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Treaty Interpretation: Theory and Reality

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Book Reviews

Martin L. Friedland (ed.), *Sanctions and Rewards in the Legal System: A Multidisciplinary Approach*. Toronto: University of Toronto Press, 1989, pp. 224. \$30.00 cloth, \$14.95 paper.

A farmer owned a donkey and a donkey-cart. He hitched the donkey to the cart and ordered the donkey to move forward. The donkey did not move. He offered the donkey a carrot, but the donkey still did not move. He beat the donkey with a stick, and again the donkey did not move. He built a fire under the donkey. The donkey moved. When the donkey stopped, the cart was over the fire.

This book consists of ten essays on the general theme of effective techniques for controlling and regulating social behaviour. The authors draw on the disciplines of management studies, history and criminology, public policy studies and economics, psychology, anthropology, law, sociology, and political science. They are, collectively, a modern manifestation of Roscoe Pound's concept of law in action as "social engineering".

The title rightly describes the volume as multidisciplinary, although one author uses the term interdisciplinary. What linkage is provided comes from the editor in the Introduction. It is evident that the authors passed their manuscripts around, but the interrelation and cross-fertilization of interdisciplinary studies are not to be found in the texts. In fact, the recognition of the discipline of policy studies other than that of each author is slight.

True interdisciplinary studies are hard to come by. Real live policy issues do not recognize the boundaries of academic disciplines. Each discipline, to be useful, must enrich the inquiry, but none prescribes its scope. And there are real risks in such studies. One is the risk of discipline insecurity. When a person deeply versed in a particular discipline finds himself exploring a policy field in which he must rely on the intelligence, integrity, and learning of a colleague in another discipline, he may react by retreating within his own. Beyond the apprehension of reliance is his concern that the product of interdisciplinary exercise will be intellectually soggy.

Along with insecurity may be found aggressiveness: a team member may fight to secure his discipline as the central one, to which others must relate and defer. (As director of an industrial relations research centre I once tried to put together an interdisciplinary team. I approached the head of the department of psychiatry in the university's faculty of medicine, who said he would be happy to be involved, and of course he would have to be the director of the team.) Aggression may stem from a belief that his discipline is superior (an economist claimed, in Chapter Three, that "[e]conomics is unique among the social sciences in having a

well-developed paradigm for guiding theoretical inquiry on any topic that an economist chooses to investigate”), or from a resolve to manage his insecurity with boldness. In any event, the struggles of dominance and subservience can be both fascinating and disheartening to observe; and if the dominance is not arrested it can destroy the exercise.

A third risk in interdisciplinary studies is lack of discipline, lack of intellectual rigour, which is what I meant in the reference to intellectual sogginess. A fourth is conflict over mind sets, over ways of thinking about things, such as working from hypothesis on the one hand, and from observation and experience on the other. Conflicts may arise from a failure to identify that fundamental factor in analysis and communication. A fifth is a difference in the perception of the problem to be examined, which in turn produces a problem in agreeing on the goal to be realized. Truly interdisciplinary studies, in short, require a high level of entrepreneurial, managerial, intellectual, and moral leadership.

The broad theme of the book under review is an inquiry into the relative merits of sanctions and rewards as techniques for controlling and regulating social conduct, heavily but not exclusively (a chapter addresses tort sanctions) in the field of criminal law. We true westerners are familiar with the admonition “If there’s goin’ to be shootin’ there’ll surely be hangin’.”) The authors’ appraisals state the theme that rewards are more effective than punishments and that an astute combination of the two is probably the best inducement to the “actor” to “internalize” the acceptable standard of conduct to produce a self-policing or self-regulating person. Not all essays are that specific, but it is not difficult to point their beams in that direction. Two essays address the question, if rewards are more efficacious than sanctions, why does the criminal law rely so heavily on sanctions, and they propound briefly a broader social need of a retributive character: there’s got to be a social pay-back.

Because of the multidisciplinary quality of the volume, I have decided to present a brief account of each essay separately, in the belief that the job of synthesizing is best performed by the reader to his own taste. Besides, I have lived long enough to learn that I would write a very bad interdisciplinary review of a multi-disciplinary text. My task is to try to whet the appetite of the curious reader for the real thing. Some briefs consist largely of selections from the essay. The authors speak in their own words. Other briefs consist mainly of my impressions of the gist or thrust of what the author was saying. My parenthetical comments are interspersed throughout the text.

Chapter One: Criminal Sanctions in England since 1500. John M. Beattie, professor of History and Criminology, University of Toronto. This is a one-of-a-kind essay in this volume. It concentrates on the methodology of historical presentation.

The nutshell into which this essay may be squeezed is that in the 16th century and before, the state practised deterrence of criminal behaviour

by terror; in the 17th century deterrence and punishment by transportation; and in the 18th and 19th centuries modification of behaviour by reform and rehabilitation.

Before 1500 much depended on the strength of the central government; the punishment for felonies was hanging, a consequence that was tempered by the jury system: juries could acquit. In the 16th century, for a whole lot of “social facts” which the author recites, there was an increase in the demand for deterrence and therefore an increase in hangings. In more philosophical terms, there was a firm identification of crime with immorality and then with the development of institutions or houses of correction.

The punishment for felonies of transportation in the 17th century (which took some pressure off juries to acquit to avoid the penalty of execution) meant transportation to the American colonies (Australia’s turn came later, with the loss of the American colonies as a ready repository). More significantly, in my view, the author notes in this period the roots of the notion that certainty of punishment is more effective than severity (see later for a consideration of certainty, swiftness, and severity as components of effectiveness, a point that runs throughout my review).

With the vibrant second half of the 18th century and the early 19th century came disillusionment with public violent punishments in crime prevention (I wish I had read the article before a judge in Sudan asked me a few years ago what I thought of the imposition of the Koranic (shari’a) law that prescribes mutilation for theft, and so on; stoning to death for adultery is on the books but it is easily evaded), and acceptance that certainty is a more efficacious route to effectiveness (that is not a tautology) than is harshness or severity.

Then in the 19th century came a rise in the non-propertied middle class and the rise of middle class reformers (e.g., John Howard) and the establishment of imprisonment and the goal of rehabilitation based on penitence (and isolation and consequent insanity). It appears that what induced moderation of these institutions was not humanitarianism so much as evidence that they did not work.

Where are we and where do we go from here? The author does not say. But he has given us a useful historical perspective.

Chapter Two: Sociology and Legal Sanctions. H. Laurence Ross, professor of Sociology at the University of New Mexico at Albuquerque. *Background:* “One might describe sociology as the study of the interaction between behaviour and rules; laws can be seen as the most formal and central of social rules.”

Criminology: “The traditional statement of the deterrence hypothesis, which originated in eighteenth-century utilitarian thought, is that the effectiveness of the threat of punishment is a function of its severity, certainty and swiftness” as filtered through the psychological profile of the person being confronted with the deterrence. (This is addressed at

greater length, to avoid overlap for purposes of this review, in my comments on the next chapter.)

The Sociology of Law: “There are two key perceptions in the sociology of law as it applies to the capabilities and limitations of legal rules in regulating behaviour. First, the formal rules are often ideal, expressing hopes rather than expectations; and second the rules are often an overburden on the system charged with applying them strict enforcement is an unreasonable expectation”; the task of “interpretation, organization and necessary partial modification” of legislation “ends up in the hands of ‘street level bureaucrats’” — the police officer, the building inspector and so on — exercising discretion. Three characteristics of the law in action are: simplification (e.g. rules of thumb for determining liability in automobile accidents), liberalism (a bad settlement may be cheaper than litigating one’s “rights”), and arbitrariness (inconsistency).

Conclusion: There is a need for effective legal sanctions to be applied with reasonable probabilities, the principal factors of which are certainty and probably swiftness, with a very doubtful case for the factor of severity.

Chapter Three: The Economics of Criminal Sanctions — Philip J. Cook, professor of Public Policy Studies and Economics and Director of the Institute of Policy Science and Public Affairs at Duke University. In order to understand this chapter, I had to learn a new grammar of the Anglo-American language in which, through the reversal of conventional grammatical sequences, nouns become verbs, verbs become adjectives and adverbs, and adjectives become adverbs and nouns. I think the chapter could have been called “The Crime Industry: When Does Crime Not Pay?” and the answer could have been given “when marginal cost equals marginal gain”.

The paradigm in economics for guiding theoretical inquiry has five parts: (i) identify the decision-makers and their objectives; (ii) identify available options and how choices will respond to changes in opportunity; (iii) specify the conditions of interrelation or exchange among the decision-makers; (iv) derive a characterization of the aggregate consequences of this inter-action, with special attention to the characteristics of ‘equilibrium’; and, (v) analyse the effects on this equilibrium of changes in contextual variables. The article addresses the first and second parts, illustrated through the crime of motor vehicle theft.

The author postulates The Rational Political Criminal, and lists the following reasons why individuals respond differently to criminal opportunities: willingness to accept risks; willingness to break the law; evaluation of gains; differences in objective circumstances. A key point in the theory is that “a change in either the probability or the average severity of punishment will cause some people to change their minds and whether the opportunity is, on balance, attractive, and thereby change their behaviour.”

The author then lists objections to the theory based on the conclusion that “common appropriative crimes and much violent crime are not very responsive to the threat of punishment”, a conclusion based on Limits of Rational Calculation (“The challenge to deterrence theorists is to find predictable ways in which the ‘psychological person’ deviates from the ‘economic person’) and limits to effectiveness of communication of threats, including certainty and severity of punishment.

The author then turns to three specific issues: (i) degree (intensity) of involvement in crime (“what limits are there on the participation in illicit activity of a potential criminal who decides that it is worthwhile to commit his first offence”); (ii) certainty and severity of punishment (and problems of allocation of scarce resources); and, (iii) substitutes and complements (“if sentences are relatively uniform, then a greater burden is placed on officials to create a stepladder effect through graduations in the likelihood of arrest and conviction”). The author then expresses the concluding thought on the deterrence process: “Once considered carefully, the claims made for the deterrence mechanism seem quite plausible and robust against the arguments that criminals as a group are insensitive to the legal consequences of their actions.” There follows the promised illustration from motor vehicle theft, describing the nature of the industry, market structures and enforcement options (including the actors — owners, thieves, and middlemen) and their interactions, and concludes with Notes on a Research Agenda.

This digest cannot possibly do justice to the article. If the reader’s curiosity has been stimulated, she can buy the book in paperback for \$14.95, borrow it, or photocopy it if she thinks she won’t get caught.

Chapter Four: Deterrence and the Tort System Robert L. Rabin, A. Calder Mackay Professor of Law, Stanford Law School, Stanford University. This article on tort law makes for an interesting comparison with the chapters on the law of crimes.

The author introduces his paper by noting “the growing disillusionment with the deterrent capacity of tort law and the need to assess whether the criticism is warranted.” He concludes that the deterrence theory has little going for it, because if consequences are not predictable, liability is not a deterrent. The negligent actor is by concept not mindful of the negligent nature of his behaviour. And if the basis for calculating damages and hence if the quantum of damages is unpredictable, the results are erratic and the deterrence theory becomes tenuous.

The author examines “area studies”: (i) Criminal activities: toxic substances. Because of the fact that harm is not immediately identifiable and the causation is not always clear, judicial decisions become unpredictable. Further, the discouragement of harmful economic activity may deter socially beneficial activity. (ii) Commercial activities: products liability. The judicial signal “often lacks clarity to serve as an effective deterrence”. (iii) Professional activities: medical malpractice Insurance plays a mediating role. And the uncertainty of liability leads to the

practice of defensive medicine. (What sort of work load can and should the health care system bear and how should it be distributed among users?). (iv) Municipal liability. Is the self-insuring municipality insensitive to tort rules because of the absence of market constraints?

Conclusion: “An underlying theme — in reality, an organizing principle — has been that deterrence is really many subjects rather than one; it plays out quite differently, depending on the characteristics of the class of actors to whom tort liability rules are addressed. But, no matter the class, the efficacy of tort law as a deterrence strategy is open to serious question. Even so, the logical follow-up question is this: deterrence through tort liability compared with what alternatives? . . . the other principal goal of tort liability, compensating the injured, can almost certainly be achieved more efficiently and equitably by other means.”

Chapter Five: Methods for Measuring General Deterrence: A Plea for the Field Experiment Franklin E. Zimring, professor of Law and Director of the Earl Warren Legal Institute at the School of Law, University of California at Berkeley. This is the second (and not the last) chapter where I have found it appropriate to present a summary through the words of the author.

The Limits of Field Experimentation: “. . . no field experiment in criminal justice will ever be executed in total conformity to its plan “there are . . . political and moral limitations on the conditions that can be varied in the name of experimentation “It is clear . . . that if ‘intervention’ evaluations are to be the primary building-blocks for deterrence theory, progress will be slow and empirically justified generalizations will be difficult — a condition that is typical of social science.”

Do We Need Experimentation? “. . . more than an axiom is needed to support major changes in punishment policy “For most crimes, in most studies, there is no significant negative simple correlation between the average length of a prison sentence and the rate of crime. By the time additional control variables are added to the equation, weighted to the tastes of the researcher and processed through the sophisticated machinery of statistical analysis, the published results are in disagreement if not disarray.” . . . The problem is that crime does indeed vary with circumstances . . . “The second problem in interpreting studies of natural variation is that of separating causes from consequences . . . “The third problem is that natural-variation studies shed no light on why punishment policy varies in real-world settings, and thus on how easy it would be to induce on a deliberate basis the kinds of policy changes that occur naturally.”

Conclusion: “Methodologies and disciplines should mesh rather than clash; deterrence research should not become yet another example of what one observer called the ‘cross-sterilization of the social sciences.’ Our ignorance is vast; there is more than enough to go around. Humility in the use of a variety of imperfect methods gives the real hope of

sustained progress in learning more about the impact of law enforcement on crime.”

Chapter Six: Sanctions and Rewards: The Approach of Psychology Joan E. Grusec, professor of Psychology at the University of Toronto. This presentation also speaks for the most part in the language of the author.

I. *Techniques for Obtaining Compliance*

Why are there differences in the way compliance-getting is viewed by behavioural and by social and developmental psychologists? Can they be reconciled?

A. *The Behavioural Approach*: Skinner asserts that punishment does not work: one should use positive reinforcement and educational inducement of desired behaviour. 1. *The Evidence*: Both punishment and positive reinforcement have transient effects. “. . . moderate levels of punishment, administered by a humane and caring agent so that the contingency between the individual’s behaviour and the aversive outcome is clear, are just as effective in controlling behaviour as is the use of positive reinforcements such as food, water, and money.” 2. *Side-Effects of Punishment*: Punishment encourages aggression (other things do too). Beware: Punish with Care.

B. *The Social and Developmental Approaches*: Control by either punishment or reward is ineffective. The question is how to induce the deviant to internalize the standard of acceptability and then to administer his own approval and disapproval. 1. *The Use of Reasoning*: “. . . an approach to socialization and induction of compliance that involves sensitizing individuals to the impact of their behaviour on others will also lead to flexibility in thinking and the ability to think constructively about one’s own adherence to societal norms.” 2. *Attribution Theory*: “. . . people are always looking for explanations for their own behaviour and the behaviour of others.” People who perceive that they have been coerced into conformity should be less likely to internalize moral standards. The role of persuasion, education and reasoning is to minimize coercion.

C. *Research Support*: “. . . reasoning paired with firm consequences for failure of obedience is the most effective approach to socialization.”

D. *Implications for the Legal System*: “The education must help the individual understand why the punishment is justified and modify her values accordingly.”

II. *The Prevention of Deviation*

A. *Modelling*: “. . . Observing offenders being punished should keep

people from engaging in the punished acts themselves: if they see deviant behaviour go unpunished, the probability that they will perform similar acts themselves on some future occasion may increase.”

B. *Structuring the Environment*: “so as to promote pro-social behaviour”.

C. *Character Attribution*: Attribution desirable (and believable) characteristics to the child

D. *Implications for the legal system*: “Modelling, structuring the child’s environment, and character attribution are all ways of trying to prevent the initial occurrence of anti-social behaviour.”

III. *The Function of Punishment*: it includes retribution by society.

A. *New Trends in Socialization Research*: “A number of variables have been shown to have an impact on parents’ behaviour. Among these are the physical attractiveness of the child, the child’s reaction to punishment, and the nature of the misdemeanour in which the child has engaged “It seems reasonable to propose . . . that such things as the amount of anger aroused by a misdeed, the sureness that the agent of socialization feels about the correctness of her position, the physical attractiveness of the wrongdoer, and the reaction of the deviant individual to threats of punishment all have an effect on the punishing agent that is apparently unrelated to a desire to modify behaviour “To be added to these variables is the need of individuals to see the world as fair and wrongdoers as having been suitably penalized.”

B. *Belief in a Just World and Equity* (digest not offered)

C. *Implications for the Legal System*: “. . . the punitiveness of our legal system may exist more for the sake of society than for the sake of the law-breaker.”

IV. *Individual Differences in Responsiveness to Sanctions and Rewards*. Aggressive children appear insensitive to punishment. *Implications for the Legal System*: Sanctions need to be individualized.

V. *Conclusion*:

“First, . . . education should play a more prominent role in the system than sanctions, and . . . education should go hand in hand with sanctions. “Second, . . . itself has certain needs when it deals with those who have broken the law, and . . . these needs must be taken into consideration in any attempt at reform. Third, “attempts to influence behaviour must be tailor-made to the individual being trained.”

VI. *Caution:*

“One is ill-advised to generalize directly from principles developed in one domain, such as that of child socialization, to the domain of adult behaviour and the legal system. Nevertheless, these principles may offer some helpful guidelines for considering the function and usefulness of present and future systems.”

Chapter Seven: Sanctions and Rewards: An Organizational Perspective

Hugh J. Arnold, Magna International Professor of Business Strategy, Faculty of Management, University of Toronto. “The nature of the organizations, the quality of their management, and the character of their systems of sanctions and rewards have a significant impact upon their members’ feelings, attitudes, actions and effectiveness “the quality of management . . .” depends on “the way in which managers make use of sanctions and rewards.”

Assumptions and their Implication: Theory X: people are lazy and dislike work; Theory Y: people have a great deal to contribute to their organizations. Dysfunctions of the Theory X Approach: it requires proscription, prevention, and punishment, and depends on regulation and supervision and the administration of sanctions. Three sets of fundamental dysfunctions are: (a) the self-fulfilling prophecy, (b) emphasis on process controls (process controls are much more cumbersome and expensive to design, implement and operate than outcome controls) and, (c) side-effects of punishment (resentment, anger, uncooperativeness and the need for monitoring, and the fact that punishment does not send a message of what is desired).

