However the Supreme Court of Canada stressed the effect of the Terms of Union in 1949 as well as the fact that international law on the continental shelf had not attained concrete form in 1949 in deciding that it is Canada that has legislative jurisdiction as well as the right to explore and exploit. See *Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 D.L.R. (4th) 385 (S.C.C.). Hence events prior to 1934 were relatively insignificant.

18. P. 220.

Newfoundland should be regarded as having satisfied the highly elastic criteria for statehood established by international law.<sup>19</sup>

The second, “in no way inconsistent” conclusion relates to whether Newfoundland developed an international personality prior to 1926.

Although all the Dominions shared an equal constitutional position prior to their achievement of statehood, their positions within the sphere of international law differed according to the nature and diversity of the international activities in which they in fact engaged. Viewed in this light it is clear that in spite of the possession of an equal potential for international action, Newfoundland obtained in law a less advanced degree of international legal personality.<sup>20</sup>

Here the book comes to a somewhat abrupt end.

This is an impressive and scholarly book which makes an important contribution to filling the gap in the legal literature about Newfoundland. It is beautifully produced<sup>21</sup> and elegantly written. The Carswell Co. Ltd. is to be congratulated, as are the Law Foundation of Newfoundland and the Government of Newfoundland for their financial support. The author has written a fine book, which certainly justifies that support.

Christine Boyle,  
Dalhousie Law School

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19. P. 231.

20. P. 246.

21. The Carswell Co. Ltd. seems to have had a very uneven record over the past several years. Other examples of their well-produced books include Michael J. Trebilcock, *The Common Law of Restraint of Trade*, 1986. Compare however the second edition of Don Stuart, *Canadian Criminal Law*, with its numerous typing/printing errors. Anyone negotiating a publishing contract with Carswells should insist on the Gilmore/Trebilcock editor, if (s)he is still available!

Douglas M. Johnston, *The Theory and History of Ocean Boundary Making*, Montreal: McGill-Queen's University Press, 1988. Pp. xii, 445. \$39.95 (Hardcover). ISBN 0-7735-0624-1.

Over the years, Douglas Johnston has written and edited a large body of literature on the subject of ocean boundary making. The "functionalist" approach to ocean boundary which he presents in this book is obviously the result of his careful accumulation of knowledge and experience over many years' involvement with the topic as researcher and writer. While at Dalhousie University in Halifax he had significant and direct involvement with the Ocean Studies Program.

"In the modern era, the world has witnessed the proliferation of coastal and offshore zones designed chiefly for the purposes of resource development and management, especially in the period since the end of World War II."

Johnston's book provides a lengthy synthesis of all disciplines relevant to ocean boundary making. The author outlines the general theory of ocean boundary making, reviews the modern history of all modes of ocean boundary making, and provides a theoretical framework for the analysis and evaluation of ocean boundary claims, practices, arrangements, and settlements. He does this in order to bring to the attention of ocean boundary makers the contemporary "functionalist" perspective to ocean boundary making as opposed to the pre-classical "unitarian" perspective. In fact, the entire book urges governments of the world to tackle ocean boundary making issues in a practical, functionalist approach, through both boundary line settlement and ocean use management/arrangements. The book deals with an extremely important question which many governments around the world are now facing or will have to face in the near future.

To that extent, Johnston's book is important not only to lawyers, but to all governments negotiating ocean boundaries. Ocean boundary negotiations involve a multi-disciplinary range of professionals, such as lawyers, economists, political scientists, sociologists, fishermen, resource-specialists, and diplomats.

Johnston discusses the different theoretical approaches to ocean boundary making both from an internal and international negotiation perspective. In attempting to answer all major questions which might emerge in negotiations concerning boundary making, he quite properly tries to place himself in the position of a government preparing itself for the difficult task of ocean boundary negotiation.

The nature of the complexities confronting government negotiators range from diversity of values, interests at stake, attitudes, physical

setting, relationship of the parties, and numerous other factors, each of which is analyzed by Johnston. He discusses and identifies different conceptual frameworks necessary to the theory of boundary making, using the physical, political, social-cultural, economic, juridical, and managerial frameworks.

