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Reviews

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**THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE:
A COMMENTARY.** Ed by **Andreas Zimmermann, Christian Tomuschat, Karin Oellers-
Frahm and Christian J Tams**

Oxford: Oxford University Press (*www.oup.com*), 2nd edn, 2012. lii + 1745 pp. ISBN
9780199692996. £295.

**Hugh Thirlway, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT
OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE**

Oxford: Oxford University Press (*www.oup.com*), 2013. lxxvi + 1104 pp. (vol. I), xxxii + 812 pp.
(vol. II). ISBN 9780199668250. £275.

Although international courts and tribunals nowadays come in many varieties, the International Court of Justice maintains a special role in the complex network of international dispute settlement bodies. As the principal judicial organ of the United Nations, it is the only permanent court of general international law open to all states wishing to subject themselves to its jurisdiction. Its jurisprudence is relied upon as authoritative by other courts as well as states, international organisations, scholars, practitioners and generally by all “speakers” of the language of public international law. The two reference works under review here analyse the Court’s case law and its procedure adopting different but complementary approaches. The *Commentary* offers a textual, rule-by-rule analysis of the relevant provisions of the Court’s Statute and of the UN Charter; it does not purport to analyse the points of substantive law decided by the Court over time, nor its case-law as such. By contrast, the *Law and Procedure* analyses the Court’s case-law topic by topic. Its main focus (occupying around two thirds of the two volumes it comprises) is the jurisprudence of the Court on those areas of substantive international law on which it has pronounced itself, such as the sources of law, treaty interpretation, the law of the sea, etc.. The remaining third of the book is devoted to those questions of jurisdiction, competence and procedure which fall squarely within the Statute’s (and thus also the *Commentary*’s) remit, again from the point of view of the Court’s statements thereupon.

The *Commentary* is now in its second edition. The editorial team has slightly changed – Christian Tams has joined Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm as editor, while Maral Kashgar and David Diehl are the new assistant editors – but the structure of the book and the list of nearly fifty prominent authors is virtually untouched, except for two new chapters, one on evidentiary issues and one on counter-claims. Such overall continuity is wise: at its first appearance in 2006, the *Commentary* successfully addressed a clear gap in the literature. The decades-old treatise concerning the Court’s predecessor, *Statut et règlement de la Cour permanente de justice internationale: éléments d’interprétation* by B S von Stauffenberg (Berlin: Heymann, 1933) was clearly outdated,

so that readers in search of procedural guidance concerning a point in the ICJ's Statute would have usually resorted to S Rosenne's masterful but costly classic, the *Law and Practice of the International Court, 1920-2005* (Leiden: Nijhoff, 2006). Not much help came from French quarters, either: the shorter *La Cour internationale de justice* (Paris: LGDJ) by M Dubisson has unfortunately not been updated since 1964, and Guyomar's *Commentaire du règlement de la Cour internationale de justice* (Paris: Pedone, 1973 and 1983) is both rather outdated and narrower in scope than the book under review.

The *Commentary's* strength is that it provides an authoritative, comprehensive and up-to-date account of the procedural law of the ICJ through the provisions of the Statute. For each Article analysed, it proceeds in three steps. It opens with a detailed historical overview, including reference to the drafting history and to the PCIJ Statute's corresponding provision; then comes an in-depth analysis of the scope and content of the provision, with extensive reference to the practice of the Court and to its jurisprudence, as well as to relevant Rules of Court and Practice Directions; finally, there is an overall evaluation of the provision. A select bibliography accompanies most Articles. In addition, certain thematic chapters cover introductory or general themes not specifically linked to a Statute provision, such as the relationship between the ICJ and other courts, the (rather elusive) "general principles of procedural law", counter-claims, evidentiary issues, discontinuance and withdrawal of cases. This structure makes the *Commentary* a rather complex book. Its list of authors includes scholars and practitioners based in Germany (a sizeable majority), the Netherlands, the United Kingdom, Switzerland, Spain, the United States, as well as Australia, Denmark, France, Italy, Israel, and China. But despite their different (though not exactly diverse) backgrounds, the contributors all employ a common language and methodology: the book is a brilliant example of contemporary legal positivism of the textual/doctrinal variety, a mode of scholarship in which the German school of international law has traditionally led the way.