Empirical Results: A considerable body of empirical evidence demonstrates the effectiveness of rewards in generating high levels of performance in organizations and, conversely, the dysfunction of reliance upon punishment. For example, in the matter of absenteeism, rewarding attendance is effective, while the punishment of absenteeism increases lost time. The most effective approach would appear to be a combination of non-monetary rewards and progressive discipline.

Similarly, in respect of job performance, goal-setting and verbal praise worked in the logging industry; and in occupational safety, employees responded to the obvious but not always recognized point that safety is for the protection of employees; it helped that employees participated in setting goals. Recognition and verbal reinforcement worked. Again, respecting salespersons’ performance, personnel participated in determining what is effective sales performance, and that was combined effectively with the application of positive rewards.

Conclusion: Punishment can and does have an impact on employee behaviour and some behaviour will bend only to punishment. But over-

all, a reward system is more efficient and effective. But one must make it clear what is wanted and not wanted.

Chapter Eight: An Anthropological View of Sanctions and Rewards
Pierre Maranda, professor of Anthropology, Laval University.

I. *Law as a Social fact* (a holistic perspective). Law is a social fact, like religion and politics. All societies have regulation mechanisms, or sanctions. Social inertia is fundamental. It is a gyroscope, maintaining direction, carrying human lives in ruts more or less clearly marked by norms. On the one hand, norms can be elicited from behaviour patterns. On the other hand, norms can also be defined from the top. Conformity to both types of norms will be required and rewarded, and deviance will be punished. And both types are teleological: that is, their function is to ensure social perpetuation.

II. *A Sketchy Statistical Framework* (a digest is not attempted)

III. *Sanctions and Rewards: The Major Regulation Mechanisms of Inertia* (conservatism). "The two main regulation mechanisms of inertia are fear and seduction. Both operate on imagination as the faculté of anticipation In other words, a little fear goes a long way toward affecting people's behaviour, but it takes a lot of seduction power to achieve the same results. This facility of fear may be the reason our legal system relies more heavily on sanctions than on rewards."

IV. *Accident Proneness and Pornography* (regulation mechanisms acting on the imagination). Men tend to 'metaphorize' vehicles as women. That relates to accident rates. Car drivers who had had no accidents predicated the same attributes of their women and of their cars: trustworthy, reliable, thrifty, very dependable though somewhat sedate and slow in responding, and requiring good care. Studies of driving and pornography make the same point.

Hypotheses on Relationships between Driving and Sexuality: (i) an active sex life correlates positively with low accident rates; (ii) the use of hard-core pornography correlates positively with high accident rates; (iii) the use of soft-core pornography correlates positively with average accident rates; (iv) abstention from pornography correlates positively with high accident rates; (v) the efficacy of publicity for safe driving correlates positively with the skilful use of images of women.

V. *Three Outlooks on Sanctions and Rewards: A. Semiotic Capital and Inertia*. "Inertia level is determined by (1) the 'semiotic capital' of 'mental stocks' owned by individuals and societies alike, and (2) by their management strategies. Sanctions and fear will have a much greater effect on people with fewer resources; conversely, rewards will have more

impact on people with greater resources, who are less easily threatened” B. *Terrorism and Martyrdom*: “. . . to carve for oneself a place in the tail of a normal distribution curve is a stimulating, rewarding endeavour.” C. *Deviation and Creativity*: “In order to be creative, a legal system has to offer positive incentives that outweigh sanctions”

VI. *Conclusion: Law and Social Reproduction*: “When we learn to use rewards (positive incentives) rather than sanctions (fear and deterrents), we will have come a long way toward a much more dynamic and productive society, a society that will want to reproduce itself for better reasons than just inertia. We can envisage a nation in which law would be inspiring and ahead of the times instead of being stifling and trying clumsily to catch up with events generated by imaginative freaks.”

Chapter Nine: Achieving Compliance with Collective Objectives: A Political Science Perspective Carolyn Tuohy, professor of Political Science, University of Toronto. This essay is written from the perspective of mainstream North American liberal pluralism. “The first section of this paper presents a theoretical analysis of the distinctive competencies and incompetencies of three pure types of social control when measured against fundamental economic and political criteria. The second section treats more practical considerations, recognizing that the choice of a compliance mechanism in practice never involves the selection of a pure type but rather involves changes to an existing mix of rewards and sanctions in an established political and economic context.”

I. *Types of Control Mechanisms*: From the perspective of political science, mechanisms for achieving compliance with governmental objectives can be classified according to three general types: (a) command (force or obedience: the apparatus of the law); (B) exchange (bargain and consent); and, (C) persuasion (education). The selection of the instrument requires a consideration of competencies, using the criteria of technical efficiency — minimizing the cost of achieving compliance; allocative efficiency — achieving optimum level of compliance; democratic accountability and participation, resting on a base of rewards and sanctions.

II. *Assessment of Competencies*. A. *Command*: Mechanisms vary according to the mix of legislature, bureaucracy and courts.

1. *Legislative-Bureaucratic Instruments*: What of technical efficiency? What of allocative efficiency? (Decisions with high ‘value’ content should be taken by legislators. Those with high ‘factual’ content should rest with administrators.) What of democratic accountability?: it requires the consent of the governed; for example, where product standards are developed by a bureaucracy, whose interests will be served?)

2. *Judicial Instruments*: They are laborious and time-consuming. But transaction costs may be outweighed by gains in allocative efficiency. Judicial instruments are not innovative. (An earlier paper describes the judiciary as walking backward like crabs [Maranda, Chapter Eight], with their vision firmly set on the past. I don't agree, and I don't think any student of developments in current Canadian constitutional law could agree; but the point is there to be made.) And judicial instruments are not good for handling polycentric problems: they require a focus (even the most complicated constitutional case requires an over-arching issue, no matter how abstract it must be, to comprehend the contending details: was that the basic flaw in "Meech Lake"? Liberal-democratic principles of accountability rate high against arbitrariness; and high on participation.

B. *Exchange* (voluntary, There are two categories of participants: individuals and groups.

1. *'Price'-based mechanisms* (e.g. car insurance rates determined by accident record). More common in the public policy arena is a mixture of price mechanisms and a command-based system (e.g. a polluter being given a choice of paying for his pollution, and thereby being free to determine the extent of his pollution). If the exchange is voluntary, it likely will be less technically efficient. In terms of allocative efficiency, exchange mechanisms are the most attractive. The individual will comply up to the point at which the marginal cost of non-compliance equals its marginal benefit. It can be persuasively argued that price-based compliance mechanisms provide a form of popular control that can be either a complement to or a substitute for democratic accountability and participation.

2. *Negotiation-Based Mechanisms*: Compliance with general social objectives is negotiated among key social and economic groups, such as trade-offs in collective bargaining. Technical efficiency of the mechanisms is not clear. Allocative efficiency of the mechanisms is similar to price mechanisms: they encourage innovative solutions.

Given this variety, the number of North American contexts in which, say, workplace labour-management committees could be expected to deal democratically and efficiently with the control of occupational health and safety hazards is limited. (Why has western Europe gone the route of "industrial democracy" while the United Kingdom and North America still cling to the model of "antagonistic cooperation"?)

C. *Persuasion*: Persuasion induces internalized standards of conduct and objectives. Enforcement costs are the lowest. Allocative efficiency is

similar to that of command mechanisms. Democratic accountability and participation: persuasion is the most consistent.

III. *Practical Choice*: “Although it is useful for analytic purposes to distinguish among ‘pure’ compliance types, any mechanism available in practice will involve a mix of command, exchange, and persuasion features. Bureaucratic mechanisms involve exchanges of information and favours as well as command; markets are populated by hierarchical actors and governed by authoritative rules. Any policy decision will involve changes to an existing mix, causing heavier reliance on command, exchange, or persuasion, and/or on the positive (reward) or the negative (sanction) dimension of each of these types. . . . Compliance mechanisms are likely to be effective when they are congruent not only with prevailing ideologies but with existing organizations of interest in particular policy arenas.” Policy determines politics and politics determine policy.

IV. *Areas for Investigation*: The proposals are based on the analysis offered at the beginning of the chapter. There is a role for “interdisciplinary” collaboration, as in the ‘Sanctions and Rewards’ project.

Chapter Ten: Choice of Target and Other Law Enforcement Variables
Christopher D. Stone, Roy P. Crocker Professor of Law at the Law Center, University of Southern California at Los Angeles

What is the best way to discourage unwanted social conduct? Replace sanctions with rewards? Common law offences are not responsive to modern problems, for example, felonies v. environmental issues. 1. There is a risk of restricting useful activity. 2. The expanding class of modern wrongs strains traditional remedies and forums (who is the wrongdoer? what is the nature and extent of damage? what are the facts? etc.) 3. There has been significant demographic change in society, including a huge rise in the number and size of corporations and scope of public agencies. There is a need to identify and reconsider the assumptions that underlie our inherited strategies for steering social conduct. The object of the paper is to identify and assess the range of variables available to a society in its efforts to enforce modification of behaviour.

The Variables: Canvass the mechanisms for law enforcement and their targets.

(1) *The Substantive Rule Variables*: Control strategies: harm-based liability rules; (a) *Harm-based liability rules* (the author reduces these to the unpronounceable acronym HBLRs). These are the tort rules. Harm is the trigger; loss is calibrated to harm; intrusion into private decision making is minimized.

(b) *Penalties*: Penalties can be triggered by rules, occurrence of harm, or application of standards (*a priori*). The sanctions are provable damages, punitive damages, and fine. Penalties also include a public ingredient to reduce the incidence of the offence. Quære: is there a need for a range of alternative “currencies” (cf. statutory power of discretion given to labour arbitrators to devise remedies)?

(c) *Standards*: Penalties differ from HBLRS in that they detach the level of sanction from the level of harm actually caused; standards differ from HBLRS in that they detach the law from the harm-causing occurrence (*ex ante*) and they limit choice (e.g. sterilization, preventive detention). Standards appear appropriate when dealing with corporations (the incorporeal legal personality).

There are three classes of standards: factor standards, which constrain input; output standards, which preserve managerial autonomy; bureaucratic standards, which impinge on managerial discretion. The value of standards is that they are immediate and predictable (see earlier chapters on the factors of immediacy, predictability and severity in assessing the effectiveness of sanctions). The risk is that standards may deter worthwhile endeavours. Limitations on the use of standards are the cost of enforcement, the limited liability of the wrongdoer, potential unfairness, and potential harm to innocents.

(d) *Rewards*: they reinforce good behaviour (see earlier) and they are far less authoritative. The case against increasing the use of rewards lies in the fact that enterprise does not recognize non-monetary rewards and governments are inexperienced in the use of them.

(2) *Target Variables*: The mechanisms for law enforcement can target the enterprise and/or the agent. It is less costly to go after the enterprise, but vicarious liability has its moral drawbacks. (a) Other target ‘sizings’: “As we move away from mechanisms that are not as directly profit-oriented, and consider strategies such as standards, publicity, and the manipulation of non-monetary resources, the range of feasible alternatives increases.” (b) Organizational Types: “Any reform that is effected will be introduced in the context of pre-existing background rules that vary among types of corporate target: rules (and application of rules) of limited liability, immunity, *respondeat superior*, and indemnification.”

(3) *Enforcement Variables*: Who will be charged with monitoring and enforcement? The ordinary citizen? public authorities?

Conclusion: “. . . of all the control techniques for organizational misconduct, the most promising innovations are bureaucratic standards.” I found this to be a fun book. My comprehension of the texts reflected the peaks and valleys of my own comprehension and appreciation of

academic disciplines “cognate” to the law. A fun book, and a humbling experience.

The writing of this book marks the first stage in the program on sanctions and rewards in the legal system, directed by the editor of this volume, sponsored by the Canadian Institute for Advanced Research as part of a wider program on law in society. It is a “sampler”, with an implied promise of more to come. At some point I hope the scholars will attempt a full-blown interdisciplinary study. I should like to be around.

Now that I have finished this review I must hurry down to the local public library and return my books before I incur a fine. I might also get a smile and a hug from the librarian.

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E. Capparos et al., *Mélanges*. Louis-Philippe Pigeon. Montreal: Wilson and Lafleur, 1989. ISBN-2-89127-116-5. Price \$45.00, 320 pp.

This is a collection of legal articles put together at the Faculty of Law, Civil Law Section, of the University of Ottawa under the direction of Professor Ernest Capparos.

"Mélanges" is meant to commemorate the late Louis-Philippe Pigeon, 1905-1986, a Justice of the Supreme Court of Canada for 13 years. It is recognized that Louis-Philippe Pigeon was a person of prodigious talents and of equally prodigious labours. His involvement in the law stretched over a period of fifty years during which he was at various times a practitioner, a law professor at Laval University, counsel to prime ministers and constitutional advisor to many governments. When he retired from the Supreme Court Bench in 1980, at the age of 75, he did not seek solace in a historical contemplation of his many achievements. He chose instead to return to academe and for the six years preceding his death, was head of the Graduate Studies Programme on Legislative Drafting at the Law Faculty of the University of Ottawa. It is evident from the comments in *"Mélanges"* that even at the twilight of his years, Louis-Philippe Pigeon continued to till his fecund fields of legal knowledge and provided, to bench and bar, cogent and articulate expressions of the state of the law.

The collection of articles covers a fairly disparate field of juridical thinking and analysis. Professor John Brierly of McGill Law School propounds the existence of a "Common Law" as the fundamental prop for the *Quebec Civil Code*. Professor Mireille D. Castelli from Laval presents a detailed analysis of the 1985 *Divorce Act*. Professor Pierre-André Coté of L'Université de Montréal offers critical analysis of the traditional theories respecting retroactive and retrospective effects of legislation. There is also a contribution by Professor Albert McClean of the UBC Faculty of Law on the clash between doctrine and precedent in the institution of the law of "trust" under the *Quebec Civil Code*.

It might be said that some articles in the collection have very little to do with the late Mr. Justice Pigeon or disclose no reference to any pronouncement attributable to him. While this may seem a shortcoming of *"Mélanges"*, each article, in my view, reflects that strong sense of judicial discipline, methodology and restraint characteristic of the jurist the authors are commemorating.

The memorial collection is in three parts. The first part contains a biographical sketch of the jurist and a bibliography of his work. It also contains a conspectus by Mr. Pierre Thibault of all the Supreme Court

decisions in which Mr. Justice Pigeon was involved during his 13 years on the Bench. This list is considerable. He participated in over a thousand appeal cases and he wrote reasons in more than three hundred of them.

Also of interest in that first part of "*Mélanges*" is an article by Chantal Jacquier of the Department of Justice at Ottawa and a former graduate student of Mr. Justice Pigeon at the University of Ottawa Law School. It is here that one discovers how much discipline is required in drafting legislation and how much more complex it becomes when the legislative text must reflect not only a duality of languages, but a duality of legal systems as well. This whole field is one in which Mr. Justice Pigeon was deeply involved throughout the years and Chantal Jacquier, in my view, provides us with a clear exposition of the fundamental principles which guided the jurist throughout.

Similar articles by Professor Ethel Groffier, McGill University on "*Le Juge Pigeon et la langue du droit*" and by Professor Alain-François Bisson on "*Interprétation adéquate des lois*", open more windows to Mr. Justice Pigeon's scholarly approach to statute interpretation. All the articles contribute in a special way to the development of scholarly writing and to the ever-growing respect of the more casual reader to that kind of effort.

Mr. Justice Pigeon's thinking in terms of duality of language and systems surfaces in "*Le Droit comparé et la Cour suprême du Canada*" authored by H. Patrick Glenn of McGill University as well as in Professor Groffier's article to which I have referred. Professor Groffier subscribes to the notion that Mr. Justice Pigeon readily adopted the doctrine that the fundamental law at the Federal level is English common law. Such is the law at the base of Canada's Constitution. Only in cases where federal law collides with the civil law is a civilian approach required to its interpretation.

It would also appear that Mr. Justice Pigeon did not discount the formula historically applied to distinguish the common law from the civil law approach to statutory interpretation. In an article published in 1982,¹ he adopts René David's comment to the effect that whereas the French jurist looks to statutes for his fundamental doctrine, the English jurist interprets those same statutes as mere exceptions to the common law.

If I may digress in that respect, I am far from sure that such an unqualified distinction between the two systems remains valid. It seems to me that over the years, the mutual influences exercised by both schools on the Supreme Court of Canada have created a much less polarized

1. *La rédaction bilingue des lois fédérales*, (1982) 13 R.G.D, 177, (cited by Chantal Jacquier, *op. cit.*)

approach. Indeed, it might be noted that the common law is becoming increasingly replaced, amended, restricted or expanded by statute and that civil law relies increasingly on judicial precedents. More and more, it might be said, that we are maintaining distinctions without differences.

This phenomenon finds an oblique reference in Senator Gérard Beaudoin's contribution to "*Mélanges*" where he surveys, in an article entitled "*Le juge Pigeon et le partage des compétences législatives*", Mr. Justice Pigeon's participation in numerous constitutional debates while a member of the Supreme Court. Senator Beaudoin, although recognizing Pigeon's constructionist approach to the division of powers in Canada, nevertheless readily concedes that Mr. Justice Pigeon's approach was "totally British in function". It was in the nature of the jurist's long experience to deal with each issue with instinctive reserve and prudence. He imposed upon himself a case by case discipline. Rarely did he let himself venture too far afield simply because it was tempting to do so.

That same characteristic appears to be reflected in Mr. Justice Pigeon's involvement in Supreme Court decisions touching upon the *Canadian Bill of Rights* of 1960. This was, of course, before the Constitution of 1982 entrusted to the courts the interpretation of the *Canadian Charter of Rights and Freedoms*. This was before numerous doctrines of interpretation surged forth into a veritable stream of new judicial consciousness: The "purposeful" intendment; the doctrine of "proportionality"; the textual as against the more conceptual approach to the *Charter's* words and phrases. On reading Senator Beaudoin's analysis, one may readily conclude that Mr. Justice Pigeon would have approached *Charter* issues with the same care and prudence as he otherwise exercised in dealing with the traditional clash between section 91 and section 92 of the constitution. As is evident in reading his strong dissent in the *Drybones* case on discrimination on the basis of race and his equally strong majority judgement in the *Lavell* case dealing with sex discrimination, one may conclude that Mr. Pigeon's preoccupation, for better or for worse, would have been much more to assure interpretative conformity in the adjudication process than to build a public platform for the expression of his personal, sociological, anthropological or cosmic values.

