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Reviewing José E. Alvarez, The Public International Law Regime Governing International Investment

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by the Tribunal.[23] Moreover, as noted above, the Tribunal also has jurisdiction to decide contract disputes between the two states (the "B" claims), which is also relevant to the issue of inter-state responsibility, including issues of attribution, circumstances precluding wrongfulness, forms of reparation, and countermeasures. Seventy-seven B claims were filed by the two states (two-thirds by Iran), and seventy-two of those claims have led to an award or decision.[24] Both Iran[25] and the United States[26] have been found in violation of their obligations, leading to the payment of compensation. Indeed, the principal remaining claims at the Tribunal, especially Case No. B1 (concerning the U.S. foreign military sales program with Iran prior to the latter's 1979 revolution), fall under this category of claims and will likely keep the Tribunal occupied for years to come.

Despite these points, *The Law of International Responsibility* is an exceptional resource. Designed to embrace numerous recent initiatives by the Commission in the field of international responsibility, the volume as a whole provides a variety of useful and important essays, which are carefully organized and thoughtfully executed by a very talented group of scholars and practitioners.

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The Public International Law Regime Governing International Investment. By José E. Alvarez. The Hague: Hague Academy of International Law, 2011. Pp. 502. $25, €18.

The Public International Law Regime Governing International Investment is a recent book by José E. Alvarez, the Herbert and Rose Rubin Professor of International Law at New York University School of Law. Based on his Hague lecture series, *The Public International Law Regime* places international investment law firmly within the rubric of public international law. Historically, international investment law might have been classified as pure private international law given the private commercial actors and investment activities involved. *The Public International Law Regime*, however, posits that a dichotomous public versus private law paradigm does not work in the context of international investment. Alvarez makes the implicit explicit by considering investment law's unique, arguably *sui generis*, hybrid essence that crosses the public and private international law divides. By articulating its legitimate and fundamental public international law elements, he uses his lectures to encourage the evolution of the international investment law regime. He explains that his resulting "monograph is an attempt to understand the evolving ideological, political and legal natures of the international investment regime—and what lessons it may hold for other treaty regimes and their dispute settlers" (p. 94).

While Alvarez focuses primarily on the public international elements that exist in investment law, he acknowledges that the relationship is not a one-way valve flowing only from investment law to public law. Rather, the relationship is reflexive. As a myriad of panels and concomitant debates at the 2012 Biennial Conference of the Society

[23] Jeremy K. Sharpe, *Iran-United States Claims Tribunal, in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 545, 554 (Chiara Giorgetti ed., 2012).

[24] *Id.* at 553–54.

[25] For example, in 1996 the Tribunal issued an award in Case No. B36 concerning a U.S. claim for amounts due from Iran under a World War II military surplus property sales agreement. The Tribunal found Iran liable for breach of the agreement and ordered Iran to pay the United States more than $21 million in principal and interest. United States v. Iran, 32 Iran-U.S. Cl. Trib. Rep. 162 (1996); United States v. Iran, 33 Iran-U.S. Cl. Trib. Rep. 56 (1997); United States v. Iran, 33 Iran-U.S. Cl. Trib. Rep. 346 (1997).

[26] For example, in 1984 the Tribunal issued an award in Case No. B7 concerning an Iranian claim for reimbursement of advance payments that had been made by the Atomic Energy Organization of Iran to the U.S. government pursuant to two uranium enrichment services contracts. The Tribunal found the United States liable and ordered it to pay nearly $8 million to Iran, plus interest. Atomic Energy Organization of Iran v. United States, 6 Iran-U.S. Cl. Trib. Rep. 141 (1984); Atomic Energy Organization of Iran v. United States, 12 Iran-U.S. Cl. Trib. Rep. 25 (1986). In Case No. B1 (Claim 4), the Tribunal found the United States liable to pay compensation for certain Iranian military properties that the United States refused to transfer to Iran after the Iranian revolution, Iran v. United States, 19 Iran-U.S. Cl. Trib. Rep. 273 (1988), leading to a settlement in which the United States paid Iran $278 million. Iran v. United States, 27 Iran-U.S. Cl. Trib. Rep. 282 (1991).