Johnston's book makes a distinction between ocean regime and ocean zones in discussing the history of ocean boundary making. In so doing, he reaches the conclusion that the history of public law and administration of the oceans has been one of more or less continuous confusion between two rival modes of thought about the distribution and administration of authority over the ocean. He sees the tension between regime and zones as reflecting the need for accommodation between general theory and specific practical requirements. Therefore, he goes on, what is important in the contemporary period is to find innovative ways of reconciling the general with the specific, and the theoretical with the practical. He believes that the only way to resolve this tension is to adopt a functionalist approach both to the concept of maritime jurisdiction and to the theory of ocean boundary making. The adoption of articles 74(1) and 83(1) at UNCLOS 111 has already accomplished this to some extent. He gives examples of, *inter alia*, the new definition of the continental shelf under article 76 of the new Law of the Sea Convention of 1982, and the multi-functional regime of the Exclusive Economic Zone.

The author further observes that the history of ocean boundary making has been the story of the emergence of ocean technology, *i.e.*, of the evolution of the science and technology of location and measurement at sea. He reviews the history of physical geography, geodesy, cartography and hydrography, and of related disciplines and techniques of location, measurement, and related forms of investigation. The author attempts to bridge the gap between the law of ocean boundary making and the physical geography of the oceans, as a prerequisite to his examination of the modern legal, political and diplomatic history of ocean boundary making.

Johnston's book underscores the point that most of the contemporary rules of ocean boundary making are the product of the neo-classical period (emphasizing the functionalist approach to boundary making) rather than the current "romantic" period of legal development emanating from conference diplomacy. As a result, throughout his analysis, the author makes a clear theoretical and historical distinction between determination of seaward limits, delineation of baselines and closing lines, and delimitation of "lateral" ocean boundaries.

Johnston explores at length, though with some difficulty, the functionalist approach to adjudication as it is applied in ocean boundary delimitation settlement (80 pages). He has been a little unfair in the



treatment of the same subject in state practice as it pertains to delimitation agreements (only 9 pages). It is an acknowledged fact that the inter-disciplinary/functionalist approach to ocean boundary making evolved through state practice in the form of treaty-making. Despite this fact, the author opted to discuss the importance of state practice in a cursory manner. He only makes reference to a generalized trend or pattern observed in the delimitation treaties concluded between states, without going further into detailed discussion of several treaties which have settled ocean borders in an inter-disciplinary manner.

For the functionalist approach advocated by Johnston to be successful, neighbouring coastal states need to have the same ocean management policies. Without identical management policies, it might be difficult for such states to cooperate in their ocean management arrangements. However, notwithstanding these difficulties, coastal states could, with determination, very well approach their ocean boundary making in a more practical, inter-disciplinary way.

The present reviewer would have liked to have been told more about the experiences of states that have approached boundary settlement from a functionalist perspective rather than the "unitarian" perspective, which the author discourages, though the latter approach is still emphasized by the majority of the judges involved in the adjudication process. Furthermore, theories have normally been built out of practice. Though the author acknowledges that fact, he does not give the ocean boundary negotiators specific instances where those theories have been built from. Does it mean that ocean boundary makers have to assume that every delimitation agreement looked at will have passed all the stages discussed in Chapter 13?

Notwithstanding these minor shortcomings, this book is to be warmly welcomed as a major contribution to international scholarship and as a basic authority for contemporary ocean boundary negotiators. It is full of stimulating, detailed, historical analysis of ocean boundary making from the pre-classical era to the present and in its analysis and recommendations it goes far beyond the existing literature which, with few exceptions, is limited to discussions of either the adjudication process to ocean boundary settlement or delimitation treaties concluded by states in specific oceanographic regions. This outstanding book is for generalist and specialist alike.

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Tanzania.

Nigel Rodley, *The Treatment of Prisoners under International Law*. Toronto: Oxford University Press, 1987. ISBN 0-19-825563-2. Pbk. xxii + 374 pp. \$44.95.