It is clear from Senator Beaudoin's comments that Mr. Justice Pigeon did not suffer from the traditional "discipline à l'outrance" which characterizes many civilian or continental jurists and academics. Mr. Justice Pigeon forthrightly recognized and respected the exceptional rapport in Canada between the civil law regime pertaining to provincial jurisdiction in Quebec and the common law which is the underpinning of all federal public laws. I note in this respect that in his book "*Rédaction*

et interprétation des lois”, Mr. Justice Pigeon stated unequivocally that Quebec is not purely and simply a civil law province. In private law, he said, Quebec is a civil law province. In the field of public law, however, the fundamental law is English common law. Mr. Justice Pigeon appears to have been quite content and quite comfortable with both.

There is a certain synergy between Senator Beaudoin’s comments and those contained in Mr. Patrick Glenn’s article on comparative law. After tracing the 19th century movement among European jurists to adopt a purely positivistic approach to law by the process of comparison with various national laws to arrive at a greater universality of laws and systems, the author offers an interesting vignette on what role the Supreme Court of Canada was originally intended to play in that respect.

Such an intention, says the author, made evident at the dawn of Confederation by the need to seek uniformity in Canadian law as an agent of national unity in an embryonic federal or regionalized state, was not, according to Professor Glenn, ever carried out. The techniques and methodology for it appeared to create unsurmountable obstacles. The sources of law, either precedent or doctrine, between the common law and the civil law could not otherwise have guaranteed the purity of either. The author does acknowledge that some concordance was achieved by the Supreme Court of Canada in applying common law principles and precedents to civil law disputes, but finds that the process was very close to a one-way street with little traffic moving the other way.

I recall in this regard that Pierre Azard, former Dean of the University of Ottawa Civil Law School had reached similar conclusions in 1965 when he analyzed the mutual influences of both civilian and common law judges of the Supreme Court, but refrained from moralizing on it.² In effect, according to this jurist, the Court in dealing with difficulties of either doctrine of statutory interpretation, provided a comparative law approach, in an effort to find the best judicial principle applicable to the issue. As I interpret Mr. Azard’s comments, no one could reasonably grieve if through this technique, the solution could be found by the application of English doctrine to a civil law issue. As the author noted, if the legislature in Quebec should find and believe such intrusion to be an attack on civil law’s integrity, it need only pass a statute to re-establish a proper balance, a policy solution which, Pierre Azard suggested, the legislature seldom used. The result, unfortunately, was to focus the

2. *La Cour suprême du Canada et l’application du droit de la Province de Québec* (1965), 43 C.B.R. 553; et *Le problème des sources de droit civil dans la Province de Québec* (1966), 44 C.B.R. 417.

juridical pundits' attention to the Supreme Court's shortcomings. My own view of such legislative inattention by Quebec is that it considered such common law encroachments as banal or benign or otherwise not worthy of prodigal attention.

I have briefly referred to an article in "*Mélanges*" by Professor Albert J. McClean of the Faculty of Law at the University of British Columbia which deals with the nature of a "trust" in Quebec law. Interesting observations are made by the author in tracing what might be termed alien influences in the application of fiduciary laws in a civilian system. I used the word "fiduciary" because conventional interpretation of what is the nature of a "fiducie" at civil law gives it a meaning somewhat removed from the institution of the "trust" at common law. The author notes that since the enactment of the Civil Code of Lower Canada in 1866, the evolution of the law of trusts in Quebec has occurred much more through the expedient yet unprincipled application of case law than through respect and reverence for the traditionally hallowed "la doctrine". Case law in Quebec is replete with decisions where a pragmatic, functional approach to the determination of trust issues was adopted, inviting of course the application of comparative law or common law precedents at the expense of civil law doctrine.

Professor McClean does not make judgment calls on that phenomenon. He leaves it to the reader, however, to draw his own conclusions when he remarks that after some 125 years of debate, followed by a draft of a *Revised Civil Code* in 1977, followed by an *Act to Add the Reformed Laws of Persons, Successions and Property to the Civil Code of Quebec* in 1987, (an act incidentally, which, as regards the law of trusts, has yet to be proclaimed), the proponents of the doctrinaire approach to that particular institution have yet to come to terms between themselves. Academic writers have continued to be engaged in long dissertations as to the ownership of trust property, as to whether such property does or does not constitute an independent legal person or as to whether the very subtle application of the doctrine of "le patrimoine d'affectation" is warranted.

Professor McClean, enjoying perhaps an Olympian view of this eastern disharmony from his Coastal Mountain heights, looks upon this phenomenon as evidence of the vitality of "la doctrine" in civilian circles, a vitality which has been made manifest by the renewed reluctance of civilian jurists to slide into a jurisprudential common law approach to the law of trusts in Quebec. At the risk of misinterpreting his message, the author's subtle suggestion might be that civil law jurists should clean up their act once and for all and realize that strict adherence to civilian doctrine in the matter of trusts perpetuates an anomaly difficult to reconcile with current needs.

Civil Law Dean Raymond Landry at the University of Ottawa provides us with an interesting article on Mr. Justice Pigeon's influence on Canadian bankruptcy law. Dean Landry is satisfied that this particular institution imposes a multi-disciplinary approach to its interpretation, replete as it is with elements of constitutional, international, civil, penal, commercial and administrative dimensions. The law has consequently provoked countless debates and indeed the author notes that since 1975 six major amending statutes have been adopted by Parliament on bankruptcy and insolvency issues.

Dean Landry suggests that part of the problem in the administration of a bankrupt estate is the presence of innumerable procedural rules which, in the hands of skilful counsel, have a tendency to increase legal costs and thereby fritter away whatever assets the debtor might otherwise have for distribution to his creditors. In the case of *Pacific Mobile Corporation v. Hunter Douglas Canada Limited*, [1979] S.C.R. 842, Mr. Justice Pigeon, in refusing leave to appeal by the debtor corporation, was so incensed at the futility of the proceedings that he assessed costs against the debtor's solicitors personally. His Lordship stated quite unequivocally that it would not be fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest.

In *Kozack v. Richter* [1974] S.C.R. 832, the Supreme Court of Canada had to consider section 142(2) of the *Bankruptcy Act* which provides that a bankrupt may be discharged upon terms such as an order for payment of periodic sums to the creditors.

The debtor in that case had sought the protection of the statute when, already of modest means, he faced a judgement in damages against him of some \$12,000 and costs. The damage had been caused by the "wilful and wanton misconduct" of the debtor.

At first instance, the Bankruptcy Court had merely ordered that the debtor's discharge be suspended for three months. The Court of Appeal had in turn imposed on the debtor the payment of \$1800 in monthly payments of \$50.00 each. On further appeal to the Supreme Court of Canada, Mr. Justice Pigeon, on behalf of the majority, reviewed the parameters of the discretion exercisable under section 142(2) of the Act, decided that it was a proper case to justify the Court's intervention and increased the sum payable by the bankrupt to 50% of the damage award. Mr. Justice Pigeon said:

"The result of the order appealed from is that the appellant will recover nothing. With respect, I cannot agree that this is in conformity with the proper principles to be applied in the exercise of the discretion vested in the Courts by the provisions of the *Bankruptcy Act*."

Referring to the standard set down in section 143 of the Act where there is imposed on a bankrupt the burden of proving that when his assets

are less than fifty percent of his liabilities, it is due “to circumstances for which he cannot justly be held to be responsible”, his Lordship concluded that the debtor’s “wilful and wanton misconduct” in causing the damages was not the kind of circumstance to absolve him. It would be, according to Mr. Justice Pigeon, tantamount to making of the Bankruptcy Act a complete refuge against any damage award, a situation which Mr. Justice Pigeon found to be against public order.

His concern for public order and his resistance to any attempt to circumvent the legislator’s intention are also found in the reasons he delivered in the leading case of *Deputy Minister of Revenue v. Rainville*, [1980] S.C.R. 35. In that case, the Court rebuffed attempts by a provincial legislature to redefine “privileges”, and thereby provide to provincial Crown debts a special preference against a bankrupt’s estate contrary to the scheme of distribution found in Section 107 of the *Bankruptcy Act*. In Mr. Justice Pigeon’s opinion, “such a result would be contrary to the intention of Parliament”.

The principle laid down in *Rainville* was made to apply in any number of so-called “privileged claims” created by provincial statutes against the assets of a bankrupt. All these attempts to establish ranking other than those laid down in the *Bankruptcy Act*, were unsuccessful.

Dean Landry observes from the foregoing review the extent to which the requirements of public order, the suppression of abuses and the pre-eminence of federal powers under section 91 of the Constitution were preserved by Mr. Justice Pigeon’s own pre-eminence in the field of statute interpretation and in his meticulous applications of diverse canons of construction.

Another article, this one by Professor Louise Viau of l’Université de Montréal makes easy reading for all lawyers and jurists in Canada, irrespective of their particular adherence to a common law or civil law discipline. The article entitled “*L’impact de la Charte canadienne des droits et libertés sur les régimes de responsabilité pénale*”. The author focuses on the parameters articulated by Dickson, J. (as he then was) in the *Sault Ste-Marie* case reported at [1978] 2 S.C.R. 1299, when dealing with the doctrines applicable to breaches of various statutes by excepting *mens rea* and proof beyond a reasonable doubt as the basic ingredient to determine culpability. Dickson J. was called upon to define the concept of strict liability under certain statutes and the concept of absolute liability under other statutes.

In the field of strict liability, Professor Viau suggests that S.11(d) of the 1982 *Charter* now requires a whole new look at the categories laid down in 1978. Section 11(d) of the *Charter* speaks of the presumption of innocence, a fundamental doctrine difficult to reconcile with Dickson J.’s 1978 statement that for strict liability offences, there exists a presumption

of guilt rebuttable only on the accused being able to exculpate himself by evidence that on a balance of probabilities there was an absence of fault. The author raises the point on the strength of the Supreme Court of Canada decision in *R. v. Oakes* [1986] 1 S.C.R. 103, where the constitutionality of Section 8 of the *Narcotics Control Act* was scrutinized. This section, as is well known, provided that upon a finding of possession of a prohibited drug, the burden shifted to the accused to prove beyond the balance of probabilities that such possession was not for the purposes of trafficking. Otherwise a trafficking conviction would follow. The Supreme Court of Canada struck down that particular rider on the grounds that it was a breach of the presumption of innocence formally declared in section 11(d) of the *Charter*.

Professor Viau suggests, therefore, that any breach of a statute imposing strict liability will have to be looked at again to see if the pre-*Charter* principle in that respect still applies. Her view, of course, is that she can find no essential difference in the application of the strict liability doctrine as between provisions in the criminal statute and other statutes which are much more regulatory in scope and purpose.

In inviting the Supreme Court of Canada to look again at the *Sault Ste-Marie* doctrine, in the light of the *Oakes* decision, Professor Viau makes no prediction as to how the Court might deal with it. Her comment is to the effect that she has given up on making book on Supreme Court orientation and approach. I find a refreshing sense of maturity and wisdom in that comment.

Another article in "*Mélanges*" is entitled "*La crise du droit transitoire canadien*". It is authored by Professor Pierre-André Côté of l'Université de Montréal Law Faculty and offers a critical analysis of current doctrine in giving retrospective and retroactive effects to legislation.

The author suggests that current interpretation rules in this respect are both incomplete and imprecise. He cites as an example the definition provided in *Craies' on Statute Law*, 9th Ed., Sweet & Maxwell, 1971 as follows:

"A statute is deemed to be retroactive which takes away or impairs any vested right acquired under existing laws, or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or consideration already past."

Professor Côté sees in this definition a field of confusion with the doctrine of acquired rights. He suggests that a distinction be maintained between the non-retroactivity rule and the preservation of acquired rights. As an example, he dismisses as unimportant the principle that procedural rules have retroactive effect. The basic substantive principle, he notes, should be that there are no acquired rights in procedural rules.

The other critical base exploited by the author is that current doctrine is incomplete. Current doctrine, he says, ignores totally the concept of “la survie de la loi” and which is reflected in the various statutory provisions of section 43 and section 44 of the *Interpretation Act*, R.S.C. 1985, Chap. I-21.

The author concedes that the foregoing shortcomings have prompted more contemporary writers, among them E.A. Dreidger, Louis Côté and others to conceive of a new approach. Yet the author disagrees with the definition given by Driedger that a retroactive statute is one that changes the law as of a time prior to its enactment while a retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment. The flaw in this approach, according to Professor Côté is that it deals exclusively with the statute itself and fails to consider its “application”.

Professor Côté suggests that doctrinal reform in this whole field of statute retroactivity should adopt a dual approach, one being methodological and the other conceptual and terminological. He deems it essential that this double-edged approach be maintained throughout so that order, consistency, clarity and integrity be achieved. In this respect, the author does not provide the answers, but he certainly makes a valiant effort to articulate the questions.

The foregoing review is a simple tour d’horizon of the various articles in “*Mélanges*”. As the reader will have noted, the manner of treatment by each individual author is evidence of a strong scholarly bent and undoubted analytical talent. The authors come from various schools and from various parts of the country. The civilian strain nevertheless permeates the whole collection and numerous are the comments and observations indicating a renewed attachment for “la doctrine”.

The articles certainly create an impression that contemporary civilists, in Quebec at least, are going through a conscious effort to re-emphasize the roots of civil law, restore its legitimacy and perhaps its “sovereignty” as well. Yet the authors’ comments and observations appear to be bereft of ideological colouring and even their most unqualified statements, propositions and conclusions are well within the bounds of legal discipline. Discipline à l’outrance, at times, but discipline nevertheless.

If the purpose of the “*Mélanges*” collection was to pay tribute to Mr. Justice Pigeon, regarded throughout Canada as one of our most eminent jurist, scholar and judge, I suggest that that purpose has been amply achieved. The analytical and unyielding performance of Mr. Justice Pigeon throughout his career is reflected in the work provided to us by his younger successors. Not all of their individual performances are of equal quality and, at times, clarity of thought and brevity of expression

are wanting. These shortcomings, however, in no way detract from their inherent distinction and professional accomplishments.

I regret being unable to provide full coverage to all of the articles in the collection. Some of them, of course, make tough sledding for those of us engaged in somewhat more prosaic pursuits. I am satisfied, however, that most of them are of a nature to pique any common law reader's curiosity and provide continuing intellectual enrichment to him.

Professor Ernest Capparos and his editorial team have done an excellent job in putting "*Mélanges Louis-Philippe Pigeon*" together and they should be commended for it.

Mr. Justice Marcel Joyal
Federal Court of Canada.

Maxwell Cohen OC, QC and Margaret E. Gouin, eds. *Lawyers and the Nuclear Debate*. University of Ottawa Press, 1988, xv and 419 pp.

The volume under review constitutes a valuable and exciting contribution to the whole nuclear debate. Its distinctiveness, perhaps, lies in the format. A mix of more formal and prepared papers, less formal papers, interventions and discussions provides an interesting example of the *genre*. While one is clearly not dealing with an academic treatise, the style of the compilation enhances the feeling of acute concern, spontaneity and the sense of the contemporary significance of the whole enterprise.

The book constitutes the Proceedings of the Canadian Conference on Nuclear Weapons and the Law, held in 1987, and is the product of a happy collaboration of academic and practising lawyers. The vast array of distinguished Canadian and international participants speaks for itself. The fact that the book was published so soon after the conference is a tribute to the dedication of the conference organisers and a source of wonderment to the rest of us.

The importance of the general topic of this conference has increased and not diminished with the passage of time since it was held. Although the ending of the cold war and the substantial easing of the postures maintained by the NATO and Warsaw Pact Alliances has transformed the nuclear debate and drawn a happy line under the various Star War enterprises of a more fanciful nature, several of the issues discussed keenly and skilfully in the book have gained in significance. Of these, one could point to the proliferation of nuclear weapons, the verification debate, and the role of national law and procedures in relation to executive decisions on international policy matters.

The book itself is organised in terms of the eight panel sessions that took place, each one composed of distinguished Canadian and international speakers. The subjects of the panel presentations ranged from "Science and Weapons of Mass Destruction in the Nuclear Age" to "The Responsibility of the Legal Profession". After each panel session, a discussion was held, during which the panelists also responded and it is these oral interventions and contributions that are often the most fascinating. Also contained in the book are a number of supplementary papers submitted to the conference by distinguished authors in English and French unable to present them in the context of the various panels. Of these, two could be particularly mentioned. First, the interesting legal analysis of the 1973 statements of the International Committee of the Red Cross concerning atomic warfare by Karl Josef Partsch in the context of the subsequent Additional Protocols of 1977. This concluded by emphasising that states cannot use the statements as a basis for the right to retain atomic weapons and this is of some importance.

Secondly, one should draw attention to the essay by Henri Meyrowitz, one of the leading writers on nuclear weapons and the law. This is entitled "Le Regime des Armes Nucleaires Selon le Droit de la Guerre" and constitutes a stimulating contribution, as one would expect, to the debate.

One of the most impressive aspects of the book is the range of expertise gathered together. Panel 1, for example, on "Science and Weapons of Mass Destruction in the Nuclear Age", chaired by the Attorney General of Ontario, brings together Professor John Polanyi, who was awarded the Nobel prize in Chemistry in 1987, Professor Yury Davidov of the Institute of the USA and Canada of the Soviet Academy of Sciences and Dr. Edward Teller, whose role in the development of the atomic and nuclear bombs is legendary. From this panel, one learns the astonishing and disturbing fact that some 25% of all scientists work in the military field. Some old coals are raked over in relation to historical events, but the call for openness in relation to nuclear weaponry is refreshing.

The Comment by Professor Oscar Schachter, a leading international lawyer of profound vision, sets the scene in terms of international legal regulation. Vision is crucial, but alone can be counter-productive. Schachter carefully and thoroughly, as far as that is possible in a short commentary, lays out the applicable legal norms. Principles such as those of proportionality and noncombatant immunity are stressed as helping to focus on important values and the role of international law is seen as assisting the responsible officials and indeed the public at large to direct attention to basic policies. However, the temptation sometimes indulged in to exaggerate hopelessly the influence of international law is quite correctly put into context. In his final sentence, which could bear much repetition, Schachter comments that "[I]aw has its appropriate and even its essential role, but we do it no service by ignoring the political and psychological contexts which limit this role".