of International Economic Law[1] demonstrated recently, public law principles inevitably inform the universe of investment law and vice versa. Alvarez's core contribution in the lectures is to ground international investment in the crossroads of international public and private law and to do so chiefly by reference to investment disputes arising from the 2001 Argentine currency crisis, where Argentina's adoption of measures to stabilize its economy led to over forty arbitrations involving claims of more than US$8 billion.[2]

The Public International Law Regime is, in many respects, a fundamental overview of the investment treaty system in general and required reading for anyone interested in the Argentine disputes. In his effort to situate investment law within the public law context, Alvarez identifies international public law elements but also recognizes internal tensions, particularly where adjudicators or other stakeholders may not fully appreciate the public law aspects of the regime. Indeed, he observes that some investor-state arbitrators "see themselves as engaged in the same task as commercial arbitrators, that is, merely resolving a particular dispute, and some [investor-state arbitrators] see investor-State arbitrations as a species of 'public law' adjudication" (p. 364). His reflexive approach to the intersection of public and private law elements likewise means that the public law stakeholders should appreciate the nuance of the private law elements of the system. In this way, Alvarez creates a foundation for other scholars to acknowledge this fundamental tension within the investment regime and to offer new frameworks that recognize even deeper tensions and public international law elements.[3]

In support of his key thesis, Alvarez succinctly identifies the core areas where investment law and public international law intersect. His "Top 10" list identifies fundamental synergies, including (1) treatification, (2) fragmentation, (3) impact on nonstate actors, (4) globalization and its discontents, (5) the international law professional, (6) the increasing judicialization of law, (7) hegemonic elements of international law, (8) global administrative law, (9) constitutionalization, and (10) humanity's law.

Each book chapter is based on one of Alvarez's five lectures. Chapter 1 provides the necessary overview of the history and context of international investment to permit an evaluation of the regime. In an effort to frame the legalization and judicialization of international investment, Alvarez places the treatification of investment law into a modern schema of globalization and its discontents. He then identifies with textbook clarity the fundamental rights—both substantive and procedural—of international investment treaties and plants two types of seeds to support his theory about the inherent public international law elements of investment law.

Alvarez's first type of seeds involves functional comparisons with established public international law regimes, namely international trade and human rights, and includes a useful nomenclature of the functions of adjudicators in human rights and investment law. His second type of seeds relates to a four-category schema for understanding the current "backlash" against the international investment regime and for exploring traditional public international law themes. The schema frames the debate by identifying (1) vertical critiques, which relate to a top-down disconnect between international and national domestic regimes creating concerns for systemic legitimacy, democracy deficits, and other vertical affronts to state sovereignty; (2) horizontal critiques, namely, a lack of sovereign equality in the investment regime that harks back to traditional debates about the divergences between the global North/South, imbalanced economic rights, and other power disparities; (3) "ideological" dissatisfaction related to structural concerns about the value of the international investment given different approaches to the value of privatization and free markets in public international law; and (4) other issues relating

[1] Information about the conference is available online at http://www.sielnet.org/Default.aspx?pageId=819491.

[2] William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 308–11 (2008).

[3] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AJIL (forthcoming 2013).

to the rule of law, including forum shopping by investors, transparency, and systemic consistency. The care that Alvarez displays in the construction of this schema is helpful both in its ordered classification of the core issues for debate and its balanced recognition of systemic critique.

Chapter 2 explores the objectives of investment treaties, the public international law instrument at the heart of the investment regime. Alvarez correctly posits that a monolithic narrative of the value of bilateral investment treaties (BITs) is improper[4] and instead suggests that BITs often perform multiple functions simultaneously, and differently, for various stakeholders. He then drills down with a focus on the BIT program of the United States and, without identifying a sharp historical divide, notes a potential generational shift in terms of the sovereign objectives in promulgating investment treaties. In the first generation of U.S. BITs, given the emphasis on U.S. capital exports, the BITs focused on (1) creating a uniform standard for fair compensation of expropriation; (2) providing other substantive guarantees of treatment to incentivize and facilitate a stable, predictable, and secure regulatory framework for foreign investment; and (3) depoliticizing investment disputes by removing sovereigns from espousal decisions. Yet, after traditional capital exporters found themselves subjected to suit or when historically capital-importing states became capital exporters, the proverbial worm turned. Once the economic paradigm of investment shifted and the hitherto theoretical reciprocal nature of BITs became a reality, states shifted to reclaim sovereignty and retain domestic policy space in a manner consistent with international law.