As Legal Adviser to Amnesty International, Mr. Rodley is well aware of the numerous occasions on which prisoners and detainees in a variety of countries suffer inhumane treatment, often involving torture or even death. As a contribution to the UNESCO series *New Challenges in International Law* he has produced this study of *The Treatment of Prisoners under International Law* seeking to show the extent to which international legal regulation attempts to protect such persons, either by way of the general rules concerning human rights or by way of specific regulations and studies carried out under the auspices of international organizations.

For the purpose of his analysis, Mr. Rodley defines prisoners or detainees as “any persons who are so positioned as to be unable to remove themselves from the orbit of official action and abuse” (p. 5). One of the accusations constantly made against those holding such persons is that they employ torture against them, and torture is defined as “officially sanctioned infliction of intense suffering, aimed at forcing someone to do or say something against his will . . . it has also become a method of inspiring fear among the population at large, or specific segments of it” (p. 7). That the idea of torture is in fact highly subjective may be seen from the case before the European Court of Human Rights lodged by Ireland against the United Kingdom concerning the treatment of detainees in Ulster (pp. 83-6). The author points out that in many instances the typical victim of torture is the “political opponent of the government — violent or non-violent, a real force for change or a minor irritant to the regime — seized by the security forces [who] may be military or police” (p. 9), and frequently such persons ‘disappear’, a matter carefully examined by the author in chapter 8 of the book. Other chapters deal with extra-legal executions (6), the death penalty, an issue that is a major item in Amnesty’s programme (7), the actual conditions of imprisonment or detention (9), corporal punishment (10), and guarantees against arbitrary arrest and detention (11).

Of late, the United Nations has itself become concerned with the treatment of detainees and has proposed a Code for Law Enforcement Officers and set out Principles of Medical Ethics, while the Council of Europe has produced a Declaration on the Police seeking to prevent abuses by such persons. These codes of ethics are examined in chapter 12. While it is true that they have no legal force of their own (p. 222), the codes do serve as guidelines and some countries have instructed their

forces to follow them in practice. Insofar as the medical code is concerned, while one understands the attitude of such bodies as the World Medical Association in instructing doctors not to participate in corporal or capital punishment (p. 297), one cannot help but enquire whether the medical profession would prefer that, for example, lethal injections be administered by completely unqualified persons, or that doctors should really refuse to state whether a person is fit to undergo corporal punishment or when the infliction of such would result in death, and should judicially-ordained amputations be carried out and treated by "butchers"?

Prisoners of war and civilians in occupied territory fall within Mr. Rodley's definition. However, since such persons are protected by the Geneva Conventions of 1949 and the 1977 Protocols supplemental thereto, the regime relating to them is *lex specialis* and it is dangerous to attempt to derive therefrom general principles applicable to the world at large, for these documents are directed to protecting non-nationals in the hands of an adverse party. Nevertheless, the author constantly indulges in such generalization, even to the extent of seeming to imply that there is some connection between both the UN Code of Law Enforcement Officers and the European Code with humanitarian law in wartime (p. 290). The Geneva Conventions have no application when the military are carrying out a police function. Similarly, the fact that these Conventions or the Protocols forbid certain activities, or even treat them as crimes, does not mean that this supports the contention that this is evidence of 'general international law', regardless of whether they replicate moral bans to be found in General Assembly Resolutions or similar non-binding documents (see pp. 232-3, 247-8, 269, etc.). At the same time, one might question the assertion that "where a right is non-derogable . . . , this is evidence that it is recognized by general international law as carrying universal obligation, regardless of whether or not a state is party to one of the treaties containing it" (p. 200).