The proliferation of nuclear weapons is an issue which, with the demise of the Cold War, has now attained a particular importance. As the super-powers halt and gradually reign back their fearsome nuclear arsenals, new powers are emerging on that brink of acquiring such weapons, if not actually over the brink. One has to mention in this context Iraq, which is seeking to add nuclear weapons to the chemical weapons it possesses and which it has already used to devastating effect both upon Iranian soldiers and its own innocent Kurdish citizens. Would its possession of such weapons lead to a balance of terror with Israel, in a stand of mutually assured destructive deterrence? Or would it mean that the next war in the Middle East, should there be one, would inevitably involve recourse to chemical and nuclear armouries? A horrifying prospect.

Panel 2 sought to come to terms with some of the underlying problems related to the international effort concerning non-proliferation. Professor Yoram Dinstein of Tel-Aviv University deals with some issues relating to the Non-Proliferation Treaty of 1968 from an Israeli perspective. That perspective, not necessarily limited to Israel, is one of a small state not a member of a powerful alliance including a nuclear power, which is actually under military threat. One has to bear in mind also the proven destructive capacity of conventional weapons. Three issues have to be addressed. First, where one's enemies are not members of the 1968 Treaty, who is to decide which state is to join at which time? Not a simple question when mutual trust is by definition lacking to say the least. Secondly, how should one cope with the very short 3 month period of notification of withdrawal from the treaty provided for in article 10? Thirdly, the nature and structure of the International Atomic Energy Agency, which is supposed to supervise the mechanism.

Answers cannot be provided in a mere brief review, but glib and facile responses to states facing real dilemmas will not suffice.

More general questions relating to international humanitarian law are discussed in the Panel 3 deliberations, and it is enough to draw attention to the thorough contribution by Professor Leslie Green, a noted expert in the field.

Two further issues must be mentioned in this review. First, the interesting and important discussion relating to the use of national legal systems when faced with in effect an executive policy decision on an international relations question. Professor Cottler, draws an interesting picture of the position in Canada, noting the importance of the Charter of Rights and Freedoms and ensuing caselaw and it is asserted that peace has now become a justiciable issue. However, Chris Greenwood correctly raises the issue of whether courts of law are an appropriate place in which to decide questions relating to national security. To the extent that courts ought to be able to examine the claim of the executive that a particular problem is one of national security, the answer must be positive. Otherwise the simple assertion of national security would suffice and that cannot be right. However, this cannot extend to the determination by a judge, of a major issue, such as the possession of nuclear weapons. Nevertheless, the increasing intermingling of international and domestic legal argumentation and process is of value and to be encouraged.

The final panel deals with the responsibility of the legal profession and the person who chose this topic is to be commended. The contributions of Professor Burns Weston and Professor John Dugard are particularly interesting. The former emphasises the relevance of legal skills to society in general with regard to crucial political and social issues. Abilities in the

fields of fact-finding and negotiation, when allied to the skills in creating institutions and building regimes, are of particular importance and must be encouraged and used. The latter panelist, drawing upon his vast experience in the civil liberties area of South African life, emphasises that lawyers do not exist alone, but are part of a complex society and must play their part in it. Their specific responsibility lies in the fields of education, both of students and of practitioners, and of practice, in attempting to obtain progressive decisions.

The book, as can thus be seen, ranges widely. It is stimulating and fascinating and the clash of ideas orally expressed is particularly interesting. This is not a heavily footnoted scholarly tome, but it is a work of value and hopefully one that will be widely read and not only by those whose interests lie solely in the area of nuclear weapons.

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Subrata Roy Chowdhury, *Rule of Law in a State of Emergency*. New York; St. Martin's Press, 1989. \$45.00.

Is there any such thing as an absolute human right? Part of the answer to this question will be found in article 4 of the United Nations' Covenant on Civil and Political Rights. The article says in part that "in time of public emergency which threatens the life of the nation . . . the States Parties to the present Covenant may take measures derogating from their obligation under the present Covenant to the extent strictly required by the exigencies of the situation . . ." Similar provisions will be found in regional conventions on the human rights.

Such provisions reflect political and material reality. In certain circumstances, the State must protect the rights of the collectivity. In the words of article 29 of the Universal Declaration of Human Rights, "everyone has duties to the community in which alone the free and full development of his personality is possible". One of these duties is to help the community to survive, and this may include recognizing its right in time of public emergency not to respect his usual rights.

These norms relating to states of emergency are, it must be added, accompanied by certain guarantees (if that word can be used in the present context) that they will not be abused. Thus, the existence of the emergency must be officially proclaimed by the derogating State; the measures taken must not be inconsistent with the States' obligations under international law and not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; no derogations are permitted from obligation arising under certain articles of the Covenant such as, for example, the right to be free from torture; and, finally, States availing themselves of the right of derogation must immediately inform, through the intermediary of the Secretary-General of the United Nations, the other parties to the Covenant of the provisions of the Covenant from which it has derogated and of the reasons by which it was actuated.

The fact is, however, that in international practice many States do not observe their obligations under the Covenant; and even where a state of emergency is officially proclaimed and reported to the Secretary-General, it may not threaten "the life of the nation" nor are the measures taken by the derogating States of a kind "strictly required by the exigencies of the situation". It may indeed simply be a case of an authoritarian regime acting in its political interest.

It is because of these failures of States to observe their obligations under article 4 of the Covenant that there has been so much interest in the article, especially by such non-governmental organizations as the

International Commission of Jurists and the International Law Association. Mr. Subrata Roy Chowdhury's book is a scholarly and exhaustive exegesis on the Paris Minimum Standards of Human Rights Norms in a State of Emergency of the International Law Association, with ample reference to other studies such as those undertaken by the International Commission of Jurists. It is without any doubt an important and useful book which should be part of any library collection on the world law of human rights.

The book is, however, marred by one highly controversial position taken by the author. He writes on page 15 that emergency situations may be envisaged in three different situations. Broadly speaking, he asserts, emergency situations may be envisaged in situations resulting from: (a) a serious political crisis (armed conflict and internal disorder); (b) force majeure (disasters of various kinds); or (c) particular economic circumstances, notably those relating to underdevelopment.

He then, strangely enough, goes on to write that while the *travaux préparatoires* cover the first two situations, they do not mention the third, namely, underdevelopment. The reason for this is very simple. Neither the United Nations Human Rights Commission nor the General Assembly — and the writer of this review was an active participant at both — intended public emergencies to include underdevelopment. If Mr. Chowdhury were correct, the Covenant on Civil and Political Rights would have little meaning for many so-called developing countries which are still in a more or less permanent state of underdevelopment.

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J. Patrick Boyer, *Local Elections in Canada*, Toronto: Butterworths, 1988, pp 581.

This book is the fifth in a series by the same author, and the same publisher, on Canadian Election Law. The previous books (with their sub-titles) are as follows: *Political Rights* (The Legal Framework of Elections in Canada); *Lawmaking by the People* (Referendums and Plebiscites in Canada); *Money and Message* (The Law Governing Election Financing, Advertising, Broadcasting and Campaigning in Canada); and, *Election Law in Canada* (The Law and Procedure of Federal, Provincial and Territorial Elections (two volumes)). The present book is sub-titled "The Law Governing Elections of Municipal Councils, School Boards and Other Local Authorities". The sub-title is a fair representation of its contents.

Chapter One, described as "An Overview" of "Democracy and Local Elections in Canada", is a good introduction. One feels that the author himself is present, whereas in successive chapters it is the statutes behind the text that shape much of what is said. Apart from Chapter One, the text basically is a paraphrase of legislation in narrative form. It is a good deal more readable to someone who is not experienced in the study of statutes or who does not have a need for the exact language of the statutes, by-laws ("by" is Anglo-Saxon for "town": the author is dealing with a mighty long tradition, going back to the involvement of the medieval merchant guilds in local government and the Renaissance rise of the commercial corporation), and regulations. A lawyer who has a client behind him will want access to the original legal materials, but I can see the book serving to give him or her a quick fix on a subject that may not be at the forefront of her or his mind.

Beyond that, I should think the book will be useful to the "actors" in municipal-local government: politicians, bureaucrats, concerned citizens who find themselves involved in the "body language" of local politics, and trade union officers who must get as tired of reading statutes as they do collective agreements and union constitutions and municipal by-laws.

Although the text instantly addresses the limited subject of elections, leaving the dynamics of local politics perhaps to another book or other authors, one is reminded of distinctive characteristics of local affairs. Municipalities do not have a protected constitutional base, being dependent for their lives on provincial legislation. Local elections tend to be biennial, giving little breathing space to the politician. The politician is much more accessible to the citizen, in the tradition of the New England Town Meeting (peace be to the United Empire Loyalists), both formally, through council and committee meetings, and informally, through visits and phone calls and headlines and letters to the editor. And

the trade-offs in choices are palpable and immediate: road repairs, negotiated wage rates, Expo or Olympics, and taxes. One is reminded also of the separation of (and linkage between) municipal politics and primary-secondary education, the latter with a long Canadian tradition of being embedded in the “grass roots” through elections, boards, committees, and parent-teacher associations and wire fences (to separate Catholic, Protestant, Separate, Public, Private, Hebrew, Non-conformist (“hedge-row”) children from their own kind in their own generation), and school teacher collective bargaining. And one must recognize the difference between the poly-centric mega-cities (the “Greater” cities) of Montreal, Toronto and Vancouver and those that still project a “hometown” image of one-ness. (I was born in Saskatoon, and in my imagination I still know what that means: Nutana, and the end of the street-car line.)

Further, although some politicians use local government as a springboard to provincial and federal politics, most stay close to the hurly-burly of local politics, and land development.

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Johannes G.C. van Aggelen, *Le rôle organisations internationaux dans la protection du droit à la vie*. Brussels: E. Story-Scientia, éditions juridiques et fiscales, 1986, ix + 104 pp.

The emerging role of international and regional organizations toward the realistic protection of the right to life (along with closely related guarantees) constitutes the scope of the scholarly treatise, which is an outgrowth of the author's participation at the Research Center of the Hague Academy of International Law. Precisely Johannes van Aggelen of the Center for Human Rights, United Nations Office at Geneva, is one of the rising scholars of the coming generation of human rights lawyers. Indeed, his work in such closely related fields as humanitarian law, the Arab-Israeli conflict, the right to an adequate food supply and supporting medical care, environmental protection, the impact of science and technology on law, the law of outer space, plus the practice of the Netherlands Government in international law and relations attest to the range of his high level of competency.¹ In fact, this wide range of research is clearly reflected in his approach to the protection of human life. Whereas the participants at the Center for Research in International Law and Relations are required to prepare an in-depth article or chapter in a volume,² van Aggelen prepared his own full-length book that will become the standard work, with regard to the future role of multinational organizations. Most authors (including this reviewer³) place their emphasis on the injured individual or racial group that has become the direct target of discrimination, which in turn oftentimes leads to physical destruction.

While the book does not intend to offer a complete exposé or evaluation of all ramifications of the degree of protection afforded by those international organizations that have been selected for analysis — in terms of four selected premises, as will be shown below — the distinguished author clearly presents a penetrating analysis of these designated points of departure. In short, the book under review presents a clearly defined analysis of the rights of individuals and groups, especially as beneficiaries of the experiments, and resulting legal

1. E.g., J. van Aggelen, "Decolonization: Dutch Territories", — *Encyclopedia of Public International Law* — (to be published).

2. E.g., W. Gormley, "The Elimination of Child Labour and the Protection of Young Workers by Means of International Human Rights Conventions", in: *New Directions in International Law* 413-46 (R. Gutierrez Girardot, M. Sarin eds 1982); and Gormley, "The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith" (1970), 14 *St. Louis U. L.J.* 367.

3. E.g., W. Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (1966).

standards, of organizations. These topics selected for examination have been intensively studied and researched. Accordingly, a major contribution to human rights literature has been produced.

Chapter I, Preliminary Observations, establishes the foundation for the author's inquiry, in that his definition of the right to life moves beyond the mere physical survival of mankind, i.e. "droit à la survie." Though in no sense derogating the indispensable nature of the continued physical survival of mankind, he contends, and quite correctly, that the "right to life" encompasses not only civil and political rights but, simultaneously, economic, social and cultural guarantees. The effect of this merging of existing human rights provisions from customary and codified public international law is that the newer concept of the "right to living" arises as the contemporary standard, which also includes both the physical and mental well-being of the human person. Indeed, the quality of life becomes the focus of his inquiry. The next step is to determine those conditions, pursuant to which the *droit à la vie* can be realized under the present political climate.

The author's approach becomes controversial in that he clearly moves beyond the strict confines of public international law, in order to consider the framework in which the "right of life" must function. Numerous factors determine the application of human rights norms, especially at the regional level, as multinational institutions seek to give effect to the goals of human rights protection.

Four main areas, encompassing the social and political context within which multinational institutions must function, along with the degree of legal competence possessed by these organizations, have been chosen as points of departure for the following examination. These "facteurs déterminants" provide the structural limits, namely the framework of the inquiry and the focus of the study.

I. *La culture.*

Human rights must evolve and subsequently be implemented within specific societies. These norms must function within the scope of numerous other cultures, as universal rights are promulgated that are deemed to be *jus cogens*.⁴ Even though the right to life is clearly within the orbit of *jus cogens* and is a right *erga omnes* that must be respected by all sovereign states, the impact of differing cultures must not be minimized. An illustration would be the treatment — and the legal status

4. W. Gormley, "The Right to Life and the Rule of Non-Derogability: Peremptory Norms of *Jus Cogens*", in: *The Right to Life in International Law* 120-59 (B. Ramcharan ed. 1985).

— of women and children within a given social order. Sexual discrimination, accompanied by racial hatred, is ever present as a form of governmental policy, in most countries. Accordingly, such discrimination becomes the focus of experiments on the part of international organizations in their attempts to promulgate universal standards as can be seen from the efforts of the United Nations, the Economic and Social Council (ECOSOC), the United Nations Commission of Human Rights, and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. In this regard, the sophisticated programs of labour and human rights protection perfected by the International Labour Organization can serve as a model for other institutions, particularly as concerns the implementation and enforcement of international conventions. Other agencies such as ICRC, WHO and FAO have adopted measures that result in cooperation with governments.

Throughout the book, van Aggelen is extremely conscious of the functional machinery and supporting procedures that are at the disposal of international institutions, throughout his step-by-step analysis of the perfection of human rights norms. In turn, they reflect the specialized missions of these organs.

II. *Le niveau de developpement.*

The right to development, considered to be one of the primary examples of the new solidarity rights (rights of the third cycle, or the third generation of human rights)⁵ bears a direct relationship to the right to life. Development law is deemed to be indispensable if humankind (along with the earth's flora and fauna) is to survive in the depressed regions. But, as we indicated above, the author is not completely preoccupied with the right to mere survival; rather he seeks to determine those areas in which the right to development becomes supportive of the world's exploding population, in terms of humanitarian perspectives. Yet, a basic question must still be answered: who, precisely, are the direct (or indirect) beneficiaries of this solidarity right? More precisely, who are the subjects, e.g. individuals or those collective entities that are capable of benefiting from, or possibly even enforcing, this right? Who are the subjects of these additional obligations at the local, national, regional and international levels?

5. Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982), 29 *Netherlands Int'l L. Rev.* 307; in conjunction with Alston, "Conjuring Up New Human Rights: A Proposal For Quality Control" (1984), 78 *Am. J. Int'l L.* 607.

One answer is that the international community has a duty — in fact an obligation — *erga omnes*, to facilitate economic and social progress, an observation shared by this reviewer. In other words, the international community, not just a few of the First World States, must alleviate the plight of the LDC.

One of the basic themes underlying the book's several theses (not completely supported by this reviewer) is the inseparability between civil and political rights, on the one hand, as contrasted with economic, social and cultural guarantees on the other.⁶ Though in sympathy with this approach of merging all classes of human rights for the purpose of strengthening the right to life, the reality of attempting to extend the reach of existing guarantees is that different methods of supervision and enforcement are applied. These differences can easily be appreciated from the two United Nations Human Rights Covenants and, likewise, from the Council of Europe's conventions in its European Treaty Series. In the reviewer's submission, the more that rights are sought to be extended, the weaker they become, largely as the result of assertions of state sovereignty. Thus, the *jus cogens* nature of the right to life can be weakened if the "right to living" incorporates too many other phases that have been traditionally classified as economic and social guarantees. However, the main consideration are the methods of enforcement, for instance, the European Commission of Human Rights can only deal with those rights contained in the European Convention of Human Rights. Similarly, the Human Rights Committee (pursuant to the Optional Protocol) is limited to those rights that have been codified into the Civil and Political Covenant. Moreover, any attempted broadening of these rights will of necessity result in the petition being declared inadmissible. The jurisprudence of the European Commission of Human Rights is unyielding.

Such observations merely highlight the controversial nature of the evolution of human rights protection by international institutions, because the basic issue remains: how much emphasis should be placed on human survival⁷ and what resources remain to further human development? As van Aggelen demonstrates in the following chapters,

6. Accord, Dr. Ramcharan, "The Concept and Dimensions of the Right to Life", in: *The Right to Life in International Law* 1-32 (B. Ramcharan ed. 1985); and Jhabvala, "The International Covenant on Civil and Political Rights as a Vehicle For the Global Promotion and Protection of Human Rights" (1985), 15 *Israel Y.B. Human Rights* 184-203; Gormley, "Book Review" (1987), 81 *Am. J. Int'l L.* 486.

7. F. Meghistu, "The Satisfaction of Survival Requirements", in: *The Right to Life*, supra note 6, at 63-83.

the destruction of human life continues as deliberate governmental policies.