A point of criticism is due concerning a minor but irksome issue: the editorial decision to disregard established conventions concerning the citation of contentious cases brought to the ICJ by special agreement. Both in the Court's own practice and in academic writing, the standard approach is to refer to cases introduced through a *compromis* by inserting a forward slash mark ("/") rather than a versus sign ("v.") between the Parties' names; thus, *Burkina Faso/Mali* is immediately distinguishable from *Nicaragua v. United States*, the former being a case brought by special agreement, the latter being a case brought under other jurisdictional headings. This elegant graphic distinction conveys a great deal of information in a simple way, and it is very helpful when quickly considering lists of authorities on any procedural issue on which the existence of a *compromis* may have a bearing. The *Commentary's* unusual choice to employ "/" for all contentious cases creates needless confusion. The Editors' justifications for this are unpersuasive, as they refer to the consensual nature of the Court's jurisdiction in all cases (xxi). But the point is that a case brought by special agreement is one brought by the parties together, not by one "in opposition to" ("versus") the other. Special agreement cases may differ from other contentious cases in terms of jurisdiction, admissibility, and applicable law. The Editors may wish to reconsider this choice in the third edition of the *Commentary*.

Another issue is that certain editorial slips can be found here and there, as is bound to happen in such a complex work. For example, Oellers-Frahm's discussion of the binding nature of provisional measures contains a rather puzzling mistake carried over from the previous edition. While the introductory remarks (1062-1063) correctly refer to the significance of the *LaGrand* case to this question (see *LaGrand (Germany v. United States of America), Judgment*,

I.C.J. Reports 2001, 466), the immediately subsequent section titled “the jurisprudence of the Court” affirms that “[t]he Court never made a clear statement concerning the legal effect of provisional measures” (1064). Something thus seems amiss. The discussion is then rectified by a whole section devoted to the *LaGrand* case (1066-1069), which is said to be “surprising in its unambiguous clarity, for it plainly states that provisional measures are binding” (1067). This section of the Commentary may thus seriously mislead the inattentive reader.

Nevertheless, taken as a whole, the *Commentary* remains an indispensable tool for practitioners and academics alike. This is also true of the *Law and Procedure*, which is the culmination of decades of work by one of the most accomplished experts on the Court, and sometime Principal Legal Secretary thereof, Hugh Thirlway. It basically consists of a hardbound reprint of his two influential series of articles on the Court’s jurisprudence that appeared in the *British Year Book of International Law* (BYIL) from 1989 to 2003 and from 2005 to 2011 respectively. These were the continuation of an analogous series of articles by Sir Gerald Fitzmaurice that appeared between 1950 and 1963 and that were eventually collected as *The law and procedure of the International Court of Justice* (Cambridge: Grotius, 1986). Each of the two series by Thirlway is bound in a separate volume following a shared table of contents.

What sets the *Law and Procedure* apart from most literature on the Court is the combination of a topic-oriented approach with a critical analysis of the Court’s decisions going well beyond the descriptive. One can easily find elsewhere some excellent case-by-case summaries, of varying degrees of conciseness, from the series published by the UN with the assistance of the Court’s Registry (www.un.org/law/ICJsummaries/) to the recent digests by G Dahlhoff (*International Court of Justice, digest of judgments and advisory opinions, canon and case law 1946-2012*, Leiden: Nijhoff, 2012) and by P M Eisemann and P Pazartzis (*La jurisprudence de la Cour internationale de Justice*, Paris: Pedone, 2008). One can also find useful thematic repositories of the Court’s statements of the law, such as the World Court Digest, a free online database edited at the Max Planck Institute for Comparative Public Law and International Law (<http://www.mpil.de/en/pub/research/details/publications/institute/wcd.cfm>). But the *Law and Procedure* series is different, because it had the ambition of commenting substantively on the Court’s case law in a thematic fashion over the course of more than twenty years—an endeavour which would have tried the endurance of many other scholars, all the more so considering Thirlway’s admirable claim that “no research assistants have been harmed in the making of this book” (vii). Indeed, the Court’s jurisprudence evolves enough over relatively short periods of time that achieving comprehensiveness is a perpetually self-defeating task, as one is bound to note when contemplating what use remains of previous monumental attempts at a complete systematic commentary of the ICJ’s (and the PCIJ’s) case law organised by subject, such as E Hambro’s *The case law of the International Court* (Leiden: Sijthoff, 8 vols each covering multiple subjects, 1952-1976) and P. Guggenheim’s *Répertoire* (Genève: Droz, 5 vols. each devoted to a different major topic, 1961-1989).