One must also question the correctness of other comments concerning armed conflict law in *The Treatment of Prisoners under International Law*. The Nuremberg Tribunal did *not* "deal only with crimes against humanity committed after the outbreak of international warfar (that is, after 1939)" (pp. 100-1). While it refused to consider the Nazi anti-Jewish legislation as such, it did regard as criminal and within its jurisdiction over crimes against humanity such actions as might be considered part and parcel of the planning of aggressive war and took as its date *a quo* the *Kristallnacht* atrocity of November 1938. Nor can it be said that the Geneva Conventions "encompass a codification of war crimes" (p. 101). They merely indicate that certain acts are to be treated

as 'grave breaches' and do not go as far, for example, as the lists to be found in Nuremberg Charter or the Canadian war crimes legislation. It is also somewhat strange to find the statement that by virtue of the Genocide Convention, "'crimes against humanity' . . . form a specific category of 'crimes under international law', namely that comprising acts committed in connection with war crimes or crimes against peace" (p. 101). This reads strangely in the light of the Canadian legislation, and Mr. Rodley recognizes that difficulties arise because of the *Apartheid* Convention which condemns such practices as crimes against humanity. It is somewhat in the nature of special pleading to read that while "[t]his could be taken as suggesting that the term is no longer restricted to acts committed in connection with international hostilities[, i]t might be more satisfactorily explained by the practice of UN organs, especially the General Assembly, to treat the situation in South Africa as one concerning the maintenance of international peace and security" (p. 101, n. 23). Moreover, this comment ignores the fact that the Convention is general in its terms, the sole reference to South Africa is in Article II, stating that "the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group or persons over any other racial group of persons and systematically oppressing them. . . . Similarly, it is questionable whether, in view of the jurisdictional provision in the Genocide Convention, individual perpetrators of genocide are "probably liable to trial on the basis of universal jurisdiction" (p. 164).

Regardless of these criticisms, there is much in the book that is valuable and this is particularly the case with the accounts of the activities of the UN Commission and Committee of Human Rights, even though they may do little more than expose a situation and make recommendations (see ch. 1 and 5). However, it is difficult to agree that statements made by representatives at international congresses, especially when there is no official record, "can be interpreted as authentic expressions of their law enforcement policies" (p. 33). But it is refreshing to be reminded, especially when the new regime in Romania is lodging charges of genocide against those alleged to have been involved in suppressing the revolt, that this offence is essentially directed against persons as members of a 'group' because they are such members and with the intention of destroying the group (pp. 53-4). However, one must tread warily in seeking to describe as *jus cogens* 'rules' which are drawn from one or two conventions even though they are intended to give effect to the principles laid down in the Universal declaration of Human Rights. If this were true

in regard, for example, to torture, one might question the need for a convention or any suggestion that non-parties were bound by the ban (p. 70), and it is far too early to put forward in support of this contention the somewhat unique US decision in *Filartiga v. Pena-Irala* (pp. 104-6). Perhaps one of the reasons that the United States has not yet become a party to the American Convention and Court of Human Rights lies in the provision that capital punishment is not to be imposed on anyone under 18 or over 70 (pp. 186-7). One has some sympathy with the author's view that it is somewhat "[b]izarre that corporal punishment may well fall foul of the prohibition [against torture, cruel, inhuman or degrading punishment], while capital punishment apparently does not" (p. 166). But is it correct to assert that "there is weighty evidence to suggest that [corporal punishment] is illegal under human rights law" (p. 242)?

There is much discussion in Canada concerning the use of firearms by the police. It is of interest to note that by the Code of Conduct for Law Enforcement Officers, "In general, firearms should not be used except when a suspect offender offers armed resistance or otherwise jeopardizes the lives of officers and less extreme measures are not sufficient to restrain or apprehend the suspect offender" (pp. 150-1, 351). This leads one to question how often it would be permissible to fire at a speeding vehicle.

Although the reviewer doubts whether the fact that "the [International] Covenant and at least two of the regional human rights conventions have . . . elements in common is strong evidence that they express a rule of general international law" (p. 269), he agrees fully that "once it is recognized that, as with the interpretation of constitutional bills or rights, the content and scope of the rights guaranteed [by, for example, the European Convention] will evolve with the changing standards of society, it has to follow that there will be an element of apparent arbitrariness in a judicial finding that what was not prohibited at one stage has subsequently become so" (p. 251). In the light of this statement, it may well be that, as society evolves, many of the statements in *The Treatment of Prisoners under International Law* now considered questionable will in fact be found to be precursors of generally accepted international law.

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# **The Dalhousie Law Journal**

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