III. *Le progrès scientifique et technique de la biologie et de médecine.*

This third determining factor reflects the increasing awareness of the impact of science and technology upon positive law. Hence, the progress presently being made in the biological sciences and in modern medicine at the global level is impacting upon millions of human beings, who in this instance, become the beneficiaries of modern methods of sanitation and of life preserving systems.⁸ Once again, the fundamental issues become evident: who possesses the required *locus standi* to enforce these rights on behalf of the subjects and beneficiaries of the law? For instance, medical ethics must be in a position to resolve such issues as to what disposition must be made of confidential medical records. How far must the need to receive sophisticated medical care be extended at public expense; and what choices will be made during the process of safeguarding the sanctity of human life, primarily in those situations in which limited medical facilities are available?⁹

The solution provided (and well chosen) is the adoption of a modern Code of Medical Ethics that would provide guidelines toward the resolution of some of these main issues, such as the use to be made of medical discoveries and the responsibility of the medical profession. Included would be the role, if any, of governments, along with applicable law, civil and criminal, that may become relevant in specific cases. The prolongation of physical existence by means of life support systems is a clear illustration, with science becoming even more sophisticated. Yet, to what extent do the contemporary norms of human rights protection require that life be prolonged at government expense? From this premise, what ethical and moral factors (including decisions of conscience) become subject to legislation, such as artificial insemination, transplants of vital organs, and the creation of new life forms by medical engineering? Likewise, negative ramifications become relevant, such as medical negligence, which not only will result in personal injury and

8. "On peut se demander par conséquent à juste titre si la catégorie des moins privilégiés est suffisamment protégée par des soins médicaux contre les risques majeurs de l'environnement physique et biologique; cette question touche à un aspect fondamental du droit à la vie." J. van Aggelen, "Le rôle des organisations internationales dans la protection du droit à la vie" 5 (1986) [hereinafter cited as *Droit à la vie*]. See also T. van Boven, "Les Nations Unies et les droits de l'homme" (1983), 43 *Ann. du droit de Louvain* 165, 167, 169.

9. Reflecting the language of the Helsinki Declaration, "Final Act of the Conference on Security and Co-operation in Europe" (1975), 14 *I.L.M.* 1292. *Droit à la vie*, supra note 8, 6 n.6.

suffering, but simultaneously violations of human rights. One concrete example would be the protection of prisoners from medical experiments. Accordingly, the subsequent level to be considered is the role of international organizations in implementing a future international code of medical conduct, which must incorporate the non-derogable right to life, as codified into article 6 of the Civil and Political Covenant.¹⁰

Of these four points of inquiry, the human right to be guaranteed medical care receives the most intensive coverage throughout the remainder of the treatise, as for example the discussion of case law.

IV. *L'état actes juridiques internationaux.*

The protection of the earth's environment follows logically from the discussion in the prior section, for the author treats medical and environmental problems as counterparts, largely because of the tragedies caused by pollution. Beginning with the *Stockholm Declaration on the Human Environment*,¹¹ of 1972, the thrust of this section, and similarly throughout the subsequent portions of the book, is directed toward the quality of life. In sum, the individual is deemed to be a beneficiary of the emerging environmental law at the global level, for the reason that a pure and decent environment is one of the conditioning factors of the right to life; consequently it becomes an obligation *erga omnes*, in the author's submission.¹² In sustaining this thesis, the author relies on the Council of Europe's efforts. Specifically, the proposal of Professor Heinhard Steiger to attach an additional protocol to the European Convention on Human Rights is cited approvingly.¹³ In order to bring environmental rights within the sphere of competence of those organs created pursuant to the European Convention (especially the European Commission of Human Rights and the European Court of Human Rights), the only means whereby this objective can be realized is through the adoption of such a

10. International Covenant on Civil and Political Rights (adopted December 16, 1966), G.A. Res. 2200A, 21 U.N. GAOR. Supp. No. 16, 49, U.N. Doc. A/6316 (1966) (entered into force March 23, 1976).

11. United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14, at 2-65, and Rev. 1 (1972).

12. Accord, Gormley, "The Right of Individuals, and Their Protecting States, to be Guaranteed a Pure and Decent Environment: The Emerging Legal Obligation of the World Community to Preserve a Stable Ecology" (in preparation).

13. H. Steiger, *The Right to a Human Environment: Proposals for an Additional Protocol to the European Human Rights Convention* (1973); discussed in W. Gormley, *Human Rights and Environment: The Need For International Co-operation* 90-96 (1976). See also R. Dupuy, *Proposals for a Short-Term and Medium-Term Program of the Council of Europe in the Field of Human Rights*, Consultative Assembly Rec. No. 683 (1972); discussed in W. Gormley, *supra* at 89-90; and Droit à la vie, *supra* note 3, at 9.

protocol. Sad to say, the High Contracting Parties are hesitant to extend the jurisdiction of the Council of Europe over the environmental field.

At the world-wide level a similar hesitancy exists; thus it becomes necessary to determine precisely the competence of international organs to deal with issues of water and air pollution, as intensified by nuclear contamination in terms of a universal law of human rights. That is to say, there are juridical barriers to the enforcement of these environmental guarantees, owing to assertions of state sovereignty.

Written prior to the tragedy at Chernobyl, this section concludes with a clear recognition of the dangers caused by nuclear pollution and its resulting medical consequences. Indeed, contemporary events are demonstrating the long-term efforts on the quality of life (including the right to survival) posed by nuclear fallout.

The second section of the First Chapter deals with those juridical acts that may be taken by international organizations in cooperation with sovereign states. Though concentrating on the role of multinational institutions, the author never loses sight of the need for cooperation (and coordination) with sovereign states. Thus, unilateral, bilateral and multilateral actions — especially treaty commitments — provide the legal basis for international, juridical acts, such as intergovernmental accords, the programs of intergovernmental organizations, and multilateral conventions that have been promulgated by international conferences. From this context, the categories of international institutions are examined. Consequently, the author considers the possible contributions of temporary and permanent institutions, along with regional bodies. The unique jurisdiction of specialized organs of the United Nations, along with their particular functions, are examined. In addition to the defined and limited competence of entities such as ILO, FAO, and WHO, it needs to be recognized that the great regional institutions, i.e. the Council of Europe, the OAS and the OAU all possess limited and clearly defined spheres of competence, in terms of the organizational objectives. May this reviewer suggest that there may arise a problem of competence when existing institutions attempt to extend their acts over the “right of living” and environmental protection. Beyond question, the role of traditional institutions, including non-governmental entities, is changing, as can be seen from the recent activities of ECOSOC, ILO and WHO. Since World War II, these agencies have created “soft law” by means of resolutions, recommendations and directives. Deriving their authority from constitutions and establishing treaties, they have contributed to the creation of a positive law of human rights. The ILO is the primary example.

Yet an additional problem arises. Is the thrust of such an organization primarily legislative or consultative in nature? One obvious response is

that true “international legislation” does not, in fact, exist. On the other hand, the ILO, with its tri-partheid structure, does produce binding international treaties. On the other end of the spectrum, do resolutions of the United Nations General Assembly constitute customary international law, or are they merely evidence of positive law, or conversely, are these resolutions merely recommendatory on governments? Obviously, such questions cannot be resolved within the confines of the book under review. Suffice it to state that regulations and recommendations of organizations contribute to the evolution of human rights protection; but, as the author so clearly recognizes, the question of the competence of a particular organization to enact “legislation” is always controversial.¹⁴ Furthermore, the methods of adoption must be analyzed. Once again, the ILO becomes the primary example of binding conventions, on the one hand, as contrasted with recommendations that are non-binding, but can be adopted as treaty texts at a future date.

In this regard, a non-governmental organization, the International Committee of the Red Cross, is selected as the primary illustration of the promulgation of global standards of protection, which, in turn, are adopted by states parties, as is shown in the concluding chapter.¹⁵

Following this brief, though challenging, exposition of the author’s purpose and scope of the study, two major chapters set forth the book’s precise, reasoned context. The step-by-step examination contains the material supporting his contentions that international organizations can play a decisive role in the implementation of human rights protection.

Chapter II, *The International Organizations and the Protection of the Right to Life*,¹⁶ reviews the *travaux preatoires* of the main human rights instruments that confer jurisdiction.¹⁷ Starting with the United Nations Charter, as it sets forth the right to life, along with supporting rights, the basic thesis is advanced: the right to life encompasses considerably more than the assurance of a mere physical existence. At this stage of the study, the numerous programs of multinational institutions must be considered. In particular, articles 5 and 6 of the Civil and Political Covenant enunciate, as codified positive law, the universal principle derived from customary law, the Universal Declaration of Human Rights and the

14. Compare the directives, regulations and recommendations of the European Communities, which have varying degrees of legal force within the member states. A number of these community acts deal with environmental standards, especially air and water pollution. As concerns the traditional criteria, see, e.g., 1-9 M. Hudson, *International Legislation* (1931-1950).

15. Notes 49 & 55 *infra*.

16. *Droit à la vie* *supra* note 3, at 17-49.

17. *Id.* at 19; including the author’s analysis of the concept of “arbitrary.” *id.* at 21ff.

United Nations Charter. In short, this universal principle of the right to life — and the absolute prohibition on the arbitrary taking of human life — imposes a sacrosanct (or *jus cogens*) obligation on states parties to respect and protect these rights, which is required by article 5.

The counterpart, however, is the protection of the security of the state; this defense has been vigorously interposed by sovereign states, before such fora as the European Commission of Human Rights and the American Commission of Human Rights. As a result, a major *corpus* of case law exists, in which state interests have been clarified by these organs, although individuals have been accorded a high degree of protection when viewed against the classical remedies of international law.

Newer areas of conflict continue to arise in the application of the right to life. When does life begin? One possible answer is that at the moment of conception there is an independent physical condition or existence.

This section concludes with an analysis of the growing jurisprudence of the Human Rights Committee. This organ, established pursuant to the Optional Protocol of the Civil and Political Covenant,¹⁸ has developed a major *corpus* of case law that can serve as valuable precedent for the interpretation of emerging human rights.

The purpose of the chapter has been accomplished with considerable skill; it reviews the main law-making contributions of the above mentioned organizations.

The next topic is a discussion of United Nations conventions that afford some degree of protection to the right to life,¹⁹ namely the *Convention on the Prevention and Punishment of the Crime of Genocide*²⁰ and the *International Convention on the Suppression and Punishment of the Crime of Apartheid*.²¹ These specialized conventions will have even greater significance in the future if, and when, international action is undertaken, as for example before an international criminal court, to be discussed below.²²

18. Optional Protocol to the International Covenant on Civil and Political Rights (adopted December 16, 1966), G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, 49, U.N. Doc. A/6316 (entered into force March 23, 1976).

19. *Droit à la vie*, supra note 3, at 24ff.

20. Convention on the Prevention and Punishment of the Crime of Genocide (adopted December 9, 1948), G.A. Res. 260 (III) A, GAOR, 3d Sess. (I), at 174, U.N. Doc. A/810, 78 U.N.T.S. 277 (entered into force January 12, 1951).

21. International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted November 30, 1973), G.A. Res. 3068, 28 U.N. GOAR, Supp. No. 30, at 75, U.N. Doc. A/9030 (entered into force 18 July 1976).

22. Note 39ff infra.

Intergovernmental organizations that are directly involved with the protection of life include the WHO, which is now dealing with problems resulting from deliberate pollution; moreover, it is collaborating with the International Atomic Energy Agency in attempting to establish minimum standards to protect personnel exposed to radiation. Indeed, these experiments will prove to be highly significant toward the protection of humankind and the quality of life.

The book's first section concludes with a recognition of ILO and its sophisticated system of labour and human rights protection that has become indispensable to safeguard continued human existence. It has perfected its own *ordre public*, pursuant to its constitution, which has been implemented by conventions and recommendations.

Part II, the counterpart to the United Nations, is the Conference of Islamic Organization. Thus, the Islamic Organization is classified as an international institution rather than as being regional in scope, for the purpose of serving as a counterpart to the United Nations. The reality of the author's approach is that he has not only employed the French language, but has adopted a French format and philosophy.²³

Founded in 1969, this newest player in the human rights arena has extended the protection of international human rights by means of the Universal Islamic Declaration of the Rights of Man,²⁴ which protects the right to life in its first article.

May this reviewer offer a suggestion, despite the fact that it may go beyond the book's narrowly defined scope? The League of Nations — as a truly international institution, approaching universality — did afford a significant degree of protection through its experiments in Upper Silesia and Woodrow Wilson's Mandate System. The Mixed Commissions had considerable success in resolving disputes between German and Polish interests, though the technique of mixed commissions had a dismal record in the Greek-Turkish disputes. When states refuse to cooperate in a spirit of good faith, international fora can achieve relatively little success.

Although no longer in existence, would it be desirable to treat the League as the counterpart to the United Nations, for the purpose of analysis, rather than upgrade the Islamic Conference, which is more in the nature of a regional organization of the type discussed in the following section?

23. On the negative side of this approach, the book lacks a much needed index.

24. Universal Islamic Declaration of Human Rights 1981 (proclaimed by the Islamic Council to mark the anniversary of the 15th century of the Islamic era, Paris, 19 September 1981).

Intergovernmental Organizations of a Non-Universal Character, the topic of section three, represents the most significant advance in the perfection of multinational machinery. That is to say, the Council of Europe and its organs; the jurisprudence of the European Commission of Human Rights, which presently has perfected the largest *corpus* of case law;²⁵ plus the achievements of the OAS represent the great accomplishments of the twentieth century. Obviously, the detailed analysis cannot be fully treated within the scope of this review. It should, however, be mentioned that the contributions toward the medical and scientific aspects of human rights protection are examined at some length, in terms of the actions taken by these organs. One example is the discussion of the abortion cases, in relation to article 1 of the American Convention that prohibits discrimination.²⁶

The OAU is noted in passing, even though it has yet to perfect a distinct jurisprudence.

This significant chapter concludes with a review of the position of non-governmental groups, particularly as relates to their efforts within the framework of ECOSOC, as permitted by article 71 of the U.N. Charter. Within this context, the author's treatment of Amnesty International²⁷ comes to grips with the book's fourth rubric, detention under illegal conditions that can lead to extra-judicial executions, as for example in Chile, Equatorial Guinea, Guatemala, South Africa and Uganda. Other examples of private institutions that are contributing to the protection of human life include the International Commission of Jurists, the World Medical Association, and the International Committee of the Red Cross.

The "*manifestations*" of those actions that have been taken to protect the right to life, the topic of the extensive third chapter,²⁸ logically follows. At this stage in the book, the accomplishments realized by multinational institutions are surveyed. The *corpus* of positive law, including case law and legal precedent, as discussed in the prior chapter, must be reconsidered in terms of the specific programs (and experiments) undertaken by these major organizations. The thrust of this chapter is directed toward gross violations of the right to life, e.g. the customary concept of genocide that was subsequently codified into the Genocide

25. It is a bit difficult to determine which international court has decided the largest *corpus* of case law. Historically, the Arbitral Tribunal for Upper Silesia resolved in excess of two thousand cases. In terms of contemporary practice, the Court of Justice of the European Communities has handed down the largest number of judgments.

26. *Droit à la vie*, supra note 3, at 37ff.

27. *Id.* at 42.

28. *Id.* at 51-85.

Convention.²⁹ In the author's submission, Genocide represents the most savage violation of the right to a continued physical existence and a mere survival, even during periods of emergency. Hence, genocide is the logical starting point for his inquiry.³⁰

In practice, the difficulty encountered by men of good will is to determine if those state actions in question that result in massacres do in fact fall within the narrow definition of "genocide," i.e. "*actions genocides*".³¹ However, the author attempts to extend this concept to include mass murders and crimes against humanity, as for example the massacre of the Armeniens after World War One.

As was true of the prior chapter, he delves into the applicable case law, in this instance that of Adolf Eichmann for the purpose of illustrating the jurisdictional criteria, e.g. whether it be territorial or universal.³² Further, can there be a retroactive effect of such mass crimes against humanity? In this case, the issues are still being debated; nonetheless, the *Eichmann* case has created valuable precedent that supports the global-type rule of law sought by van Aggelen. From this foundation, proposals are advanced that would establish an international criminal court, designed to protect human life, under the authority of article 6 of the Civil and Political Covenant. But such a court might be limited to cases arising under this far-reaching concept of genocide, at least during its formative stages.

Involved in the interpretation of genocide is the possible extradition of nationals, possibly state officials, to stand trial before a multinational tribunal. In this type of criminal proceeding, an act of state or crimes committed pursuant to governmental policies, may still be placed at issue. Indeed, such considerations led to the *Genocide* case.³³ Unfortunately, the issues posed have yet to be resolved, notwithstanding the efforts by the United Nations to prevent the crime of genocide and to protect minorities from extinction. The author, therefore, reviews the actions of the United Nations (particularly of the General Assembly), ECOSOC, the Commission of Human Rights, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

29. Genocide Convention, supra note 20.

30. R. Lemkin, "Le Génocide" (1946), 17 Rev. int'l de droit pénal 371; and R. Lemkin, *Genocide as a Crime Under International Law* (1947). Cf "De plus, les crimes internationaux n'ont pas encore fait l'objet d'une codification précise." *Droit à la vie*, at 64.

31. Schwelb, "Crimes Against Humanity" (1946), 23 Brit. Y.B. Int'l L. 178; and Schwelb, "International Conventions on Human Rights" (1960), 9 Int'l & Comp. L.Q. 654, 657.

32. *Attorney-General of Israel v. Eichmann*, (1968), 36 Int'l L. Rep. 5, 24-25; cited *Droit à la vie*, supra note 3 at 55 n.21.

33. Reservations to the Convention on Genocide, [1959] I.C.J. 15; discussed *Droit à la vie*, at 57-58.

The second illustration of crimes against humanity that do in fact approach the savagery of genocide is apartheid. Obviously the continuing regime of apartheid in Southern Africa is the most pressing issue facing those U.N. organs mentioned above.³⁴ In fact, the resolutions of ECOSOC and the U.N. General Assembly culminated with the *International Convention on the Elimination of Apartheid*.³⁵ The important consideration is that apartheid is directed against racial groups, as such. Accordingly, the author discusses the broader concept of political genocide, which in the reviewer's submission moves beyond the Genocide Convention that was originally adopted. It should be noted that in 1945 there were enlightened proposals to include economic and political genocide, but they were rejected by the victorious allies, which were unprepared to accept such sweeping limitations on the exercise of their absolute sovereignty.

Still, there are contemporary attempts to expand the genocide concept, as a form of customary law. There are also serious proposals to extend this norm into related fields, such as environmental protection by adopting a convention against the practice in modern warfare of ECOCIDE, namely, the deliberate destruction of the environment.³⁶ Indeed, the reviewer strongly supports the extension of the genocide concept into additional areas by means of new international conventions that will deal more directly with contemporary situations, such as international criminal responsibility. The primary example of the type of convention sought is the *International Convention on the Elimination of All Forms of Racial Discrimination*,³⁷ because of the methods of implementation that are available, such as individual petition and the establishment of supervisory organs. In view of the success of this convention (along with those cited above³⁸), proposals continue to be advanced seeking an international criminal code, supported by an international criminal court. The premise defended by the author and quite correctly, is that codification will be required.³⁹ In this instance, the

34. Id. at 61.

35. Note 21 supra.

36. R. Falk, "Environmental Warfare and Ecocide Facts" (1973), 9 Rev. belge de droit international 1.

37. International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature March 7, 1966), 660 U.N.T.S. 195 (entered into force January 4, 1969).