The style and content of the *Law and Procedure* clearly benefit from being single-authored: Thirlway’s take on the Court’s jurisprudence comes alive at every page. He offers a detailed critical analysis of the state of the case-law on each sub-topic, with attempts at de-coding the judicial (and non-judicial) policy considerations which may have produced certain decisions by the Court (see e.g. 935 on jurisdictional issues concerning provisional measures). The line of argument of the Court is scrutinised with reference to possible alternatives, and great attention is devoted to the separate and dissenting opinions of Members of the Court, especially when they highlight points with which Thirlway agrees or disagrees (see e.g. 1782-1785). Thirlway’s

criticism at times borders on the scathing. For example, in his discussion of the binding nature of provisional measures, Thirlway spares no argument against *LaGrand* (960 ff), which he considers “naked judicial legislation on both the procedural and the substantive level” (965) and “a disaster” for “the system of international judicial jurisdiction” (968).

Because of these features, Thirlway’s series of BYIL articles is of great importance, and will remain so for many years to come. Precisely for this reason, one is left with the sensation that this 2013 “complete edition” was a missed opportunity to update and bring all the material together in monographic form. Although the *Law and Procedure* is certainly a beautiful set of two nicely bound volumes offering easy access to materials otherwise scattered among many BYIL volumes, it is legitimate to wonder what its actual added value is compared to the BYIL version of the two series. One answer is that the index, the joint table of contents and the extra footnotes pointing to newer decisions of the Court adopted until 2012 are all very useful tools. But a unified version of the articles, proceeding subject by subject and updated until late 2012, would have been an even better addition to the literature on the Court. Thirlway acknowledges in the preface that it was indeed his original intention to combine the two series of articles into one, but the task proved understandably too cumbersome in light of the extensive re-writing which would have been necessary (vi). Such an ambitious project would also have allowed him to abandon some aspects of Sir Gerald’s original table of contents, which may appear too constraining today in view of how the Court’s jurisprudence has developed. For instance, the lack of a discrete section on the use of force in international law is quite striking (self-defence is only treated as one of the circumstances precluding wrongfulness in the context of international responsibility, 606-610 and 1530-1539), and a new table of contents would probably include subjects such as environmental law and human rights, understandably not included in Sir Gerald’s time.

The different approaches of the *Commentary* and the *Law and Procedure* only affect the way the books are used in practice, not how well-informed one is about a certain topic after reading them. Even for those parts in which they overlap topic-wise, one is best advised to read both: Thirlway’s distinctive approach will often be different from that of one of the many authors of the *Commentary*. Although they are reference works, the *Commentary* and the *Law and Procedure* are not sterile descriptions of settled law (if such a thing exists in international law), but complex narratives of the multifarious statements of the Court. Indeed, taken together, the two books constitute an indispensable starting point for any contemporary inquiry on the Court’s practice or jurisprudence—all speakers need grammar books, after all.

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Kirsten Sellars, “CRIMES AGAINST PEACE” AND INTERNATIONAL LAW

Cambridge: Cambridge University Press (www.cambridge.org), 2013. xv + 316 pp. ISBN 9781107028845. £70.

Kirsten Sellars’ highly readable book is a diplomatic and legal history of the attempts made during the twentieth century to establish crimes against peace as a separate crime in international law. Her assiduous use of the political and diplomatic record to illuminate the