38. Supra notes 10, 11, 15, 18, 20, 21; in connection with notes 49 & 51, infra.

39. Adopting the proposal of C. Bassiouni, Commission des droits de l'homme, Rés 12 (XXXVI) du 26 février 1980; Rapport de M. Cherif Bassiouni, Doc. E/CN. 4/1426 du 19 janvier 1981; cited in *Droit à la vie*, at 63, n.64. The author concludes: "La crime de génocide en tant que crime contra l'humanité devrait également être jugé par une telle cour." *Droit à la vie*, at 65.

desired treaties and subsequent establishing tribunal would be created pursuant to the convention on the suppression and prevention of apartheid,⁴⁰ with the possibility of additional protocols that would extend its jurisdiction over those international crimes that were codified in multinational conventions. Apartheid could be included within this scheme, and state responsibility (and collective responsibility) would arise. Furthermore, an additional protocol to this 1973 convention is being considered by the International Law Commission, along with its study of state responsibility.

Section III, The Question of Involuntary Disappearances, including forced disappearances,⁴¹ is all too closely related to apartheid and even genocide. The present South African government continues to violate this phase of the right to life, including arrest without charges and imprisonment without trial. Moreover, the Government of Liberia employs this practice on a regular basis to achieve the destruction of an entire racial group. Forced disappearances, therefore, have become a major violation, owing to the mass disappearances in Latin America. Notwithstanding the severity of this institutionalized practice (as for example in Argentina, Chile and Guatemala) it is not really a new phenomenon. Dictatorships of the left and the right have used this illegal conduct to destroy their opposition, namely individuals and groups. Thus, public authorities — citing the “need” to preserve public order and the security of the state — have permitted and even encouraged excesses by those in positions of authority, especially by their military commanders.

The significant consideration, demonstrated throughout the book, is that these illegal measures, and violence of a general nature, result in common factors that are evident on all continents. For instance, no formal recourse is at the disposal of the victims; no measure of habeas corpus is available; and there is a lack of judicial protection being offered to detainees. These practices are under investigation by the U.N. Commission of Human Rights. For certain, the United Nations is in a position to render major contributions in this area.

The subsequent stage is that of disappearances on the part of those who have been illegally detained. This phenomenon is both a regional and a global tragedy, even though Latin America is the area that is experiencing the retrograde impact on human rights protection. Accordingly, it is difficult for the human rights organs and the parent United Nations to

40. Note 21 supra.

41. Section III, Droit à la vie, at 65-74.

provide effective relief, because of the fact that highly placed governmental officials — especially the military — are at fault.

In sum, an illegal disappearance is the first step toward the imposition of degrading treatment, torture, and extra-judicial executions.⁴² The worst offenders are Argentina and Chile, as can be seen from the jurisprudence of the American Convention of Human Rights. Within these countries there have been disappearances of opposition leaders on a massive scale, and the practice has been intensified by the disappearances and enslavement of women and children, who lack judicial protection. Consequently, the liberty and security of the person — and human dignity — is violated. Detention is accomplished under inhumane conditions, minus minimum standards of treatment, thereby jeopardizing not only the right to life, but similarly the right to living. Following arrest (all too frequently at night) by the security forces or paramilitary units, the subjects are interrogated by the military, oftentimes at secret locations. The accused are held incommunicado, since the authorities refuse to indicate the location of these victims or, for that matter, even admit that they are being held in custody.

The next stage in this illegal chain of events is the systematic torture and even deliberate extermination of selected individuals and designated groups of minorities. Accordingly, the issue becomes: where does liability fall? Is the government liable, or are specific officials liable, in law, for their illegal acts and brutal violations of human rights? Precisely, the author asks: has there been governmental approval or, alternatively, are individual military commanders acting on their own authority when committing atrocities? In such a situation, is political responsibility imposed on state agencies? Are government forces involved in these disappearances, or does the government passively tolerate these vicious practices and subsequent disappearances? It may also be asked: does the government only interrogate and intimidate, on the one hand, or systematically “eliminate” a group? Perhaps the beginnings of actions that may eventually fall within the sphere of genocide can be detected.

In this series of questions, albeit legal issues, van Aggelen is especially conscious of institutionalized discrimination against groups and segments of society, in addition to private individuals.

The next consideration in his line of reasoning is the possible recourse that may be available following such disappearances — all too frequently after the victim has been murdered. The answers provided are directed toward the efforts of United Nations organs. For example, in 1980 the U.N. Human Rights Commission set up a working group to examine the

42. *Id.* at 67ff.

situation of the disappeared. Thus, the regime in Chile was treated at its first session. The author, as is frequently done throughout the book, considers the procedure adopted by the particular organ, e.g. any replies received from governments, those resolutions adopted by the commission, plus subsequent actions taken by the United Nations General Assembly.

Numerous illustrations, such as the appointment of a special *rapporteur*, are provided in an attempt to demonstrate how the role of international bodies is implemented. In fact, the appointment of special *rapporteurs* is one of the devices that has been employed with considerable success and will be utilized in the future. Such detail, e.g., the examination of Guatemala and Argentina cannot be reconsidered within the scope of this review, but such a detailed analysis is of unique importance to the safeguard of human rights. Suffice it to say that the defenses are also taken into account. Guatemala declared that disappearances resulted from the general atmosphere of violence and not from state action, whereas Argentina objected to the jurisdiction of the Human Rights Commission. The government alleged that the commission had exceeded its original mandate. Secondly, Argentina contended that these disappearances were not on a large scale and, therefore, could not constitute a gross violation of human rights. Rather, the phenomenon of disappearances resulted from the activities of "criminal organizations" and terrorist groups. There were, it was alleged, various types of terrorism that were employed to overthrow the government.⁴³

At the present time, a further consideration comes into play: is the new democratic government in Argentina to be held responsible for the acts of the former dictatorship? A partial solution may be forthcoming from the examinations by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This body is currently surveying measures of discrimination that are being applied against minorities and their resulting impact upon the disappeared, as the result of deliberate governmental policy.⁴⁴

The proposal offered by the distinguished author is that an international writ of habeas corpus be made available.

The American Commission of Human Rights, in its proceedings against Bolivia and Guatemala are also compared, particularly the collaboration between the working group of the U.N. and the American

43. *Id.* at 70-71 & *passim*.

44. The sub-commission presents a number of proposals, *id.* at 71.

Commission, which represents the type of international cooperation that is so desperately needed to deal with these tragic violations.

In evaluating the above mentioned accomplishments, there must not be a false impression created, in view of the fact that the U.N. and OAS have been unable to resolve the problem of the disappeared in Latin America. This practice, sad to say, continues with respect to internal and international conflicts. In fact, military regimes of both the left and the right resort to such illegal acts in their attempts to eliminate opposition. Moreover, similar practices are common throughout the African continent, as an institutional method.

Some possible relief may be found in Protocol One to the Geneva Conventions of 1949.⁴⁵ Consequently, the International Committee of the Red Cross continues to deal with some of these aspects discussed above. However, the solution is an international convention, with supporting structures and enforcement machinery, to protect detainees and the disappeared.⁴⁶ On the other hand, it is necessary to recall the *travux preatoires* of the 1977 Protocols: a fifth Geneva Convention was the desired solution. Unfortunately it was unacceptable to states: they insisted upon freedom of action in non-international conflicts.

Owing to the vicious nature of this practice, there exists a humane responsibility on the state, in question, to adopt such a specialized convention to deal with the disappeared. In this context, these victims are also subjected to cruel and degrading treatment — also becoming an example of a gross violation of human rights that has a direct bearing on the right to life.

From this perspective, the topic of illegal executions follows both logically and in practice. At this stage of the inquiry there is necessarily a return to the struggle for mere survival. Furthermore, the extensive use of “legal” executions that only satisfy formalistic criteria must not be minimized, particularly during periods of hostilities. That is to say, capital punishment continues to be debated within U.N. agencies, since its use as a criminal penalty is legal under clearly specified situations under the human rights conventions, examined in this book. There are, however, steps being taken to limit the death penalty to those exceptions already in existence. If this approach be adopted — as currently exists pursuant to the American Convention of Human Rights, in article 4(2) — no

45. Protocol Additional to the Geneva Conventions of 12 August 1949 [infra note 55] and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), U.N. Doc. A/32/144, 15 August 1977 (opened for signature 10 June 1977) (entered into force 7 December 1978). See also note 55 and the conventions cited.

46. Droit à la vie, at 74 n.101.

additional categories involving the application of the death penalty would be permissible. But this approach overlooks the growing demand for an extended use of the death penalty within industrialized societies. Since 1968 the whole question of the use of the death penalty — as a legal deterrent to protect society — has been under investigation by the U.N. General Assembly, ECOSOC, and the Human Rights Commission. Additional factors, e.g. the inherent differences between civil and military tribunals, must be taken into account at such time as the permissible categories of the death penalty are examined, with a view toward restricting its further use.⁴⁷

The resolutions of the General Assembly and ECOSOC invites governments to provide legal guarantees to persons accused of crimes that carry the death penalty. Furthermore, multinational institutions are insisting that administrative relief in the form of executive clemency, as a matter of grace by the sovereign, be placed at the disposal of those convicted, for the reason that commutation of the death penalty must be included as a balance that may be exercised by the executive branch. This duty, placed directly on states parties to the aforementioned international conventions, already has its basis in positive law. In 1973 the U.N. Secretary-General requested ECOSOC to present an analytical report. In turn, questionnaires were sent to governments in order to detect the number of executions that might violate the right to life. In particular, the protection of women and children was considered as an indispensable phase.⁴⁸

The result of efforts by U.N. agencies (too numerous to recite within the scope of this review) is a proposal to add a protocol to the Civil and Political Covenant that will outlaw the death penalty.⁴⁹

At the regional level, a similar development can be detected, in view of the fact that the Council of Europe is attempting to abandon the death penalty, as can be appreciated from the recent efforts of its Juridical Committee, the European Ministers of Justice, and the Parliamentary Assembly.⁵⁰ Specifically, the main thrust of recent actions by the Council of Europe is to guide the High Contracting Parties in their efforts to modify their internal legislation. However, a simultaneous undertaking can be seen from attempts by the Parliamentary Assembly to obtain a revision of article 2 of the European Convention of Human Rights, in

47. Commission des droits de l'homme, Res. 16 (XXIV) du 8 mars 1968, G.A. Res. 2393 (XXIII) 26 mars 1968; cited in *Droit à la vie*, at 74 n.106.

48. E.g., *Droit à la vie*, at 76.

49. Draft Second Protocol to the International Covenant on Civil and Political Rights. U.N. Doc. A/C. 3/35/L. 75, at 3-5. See note 55 *infra*.

50. Résolution 727, du 22 avril 1980; cited in *Droit à la vie*, at 77 n.117.

order to abolish the death penalty. Subsequently, the text of the desired new protocol was transmitted to the Committee of Ministers. This additional Protocol Number Six⁵¹ can be compared with its U.N. counterpart, in that the death penalty will be eliminated.

An even more advanced development can be seen in the American Convention of Human Rights, because of the fact that the most severe limitations have been placed on the application of the death penalty: the permitted categories are closed. No additional crimes may become subject to execution; moreover, upon ratification of the American Convention, state parties may not — under any conditions — extend the use of this penalty, even as to categories permitted by the American Convention.

It was shown above that scholars are seeking to have an identical standard applied to international human rights, in order to prevent any further extension of the death penalty. Thus, an analysis of article 4 of the American Convention is provided, but for the purpose of this review it must be mentioned that the use of this penalty is limited to serious crimes that have grave consequences. May this reviewer suggest, therefore, that the American Convention be subjected to intensive study for the purpose of determining if its sophisticated provisions are having the desired effect. Secondly, would it be practical to apply these criteria at the international level?

The author's careful treatment of regional standards concludes with a review of the practices in Northern Ireland,⁵² in which extra-judicial executions have, tragically, become a fact of life. On the other hand, excessive force has been applied by the security forces, on the theory that the degree of force employed was necessary to effect a lawful arrest. Therefore, the necessary amount of force (or the minimum force that may be required) becomes the fundamental issue, when life is to be safeguarded.

The next stage in the author's presentation is to deal with illegal (or extra-legal) executions that have become the more pressing practices at the global level. In short, the number of illegal killings far exceeds judicial executions. There is a disproportionate number of summary executions of detained persons; furthermore, there is a tendency of dictatorships to institutionalize this practice of arbitrary killings by the military,

51. Protocol No. 6 to the European Convention For the Protection of Human Rights and Fundamental Freedoms Concerning Abolition of the Death Penalty, Council of Europe H (83), 3, 14 February 1983; cited in *Droit à la vie*, at 77 n.119. See especially art. 3 of the protocol.

52. *Ireland v. United Kingdom*, European Court of Human Rights (1978), 21 Y.B. Eur. Conv. Human Rights 602-12.

paramilitary and civil police. Sad to say, the numerous violations cited earlier once again become relevant, as for example racial discrimination resulting in apartheid and genocide. The ultimate impact is the destruction of entire groups. To illustrate, the Human Rights Commission and the sub-commission on prevention of discrimination have been gravely concerned with protection of minorities and the prevention of racial discrimination. Going back as far as 1975 and 1979, the practices of the Government of Kampuchea were examined by the special *rapporteur*.

Yet, in addition to the practice of international agencies, the theory — in this instance the development of human rights law — was clarified. In brief, what is the precise meaning of extra legal (*extrajudiciaire*)? Several factors such as the definition of “arbitrary” or “summary” execution must be determined in the first instance. But, realistically, it will become increasingly difficult to detect the dividing line between a summary execution and a minimal juridical proceeding, if guerrilla warfare continues. Fortunately, the author comes to grips with this type of unresolved legal issue, when he offers numerous illustrations of violations of the right to life for the purpose of detecting the common elements that are contained within such violations. Examples are: not being represented by competent counsel, lack of an impartial judiciary, the application — retroactively — of the death penalty, the use of revolutionary or improperly constituted tribunals, frequently existing outside the normal judicial systems, and sentences that are not passed pursuant to law and not subject to judicial review.⁵³ Tragically, numerous instances of these practices come to mind: the result is all too frequently arbitrary executions.⁵⁴ Conversely, some relief might be forthcoming if the governments in question would respect their commitments under the 1949 Geneva Conventions and the two 1977 protocols,⁵⁵ relative to the protection of the victims of armed conflicts.

53. Report on the Situation of Human Rights in El Salvador, OAE/Ser. L/V/II/46, Doc. 23, Rev. 1, at 51-52 (1978); cited in *Droit à la vie*, at 83 n.141.

54. *Id.* at 83ff.

55. The 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316; 75 U.N.T.S. 135. The 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31; The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 267; as extended by Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) U.N. Doc. A/32/144, 15 August 1977 (opened for signature 10 June 1977) (entered into force 7 December 1978) [*supra* note 49]; and Protocol Additional to the Geneva Conventions of 12 August 1949; and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (entered into force 7 December 1978); contained in D. Schindler & J. Toman, *The Laws of Armed Conflict* 551-636 (2d ed. 1981).

In connection with notes 15 & 49 *supra*.

In evaluating the numerous violations of human rights, the counter measures taken by multinational institutions, and the significant body of case law, the distinguished author advances some observations that lead into the concluding chapter. As concerns international crimes that have been perpetrated under the authority of domestic legislation, the conclusion is beyond dispute: state responsibility ensues and, likewise, for its high officials and agents. Furthermore, this level of responsibility is not, and cannot be, derogated in time of war or national emergency. As a consequence, the state has a moral and legal obligation to adopt corrective measures of a legislative and judicial nature and, secondly, to redress prior violations and resulting injuries, in the author's well chosen conclusion. Included within this concept of state responsibility are those officials who have been responsible for past violations and injuries.

The proposed solution is the adoption of a code of professional conduct that may remedy the above mentioned abuses of individual rights and, secondly, provide guidelines that would regulate the military, paramilitary and civil police. The object of such a code of conduct would be to insure the proper application of the law. Appropriate justice could be directed toward those officials who were responsible for illegal executions. Possibly the most controversial phase of the author's proposed code of conduct are those provisions imposing universal jurisdiction over those officials, who would become subject to prosecution wherever they might be located. In this regard, it would be possible to have dual (and concurrent) jurisdiction, if a territorial competence were also present, for the reason that these are crimes against humanity, and they also constitute crimes against peace. As a result, they can be deemed offenses that are incalculable. Included are crimes committed by foreign armies. Accordingly, appropriate legislation is required to provide legal remedies.

One of the underlying themes advanced throughout the book is the function of non-governmental entities, but as concerns the application of universal jurisdiction over crimes against humanity, private groups are in a special position to obtain and disseminate information concerning illegal executions. Here, then, is a highly significant function that can be exercised to aid the efforts of international organizations, since world public opinion can be directed toward the protection of the right to life, including the right to living.

The concluding chapter⁵⁶ brings together the author's theses, namely, that the right to life is the fundamental human right, which incorporates newer guarantees, particularly the right to development, in terms of

56. *Droit à la vie*, at 87-89.

unique cultures. Fundamental to this approach is the concept of the indivisibility of all human rights — a position challenged by this reviewer, owing to the differing methods of enforcement. In any event, one legal norm becomes controlling: the right to life occupies a position of *jus cogens* and is peremptory; therefore, it must be respected by states and protected by means of municipal legislation, in view of the fact that this right is non-derogable. Precisely, there is an obligation imposed upon governments to protect this right to national constitutions, which has already been accomplished in the majority of instances, at least at the theoretical realm. The duty of states to implement and enforce these human rights within their sphere of municipal law is clear: the duty exists. Yet, in practice, many states do not consider the right to life to be inalienable.⁵⁷ Thus, the difference between the theory and practice of law becomes all too evident. The proposal and solution is for the international community — within the framework of the United Nations — to insure these rights by means of treaty texts and by developing the law in a scientific manner, which is being advocated by the U.N. General Assembly.⁵⁸ Henceforth, the legislator — at the national and international levels — must strive toward the institutionalization of these norms. Although significant accomplishments can be cited, as has been done throughout the book, their work has been insufficient, for they have not succeeded in implementing these norms.

It must now become the domain of international organizations to achieve the desired goals. Consequently they must assume the primary responsibility, because of the fact that they possess the special skills to promulgate the required codifications. They must, therefore, codify and develop human rights law.

From this perspective, the most competent organ is the United Nations Commission of Human Rights, which has perfected a number of such international conventions, including the Political and Civil Covenant and the 1984 *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*.⁵⁹ Included should be the series of

57. Id. at 87.

58. Id. at 87 n.2.

59. G.A. Res. 39/46, 10 December 1984, U.N. Doc. A/RES/46, 17 December 1984. See also Commission des droits de l'homme, Res. 1948/21 (adoptée le 6 mars 1984); cited in Droit à la vie, at 87 n.3.

See generally, N. Lerner, "The U.N. Convention on Torture" (1986), 16 Israel Y.B. Human Rights.

In terms of regional solutions, see also Inter-American Convention to Prevent and Punish Torture, AG/Res. 783 (XV — 0/85), O.A.S. GA Doc., OEA/Ser. P. AG/Doc. 2023/85, Rev. 1, at 46-54, March 12, 1986. O.A.S. T.S. No. 67; reprinted I.L.M. 519 (1986).

conventions designed to combat terrorism.⁶⁰ Still, the primary codification remains article 6 of the Political and Civil Covenant. Notwithstanding the fact that seventy-five states have ratified (and thereby accepted the duty to implement this right within their internal, domestic orders), flagrant violations of the requirements set forth in article 6 are increasing, particularly within the developing world. In sum, the crimes of genocide and apartheid, the institutionalization of disappearances of individuals and illegal executions by governmental authorities, accompanied by the excessive use of force (frequently resulting in death) are all too common. The tragedy for mankind is that these practices are accelerating rather than being contained. Consequently, it should be demanded that international organizations perfect adequate solutions and, subsequently, work for their adoption. In the author's view, the main responsibility rests on international organizations to ensure that states act in conformity with the standards of the global community. Yet, it may still be asked: can international organizations that clearly are not supranational assume such a dynamic supervisory role? What are the realistic limits to the competence of the international and regional organizations that have been examined in the book? Tragically for all of mankind, this reviewer must concede that the sovereign state remains supreme, as can be appreciated from the political climate existing within the multinational institutions, and particularly within United Nations organs.

In spite of these observations, it may still be possible to envisage the creation of an international criminal court that will have jurisdiction over crimes against humanity and gross violations of the right to life. Indeed, the author is especially conscious of the jurisdictional difficulties when advancing his final recommendations. Accordingly, he again presents his far-reaching conclusion: states have an obligation under international human rights law to prevent these crimes and to submit to compulsory,

60. Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo (opened for signature September 14, 1963), 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague (opened for signature December 16, 1970), 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 112; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal (opened for signature September 23, 1971), 24 U.S.T. 565, T.I.A.S. No. 7570, 24 U.N.T.S. 574; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York (opened for signature December 14, 1973), 28 U.S.T. 1975, T.I.A.S. No. 8532, and the International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. No. 39 at 23, U.N. Doc. A/34/39 (1979); reprinted (1979), 18 I.L.M. 1456.

See also Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, G.A. Res. 40/61 (Adopted December 9, 1985), A/Res/40/61 (XL) (14 January 1986); reprinted (1986), 25 I.L.M. 239.

universal jurisdiction, in order to fulfill the rights of victims, even though the possibility of criminal proceedings remains repugnant to sovereign states. They continue to be fearful of any extra-territorial jurisdiction that may be exercised by such fora.

The right to life continues to face the special dangers posed by derogation, during periods of conflict. Consequently, the vital — and indeed unique — task of the ICRC, relative to the protection of designated classes of persons under the 1949 Geneva Conventions and the 1977 Protocols, serves as the prototype of the desired legal order. That is to say, the ICRC, as it strives to implement its major conventions, becomes the model for the type of solution so desperately sought.

In terms of models and prototypes of required schemes of human rights protection, this reviewer feels compelled to suggest that van Aggelen continue with his outstanding research in this area and produce additional texts — including some in the English language — that are even more exhaustive of the future role of international organizations. Therefore, the book should be considered as a link in a chain of scholarly undertakings.

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Yambrusic, Edward Slavko. *Treaty Interpretation: Theory and Reality*. Lanham: University Press of America, 1987, 289 + xi pp. \$15.75 (paper), \$28.50 (cloth).

The inconsistencies, and conflicting theories of treaty interpretation, constitute the foundation for the present inquiry. The thesis defended is “that neither the judicial praxis nor international legislation, individually or together, have provided a realistic solution to the fundamental challenge facing the International Court of Justice of finding the right balance between stability and progressive development of international law.”¹ This fundamental thesis reemerges at several key portions of the text,² when the author attempts to prove that existing standards of treaty interpretation are inadequate, on the ground they do not lead toward that degree of predictability and certainty, which he feels is required by governments in this nuclear age. Accordingly, the norms of treaty interpretation must be reexamined, but with a definite goal in mind, namely, “the new international law of ‘social’ interdependence”³ will prevail over positivistic, classical law.⁴ As the author observes, and quite correctly,

the fundamental challenge of the twentieth century international lawyer is how to close the gap between the classical international law based on the no longer relevant assumptions of absolute sovereignty, power, and coercion, and the new international law reflecting the new international realities of coordination and cooperation based on the reciprocal consensual relationships.⁵

Dr. Yambrusic seeks a consensus, not only as to the fundamental (and peremptory) norms of international jurisprudence, but primarily on the norms and methodology of treaty interpretation. Hence, his scholarly evaluation centers, primarily, on state practice, the case law of the International Court of Justice, the proceedings of the International Law

1. E. Yambrusic, *Treaty Interpretation: Theory and Reality* 4 (1987) [hereinafter cited as *Treaty Interpretation*].

Throughout the text, the author employs the terms “international legislation” or “legislation” when referring to the codification of legal norms by international organs and conferences. While not an invalid approach, there might be some question raised as to whether the efforts of the International Law Commission or the United Nations constitute true legislation as this concept is typically employed in domestic law. But cf. 1 M. Hudson, *International Legislation* vii-x (1931).

2. E.g., ch. IV, *infra* note 53, at 239. See also *infra* notes 38 & 55.

3. *Id.* at 2.

4. The seven fundamental principles are listed *id.* at 2-3. Cf. the underlying principles of C. Jenks, *The Common Law of Mankind* 57-60 (1958).

5. *Treaty Interpretation*, *supra* note 1, at 4.

Commission and its codification on the Law of Treaties,⁶ the Vienna Conference on the Law of Treaties⁷ and the resulting Vienna Convention on the Law of Treaties.⁸

The four main chapters, plus the separate concluding section, deal with these topics. Chapter One reviews state practice, the Chapter Two is devoted to an examination of the most significant cases (contentious and advisory opinions) that demonstrate the techniques and standards applied by judges of the International Court of Justice when they interpret treaties and conventions. “The purpose of the analysis is (a) to ascertain the praxis of the Court with respect to the interpretative process, and (b) to illustrate the wide range and scope of the parameters of the investigation, mainly, whether there is, or can be, within the framework of contemporary international law, *the* ‘norm’ of treaty interpretation.”⁹ This second chapter is the most lengthy, and it provides insight into the ICJ’s judicial standards. Chapter Three, which is much narrower in scope, surveys the drafting history of article 31 and article 32 of the Vienna Convention on the Law of Treaties in an attempt to demonstrate how the members of the United Nations, acting through the International Law Commission, have sought to legislate general and subsidiary rules of treaty interpretation — a result that is ultimately criticized. The Fourth Chapter includes a short comparative analysis of the judicial and legislative experience — which the author contends does not establish the needed fundamental rule of treaty interpretation — serves as the conclusion to the massive *corpus* of material included within the study.

In view of the above recited summary of the book’s general structure and contents, this reviewer feels that it might be helpful, at this point, to indicate the primary conclusion and recommendation, that are advanced. Dr. Yambrusic indicates, in regard to the areas of judicial interpretation and legislative-type codification, that the existing norms of treaty interpretation are inadequate because certainty and predictability cannot be provided to states and the political (and administrative) organs of

6. 1966 Draft Articles on the Law of Treaties, Report of the International Law Commission, 18th sess. 4 May-19 July; [1966] 2 Y.B. Int’l L. Comm’n 7, U.N. Doc. A/CN. 4/SER. A/1966/Add. 1 (1966); (1967) 61 Am. J. Int’l L. 248. See generally, H. Briggs, “*Reflections on Codification by the International Law Commission and Other Agencies*” (1969), 126 *Recueil des Cours* 233-316; and H. Briggs, *The International Law Commission* (1965) (as concerns the evolution and progressive development of international law by the ILC).

7. Final Act of the United Nations Conference on the Law of Treaties, UNGA, U.N. Conference on Law of Treaties, A/CONF. 39/26, 23 May 1969; 8 I.L.M. 728 (1969).

8. Vienna Convention on the Law of Treaties (adopted May 22, 1969) (opened for signature May 23, 1969) (entered into force 27 January 1980), UNGA, United Nations Conference on the Law of Treaties, A/CONF. 39/27, 23 May 1969; 8 I.L.M. 679 (1969).

9. *Treaty Interpretation*, supra note 1, at 5.

international institutions. Consequently, he advocates the norm of the *total approach* to treaty interpretation, thereby not rejecting any of the classical and modern criteria of interpretation but, at the same time, not relying exclusively (or even primarily) on the plain and ordinary meaning of words, the primacy of the text, the intention of the parties, the specific context in which the treaty will function, the hierarchy of norms of interpretation, the use of the *travaux préparatoires*, and those codified rules contained in the Vienna Convention.

Oddly, the author merely indicates the superiority of the *total approach*; the concept is never examined; and its precise content is never explored. This reviewer wonders why there was not a major section or chapter — possibly in the nature of a concluding chapter — in view of the fact that a recommendation was being advanced, though not defended. Admittedly, the reader will be able to detect the author's purpose. On the other hand, the book takes a negative approach in that the shortcomings and weaknesses of traditional criteria are analyzed at considerable length. Conversely, relatively little is indicated as to the total approach theory, with the result that the treatment of the theories in question appears to be uneven. Would it not have been highly desirable to subject the “total approach” to an *equally penetrating analysis*, especially of cases in which this standard had been successfully applied? This reviewer, accordingly, has a number of questions that might still be asked, particularly if any hierarchy of existing norms might emerge, as the new international law evolves? Realistically, a review of possible questions that have not been raised in the book must necessarily lie beyond the scope of this short review, yet it can be anticipated that Dr. Yambrusic will elaborate upon the “total approach” in subsequent publications. If correct in his analysis, major contributions will be forthcoming, for, as demonstrated in the book under review, there are major conflicts and even weaknesses within the existing rules of interpretation, particularly in the Vienna Convention. As the author maintains in his concluding remarks to the introductory comments, he “demonstrates the major flaws in both the legislative and judicial experience”¹⁰. He explains that,

the author develops his approach of the “total context,” which in his view, should better lend itself to the ultimate goal of assuring legal objectivity, certainty, and predictability in the interpretative process. The “total context” approach should also facilitate the equilibrium between the stability and progressive development of international law by closing the gap between the classical and “new” international law within the matrix

10. *Id.* at 6.

of a legal frame of reference rather than the mere subjective consideration of fact and policy.¹¹

The reviewer believes that it is helpful to keep in mind the author's purpose and recommendation when examining the book's subsequent chapters. It might even be asked if the author goes beyond the scope of strict treaty interpretation? A negative answer must necessarily be forthcoming because of the fact that it is essential to deal with the factual context and the time period in which cases were decided.

Chapter I, *Interpretation of Treaties — Conceptual and Theoretical Developments and State Practice*¹² sets forth the basic theories that will be tested in the book's two main chapters and, secondly, it reviews the legal standards applied by a few of the major states. Although one of the shorter chapters, a good deal of material has been included. It also appears that the author is seeking to synthesize the classical views, e.g. of Vattel,¹³ with the modern approach of the late Judge Alvarez.¹⁴ Therefore, the new international law of Judge Alvarez serves as inspiration, and even precedent, for the author's proposals — an approach also favored by this reviewer.¹⁵ May it, therefore, be suggested that the contributions of the late Judge Alvarez are of special significance to a number of rubrics of contemporary international law, especially treaty law and human rights protection, as is subsequently shown in connection with the series of South West Africa cases.¹⁶ Indeed, the basis of Alvarez's (and to a large extent of Yambrusic's) theories can be seen in the premise that "a legal precept once put into effect acquires a life of its own"¹⁷. Judge Alvarez continues:

Their development is to be judged according to new international conditions and without regard to the intentions of those who created the law or established the convention. Even if the text of a precept or a convention is clear, the text should not be applied, subsequently, if such

11. Id.

12. Id. at 9-54.

13. E. Vattel, *The Law of Nations or the Principles of Natural Law* (edition of 1758) (Trans C. Fenwick); reprinted in (1961), 8 *The Classics of International Law* 199; cited in *Treaty Interpretation*, supra note 1, at 9.

14. A. Alvarez, *Le Droit international nouveau — son acceptation — son étude* 106 (1960); cited in *Treaty Interpretation*, supra note, at 11.

15. W. Gormley, *The Implementation of the United Nations Human Rights Covenants: Contemporary Legal Precedent and Future Procedural Remedies* (unpublished LL.D. thesis, Victoria University of Manchester 1972). See especially Alvarez (dissenting opinion), "Advisory Opinion on the Status of South West Africa," [1950] I.C.J. 128 at 174-185; (a recognition of human rights as erga omnes); *Treaty Interpretation*, supra note 1, at 117-18.

16. Note 35 infra, in connection with note 15 supra.

17. Alvarez, supra note 14, at 106; cited in *Treaty Interpretation*, supra note 1, at 11.

application could result in consequences which would be inadmissible in view of the changed circumstances of international life occurring after the entering in force of the precept or convention.¹⁸

It needs to be stressed that Dr. Yambrusic presents an objective review of the various theories — such as textual objectivity, the “intention of the parties” and the subsidiary means — which he intends to supercede, though not eliminate. Thus, he is aware of the sharp differences that can arise when the objective and subjective approaches to interpretation are applied to a concrete dispute. Likewise, the divergent views of scholars and jurisconsults are considered. Accordingly, the author concludes: “Between these two diametrically opposed approaches [Vattel’s classical view and McDougal’s New Haven School] one finds the whole spectrum of variations of the ‘textual objectivity’ oscillating, with varying degrees of emphasis, between the factual and legal context of the treaty”¹⁹. Since the desired degree of legal clarity cannot be supplied by the publicists (as specified in article 38(d) of the Statute of the International Court of Justice), the inquiry shifts to an examination of state practice.²⁰

The section devoted to common law jurisdictions is well done, even though it is limited to the case law of the United State and Great Britain. In fact, the analysis of the jurisprudence of the United States Supreme Court will serve as a valuable reference. Yet this reviewer wonders why the leading judgments from some other common law jurisdictions were not included. Such legal systems as those of Pakistan, Canada, Australia, and New Zealand might help to provide some additional insight into “global state practice.” Realistically, the reviewer suspects that it was necessary to place some limits on the areas investigated. A similar question can be asked in relation to the discussion of civil law, i.e. continental jurisprudence, that can be traced to the Civil Code. Obviously, French practice dominates, but why was Austrian practice selected as one of the three primary jurisdictions (along with the German)? May it be suggested that some background discussion of other national systems might have been enlightening.

Necessarily, attention must be accorded the Soviet, and Socialist, theories and practice, which is founded on strict legal positivism. It utilizes the text of the treaty as the point of departure, though Marxist goals are sought, as a phase of the apparent intention of the parties.

18. *Id.* Accord generally Alvarez (separate opinion), “Anglo-Iranian Oil Company Case” (Preliminary Objection) (*United Kingdom v. Iran*), [1952] I.C.J. 93; *Treaty Interpretation*, supra note 1, at 107-08.

19. *Treaty Interpretation*, supra note 1, at 14.

20. *Id.* at 15-36.

In considering the contribution rendered by the Second Chapter, it becomes apparent that the differences in the results achieved through the application of these diverse theories are stressed to a greater extent than are the similarities. He concludes, and quite properly, “that the parameters of the relevant frame of reference are being determined by the character of the treaty, its historic context, and *the specific terms of reference of the interpreter*”²¹. May it further be suggested that the key to fully appreciating the approach of Dr. Yambrusic is to grasp the “categorical imperative” of “terms of reference” employed to interpret a particular treaty. This phase of the “Yambrusic approach” becomes increasingly evident not only in terms of municipal case law, but especially when the judgments and advisory opinions — along with the dissenting and separate opinions — of the justices on the International Court of Justice are studied in the subsequent chapter.

Beyond question, the discussion of national case law serves as a basis for the remainder of the book, because he concludes that the states which follow the Civil Code tend to emphasize legal referents (the relationship between municipal and international law) as they relate to the meanings of the terms and language employed. Henceforth, the text of the treaty speaks for itself. Conversely, the socialist and common law jurisdictions recognize the inherent limitations of language, for extrinsic evidence plays a different role. Of course, the differences between the U.S. and U.K. practices are also enunciated in the analysis, since the British rely on the textual approach — or textual objectivity²² — whereas greater deference is placed on the *travaux préparatoires* of the treaty by a majority of American jurists (including this reviewer). Significantly, the author shows that “American courts have rejected the notion of ‘rules’ of interpretation as obligatory legal norms. . . . Rather, the various canons of interpretation are used as guides.”²³ American courts utilize the text of the treaty as their point of departure in seeking the intention of the parties in terms of the surrounding circumstances.

The final conclusion to the First Chapter is that the evaluation of the above mentioned jurisdictions reveals that there are no universally accepted formal rules. “The state practice failed to reveal any clear coherent set of principles deemed by states as obligatory rules of

21. *Id.* at 35 (emphasis added).

22. *Id.* at 18-19.

23. *Id.* at 26 (emphasis in original). Although the author begins his analysis by citing the Restatement (Second) of The Foreign Relations Law of the United States S 147 (1965), he relies primarily on a case analysis, particularly the jurisprudence of the United States Supreme Court. *Treaty Interpretation*, *supra* note 1, at 19-27.

interpretation.”²⁴ This conclusion becomes one of the underlying themes supporting the remainder of the study. In view of the fact that treaty standards of sovereigns cannot produce the desired degree of certainty and predictability, the inquiry shifts to an examination of the case law of the International Court of Justice.²⁵

The Second Chapter, therefore, undertakes a selective evaluation of the jurisprudence of the ICJ up to 1969, the date on which the Vienna Convention on the Law of Treaties was adopted.²⁶ Yet, this reviewer wonders why two decades of case law have been omitted, in view of the fact that recent and pending cases deal with serious issues of treaty interpretation? For instance, the recent and pending cases involving the United States turn on treaty interpretation.²⁷ In fact, the omission of the United States-Nicaragua case tends to reduce the book’s sense of realism, in the opinion of the reviewer.

The specific purpose of this chapter is to ascertain, if possible, “the central issue or issues involved, how they were resolved, what method or methods of interpretation were used by the Court (including separate and dissenting opinions), and what role, if any, the modes of interpretation have played in the *ratio decidendi* of the Court. . .”²⁸ In other words, is there, or can there be, a single primary “norm” of treaty interpretation?²⁹ In order to arrive at an answer to this question, the author adopts the inductive method of case analysis, namely, a positivistic approach for the purpose of detecting the criteria employed by individual judges at such time as treaties and conventions are examined. At this point in the study, the emphasis shifts away from the views of theorists and concentrates on the dispute-resolution process. Specifically, the cases are not examined in their entirety; instead only those portions that shed light on the interpretative process are considered.³⁰

24. *Id.* at 36.

25. Ch. 2, “The Jurisprudence of the International Court of Justice”, *id.* at 55-167.

26. Note 8 *supra*. See *id.* at 55.

27. E.g., Case Concerning Delimitation of Maritime Boundary in Gulf of Maine Area (*Canada v. United States*) (Judgment), [1984] I.C.J. 246; Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States*) (Merits) (Judgment), [1986] I.C.J. 14; Elettronica Sicula S.p.A., (*United States v. Italy*), I.C.J. Communiqué No. 87/2, 9 February 1987; and I.C.J. Communiqué No. 88/5, 18 March 1988.

28. *Treaty Interpretation*, *supra* note 1, at 55.

29. *Id.*

30. The reliance on judgments and opinions of the ICJ as authoritative pronouncements of positive international law can provide significant insights into numerous rubrics of law, as for example environmental law and the law of the sea. E.g., W. Gormley, ch. 6, “The Human Right of All Peoples, and of All States, to be Free From the Effects of Nuclear Fall-Out”, 146-88; and ch. 7, “The Need for International and Regional Co-operation to Conserve the Earth’s Living Resources” 186-212, *Human Rights and Environment* (1976).

Notwithstanding the value of the penetrating case study, an extensive commentary would have the effect of making this review unduly lengthy. Suffice to say, each judgment and opinion is analyzed, not only with regard to the majority and dissenting views, but similarly, in terms of individual concurring opinions and dissents. Of course, the purpose of the author's survey is not to deal primarily with the substantive portions of the numerous holdings but, rather, to isolate those rules and norms of treaty interpretation that may provide some insight into the judicial practice of the world's premier tribunal.³¹ Hence each case is accorded its own "conclusions" in which the insight that may have been provided by an individual judgment or opinion is synthesized. As a result, each of the thirteen holdings can stand as a unique section if a vertical analysis is sought. Secondly, a horizontal approach may be desired by the reader. For instance, the opinions of the late Judge Alvarez are particularly revealing in terms of the author's "total approach." In fact, this reviewer has long been an admirer of Alvarez's new international law, especially as his concepts relate to human rights protection.³² It is submitted, therefore, that there is considerable value in tracing the line of thought of particular judges. In the present instance, moreover, the beginnings of the author's "total approach" can be detected.³³

In sum, the reviewer was especially interested in the discussion of the *Interpretation of the Peace Treaties with Bulgaria, Hungary, and Romania*,³⁴ the South West Africa judgments,³⁵ and the Namibia advisory opinion.³⁶ Indeed, at the conclusions to the *South West Africa case* (first phase),³⁷ Dr. Yambrusic again restates his basic premise "that

31. *Treaty Interpretation*, supra note 1, at 55.

32. Note 15 supra.

33. E.g., Alvarez (Individual Opinion) 67-72, "Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations," [1948] I.C.J. 57; *Treaty Interpretation*, supra note 1, at 65; and Alvarez (Dissenting Opinion) 12-21; Advisory Opinion on Competence of the General Assembly for the admission of a State to the United Nations, [1950] I.C.J. 4; *Treaty Interpretation*, supra note 1, at 65-66.

See especially, Judge Alvarez on social justice in: (Dissenting Opinion) 67-75; Advisory Opinion on Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, [1954] I.C.J. 47; *Treaty Interpretation*, supra note 1, at 78-79.

34. Advisory Opinion (First Phase), [1950] I.C.J. 65; and id. (Second Phase) 221.

35. South West Africa Cases (*Ethiopia v. South Africa; Liberia v. South Africa*) (First Phase), [1962] I.C.J. 319; and South West Africa (Second Phase), [1966] I.C.J. 6. Accord generally, Gormley, "Elimination of the Inter-State Complaint: South-West Africa Cases and Resulting Procedural Deficiencies in the International Court of Justice" (1967), 3 *Texas Int'l L. Rev.* 43 (1967).

36. Advisory Opinion on the Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1960), [1971] I.C.J. 16.

37. (First Phase), supra note 35.

the justices of the Court could not agree on a 'single' norm of treaty interpretation that could be deemed a customary rule of international law."³⁸

It remained for the Namibia Advisory Opinion³⁹ to undo some of the effects of the 1966 South West Africa judgment. As such, the analysis of those standards of interpretation that were gleaned from the several opinions illustrates the state of affairs which the author terms "juristic subjectivity," in that "the so-called canons of interpretation were considered merely as guides to the logical process of the interpreter's reasoning rather than the obligatory norms to be followed by the Court"⁴⁰. The review of individual opinions, especially of Judges Ammon and Alvarez, forcefully enunciates this conclusion. Therefore, the South West Africa cases (including the Namibia Advisory Opinion) serve as the final stage in the lengthy analysis, and interestingly, the conclusions to this section of the book constitutes the final insight provided by the book's longest chapter. But is it valid to criticize the International Court and its judges for not creating rules of interpretation or achieving legal certainty? The author presents a well documented argument; however, there is the possibility that the strong condemnation of the ICJ's judicial process is a bit too extreme, when it is stated that the ICJ has failed to produce a consistent pattern of legal precedents.

There is, moreover, an admittedly minor point that detracts from the book's objectivity. The judges are consistently referred to as "the American judge," "the British judge," "the Soviet judge" throughout the chapter, as if these jurists were in fact national judges or representatives of their governments. Without belaboring this observation, it need only be mentioned that judges on international and regional tribunals serve in their individual capacity and are not national delegates.⁴¹

In yet another instance this reviewer was upset, although personal prejudice may have intervened. Precisely, on several occasions President Sir Percy Spender is referred to as "distinguished jurists," a designation seldom detected in current legal literature. In view of his administrative

38. *Treaty Interpretation*, supra note 1, at 128.

39. (Second Phase), supra note 35; discussed in *Treaty Interpretation*, supra note 1, at 130 ff. 40. *Id.* at 144.

41. Stat. I.C.J., art. 2, in conjunction with art. 20. Art. 5(1) (Declaration) — Rules of Court, Acts and Documents Concerning the Organization of the Court, No. 2 (adopted 6 May 1946, amended on 10 May 1972) — provides that every member of the court undertakes to submit a declaration that he will perform his duties and exercise his powers as a "judge honourably, faithfully, impartially and conscientiously."

role in the 1966 South West Africa judgment,⁴² such repeated use of the word “distinguished” detracts from the scientific objectivity of the book, in the reviewer’s submission.

The Third Chapter,⁴³ is devoted to the exposition of the *Vienna Convention on the Law of Treaties*,⁴⁴ namely, articles 31 and 32. The purpose of this chapter is to show that the “Members of the United Nations, under the guidance and leadership of the United Nations International Law Commission, have likewise failed [as has the ICJ] in providing the international community with a general rule of interpretation. . .”⁴⁵ In effect, the author carries forward, into his discussion of the codification process, his conclusions from the preceding discussion of the ICJ. It seems impossible to ensure certainty and stability within the realm of treaty law. Possibly, then, Dr. Yambrusic is seeking too high a goal, for the reason that a single (or even primary) standard may be impracticable or only attainable at a philosophical level. May it even be proposed — more in the nature of a rhetorical question — that the “total approach” will be incapable of producing the desired goal of certainty and predictability. Likewise, the application of the “total approach” will not lead to clearly defined rules of interpretation or a consistent hierarchy of law standards, in the reviewer’s opinion.

While reading the earlier chapter dealing with the jurisprudence of the International Court of Justice, the reviewer was of the opinion that a discussion of inter-temporal law⁴⁶ might have provided significant insight into the approach being taken by a number of judges, namely the interpretation as contrasted with the application of a treaty.⁴⁷ This topic (of special interest to the reviewer⁴⁸) is treated in the subsequent section, as it relates to the efforts of the International Law Commission and the

42. Reference is made by the reviewer to the disqualification of Judge (later President) Sir Muhammad Zafrulla Khan by President Sir Percy Spender, thereby permitting him to cast the “third” and deciding vote in the 1966 South West Africa Judgment (Second Phase), supra note 35. Discussed in Gormley, supra notes 15 & 35.

43. Ch. 3, “*The General Rule of Interpretation of the Vienna Convention on the Law of Treaties — The Travaux Préparatoires*,” *Treaty Interpretation*, supra note 1, at 169-238.

44. Supra note 8.

45. *Treaty Interpretation*, supra note 1, at 169.

46. G. e Silva, “Le facteur temps et les traitées” (1977), 154 *Recueil des Cours* 213. See especially ch. 3, “Droit intertemporel des traitées”, id. at 265-70. *Treaty Interpretation*, supra, note 1, n.27, at 220; citing Max Huber in *Island of Palmas case (Netherlands v. United States)* (1928), 2 U.N. R.I.A.A. 829.

47. Additional insight into the distinction — and even the “merging” of the interpretation and application of treaty provisions was given by the International Court of Justice in the Aegean Sea Continental Shelf case (*Greece v. Turkey*) (Judgment), [1978] I.C.J. 3, at 32-34.

48. Gormley, “The Protection of the Earth-Space Environment” (1986), 19 *Indian Y.B. Int’l Aff.* 106, 137.

Vienna Conferences.⁴⁹ Parenthetically, it is to be regretted that inter-temporal law was deleted, with a single exception, in the final Convention on the Law of Treaties.⁵⁰ May the reviewer propose, however, that a future application of inter-temporal law may help to clarify some of the problems left unresolved by the text of the Vienna Convention.

The author reviews, and quite effectively, the major positions that were defended at the two Vienna Conferences. Unanimity could not be reached: the emerging treaty articles were the result of a series of compromises. The effect on treaty law is that the divergent positions expressed by the judges of the ICJ and the members of the ILC remain. Subjectively in the selection and application of norms of interpretation — as codified in articles 31 and 32 of the Vienna Convention — still dominate, in the author's view. This element of subjectivity will remain "ever present". Yet, once again, may it be asked: has the author become a bit too severe in his criticism of the ICJ and the ILC, in terms of the existing political climate?

Conversely, there was — and remains — certain preferences, namely, two basic approaches: the "majority view" supports the notion that words have a natural and ordinary meaning and, secondly, a significant minority position that words, by their very nature, are ambiguous and have meaning only within the context in which they function.⁵¹ As seen from the work of the distinguished *rapporteurs* of the ILC, and the replies from governments, a consensus could not be reached. Only compromises were possible, as the author illustrates in his discussion of the two sessions of the Vienna Conference. It is not unfair to conclude that this conference reflected the basic divisions that persist between governments and jurisconsults, with the effect that any further compromise became difficult. The review of these two sessions demonstrates the inevitable reality: the parties accepted solutions with which they were "dissatisfied" for the purpose of salvaging the conference and "agreeing" upon a final text. On the positive side, the delegates rendered a major contribution by arriving at a text that was opened for signature and which entered into force. The solution, which did not achieve the fundamental rule of interpretation sought by the author, provided — in draft article 27,

49. E.g., *Treaty Interpretation*, supra note 1, at 176, 178, 182, 190, & n.27, at 220.

50. G. e Silva, supra note 46.

51. May the reviewer again propose an examination of this problem in terms of inter-temporal law, i.e. the differences, if any, between the interpretation and application of a bilateral treaty or multilateral convention at such time as a dispute must be resolved.

general rules of interpretation, supported by *supplementary means of interpretation* in draft article 28 — a hierarchy of standards that can be applied to concrete situations depending on the degree of additional clarity desired. May it be suggested that considerable clarification has resulted from the texts of draft articles 27 and 28, which emerged as articles 31 and 32 in the final codification. At the very least, customary international law has been codified and developed by the ILC and the final Vienna Convention.

The reviewer wondered why the author did not provide any conclusions to his third chapter? Rather, the chapter just “stops,” following a single page review of the position taken by Professor Nahlik, who observed that recourse to the so-called historical standard of interpretation might only confirm the meaning arrived at by the use of the primary means set forth in draft article 27. Nonetheless, there may also be a change in the prior standards of interpretation. Consequently, he recognizes the value of employing subsidiary means of interpretation, but limited to those situations in which additional clarity was required. [Parenthetically, the reader will discover that the expected concluding remarks have been shifted into the following chapter.⁵²]

Professor Nahlik’s suggested amendment was not pursued, owing to the late stage of the conference. Still the basic problem remains. The author utilizes this resulting degree of uncertainty for the purpose of illustrating the flexibility in the application of existing treaty standards. This approach becomes even more obvious in Chapter IV, *A Comparative Analysis of the Legislative Developments and the Judicial Practice*,⁵³ when he seeks to synthesize the content drawn from the prior discussion. In fact, this short chapter restates the underlying theme, i.e. that neither international codification nor judicial reasoning “have provided a prudent realistic answer to the fundamental challenge of the international arbiter of how to achieve the judicious balance between stability of treaty relations and the progressive development of international law”⁵⁴. From this context, Dr. Yambrusic undertakes a final attempt to ascertain if a fundamental rule of treaty interpretation can be detected, particularly within the hierarchy of law contained in articles 31 and 32 of the Vienna Convention, in terms of state practice and judicial pronouncements. However, the author assumes the role of an advocate when he proposes to demonstrate the major flaws in the legislative and judicial experience. Specifically, the adoption of the “total context” is

52. *Treaty Interpretation*, supra note 1, at 242-43.

53. *Id.* at 239-46.

54. *Id.* at 239.

restated, and it is proposed that this notion of “total context” “should better lend itself to the ultimate goal of assuring legal objectivity, certainty, and predictability. . .”⁵⁵

From the most positive perspective, the author has come to grips with the basic shortcoming; consequently, recommendations are offered for the purpose of bringing higher degrees of certainty and stability into the treaty process. Conversely, earlier in this review it was indicated that the contrary situation might emerge. Precisely, this reviewer took the position that a full chapter should have been provided in order to explain the content of function of the “total context,” as the main criterion. In other words, the author had recognized the problem and offered a general-type recommendation, but he has failed to examine this approach for the enlightenment of the reader. In view of the fact that searching and penetrating examinations of the ICJ and ILC (along with state practice) constitute the major portion of the text, it seems valid to suggest that an equally severe analysis and criticism, should have been included in regard to the proposed “total context.” In the submission of this reviewer, the book does not go far enough in dealing with the major recommendations advanced.

It is essential not to minimize the contribution rendered by Dr. Yambrusic in the final chapter and in the conclusions. The ILC it again subjected to sharp criticism as is the Vienna Convention, with the intention of indicating the inherent weaknesses in contemporary treaty law. Beyond question, the author has rendered a contribution in raising these issues for further consideration. By way of example, he holds: “[O]ne can reasonably conclude that the ‘general rule’ of Articles 31 and 32 are not declaratory of customary international law”⁵⁶. However, such a conclusion — though it may have merit, as a means to stimulate further investigation — may be questioned on at least two grounds. First, the ILC and the Vienna conferences were not limited to codifying customary law; rather the international law was progressively developed and, secondly, the Vienna Convention evolved into customary law, during the lengthy period in which the text remained open for ratification.

Such statements — those of the author and the reviewer — have the advantage of focusing on some of the major difficulties of treaty law and state practice; yet, it is necessary not to minimize the contributions of the ILC. The author, in his conclusions,⁵⁷ actually advances a strong attack against the ILC, as for example when he argues: “[A] legislative design

55. Id.

56. Id. at 245-46.

57. Id. at 247-53.

which produces unrealistic rules that merely conceal differences will increase rather than reduce conflicts among states, thus weakening the most cohesive force in the international community — the treaty relationship among nation states”⁵⁸.

Indeed, the book’s conclusions follow this line of approach. But this is not to say that the concluding thoughts are not without merit, in terms of the author’s perspective and thesis that have been defended throughout the text. Accordingly, his final thoughts restate the subjective nature of treaty interpretation, in terms of the objectives sought. In reality, Dr. Yambrusic moves close to inter-temporal law when he maintains:

While stressing the objective or apparent intention of the parties, the interpreter recognizes that words as such are ambiguous and can have meaning only within the particular context in which they are used. The duty of the interpreter, therefore, is to give effect to the expressed intention of the parties in the light of the factual and legal circumstances *both* at the time of the conclusion of the treaty — to establish its meaning — and at the time of the interpretation — to establish its legal effect.⁵⁹

Dr. Yambrusic concludes with strong pleas as to the future role that arbitors, judges, legislators, and especially statesmen must assume if the progressive development of international law is to meet the legal and political needs of the global community. Basic to the author’s approach is the acceptance of good faith and *pacta sunt servanda*.⁶⁰ Inherent in this approach is a higher level of international and regional co-operation in a spirit of good faith.⁶¹ Notwithstanding the obvious nature of these final comments, international relations and the global legal order must necessarily depend upon the good faith intention of the parties.

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58. *Id.* at 247.

59. *Id.* at 251 (emphasis in original).

60. Accord Gormley, “The Codification of Pacta Sunt Servanda By the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith” (1970), 14 *St. Louis U. L.J.* 367.

61. W. Gormley, *supra* note 30.