[4] *See* Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L. ORG. 1 (2011) (questioning the value of creating monolithic narratives about the actual or intended benefits of investment treaties); *see also* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 400 (2010); Todd Allee & Clint Peinhardt, *Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions*, 54 INT'L STUD. Q. 1 (2010).

Despite the utility of Alvarez's careful state-specific analysis, the lectures focus on the U.S. experience to the exclusion of other key players in the international investment regime. There is certainly value in explaining the position of the United States as a major player in the regime, and the U.S. model has arguably influenced the practice of other states. Nevertheless, including additional narratives from other interested states, particularly emerging economies or economies in transition, would have been useful. While Alvarez does refer to China and other states—but not with the detail of his exploration of the United States—one wonders whether his characterization of the international investment regime would be the same if a "bottom up" approach were considered from the perspective of states, like Egypt or South Korea, that have a complicated and fragmented history of BITs. Given the lectures' use of Argentine examples to illustrate key elements related to investment disputes, a non-U.S.-focused case study on treaty creation could provide useful insights on key public international law themes of fragmentation and state sovereignty.

Having grounded the discussion, Alvarez uses chapters 3 and 4 to provide specific examples—typically related to Argentina—of demonstrable doctrinal links between the investment treaty system and public international law. Chapter 3 focuses on the evolution of fair and equitable treatment (FET) provisions, whereas chapter 4 explores the Argentine cases in detail. The strength of Alvarez's core thesis, namely that international investment law is inevitably intertwined with public international law, is demonstrated in these chapters. Having crisply identified seven unique interpretive questions about FET, Alvarez has two goals in chapter 3: to provide a roadmap for those interested in the evolution and treatment of FET and to demonstrate how FET applies. In keeping with his public international law focus, he queries how FET may be distinct from customary international law while simultaneously identifying how textual variance exacerbates concerns about fragmentation, even though "most tribunals charged with interpreting FET have not emphasized the textual differences among FET clauses" (p. 205). Chapter 4 develops this theme and uses Argentina

to explore challenges related to inconsistency in the relevant jurisprudence, the meaning of "necessity" under international law, and the interpretation and application of provisions relating to essential security and nonprecluded measures.

Chapter 5 moves beyond Alvarez's core thesis of identifying investment law's synergies with public international law. Rather, he seeks here to offer normative insights about the future of the investment regime. By highlighting its transitional nature and the existing backlash, Alvarez uses the Argentine cases to highlight the best and the worst of the investment regime. Argentina thus becomes the showcase for exploring inconsistent and disparate outcomes, challenges to sovereignty, implications for the human rights—particularly related to concerns for the rule of law and procedural justice—before turning to the thorny question of claims of purported "pro-investor" bias. In reaping the harvest from the seeds planted in chapter 1, Alvarez uses his four-category schema to offer assessments of various normative solutions for improving the investment system. He then comes full circle to consider the points of intersection between the investment regime and public international law. He closes by encouraging stakeholders to grasp the deep complexity of the investment regime, which is not inherently capable of overly simplistic dichotomies. Instead, akin to dialogues for legal pluralism, he encourages an appreciation that the investment regime may relate to "harmonization *and* fragmentation, reflect the views of States *and* non-State actors, be both a tool of . . . globalization *and* of 'humanity,' [and] enforce *both* treaty and non-treaty sources of law" (p. 457). Ultimately, Alvarez's encouragement of a "both/and" approach to the international investment law regime is appropriate. Following Alvarez's call will undoubtedly require deep and complex thinking that challenges traditional classifications and stark conceptions of international law. Yet, while the task is not easy, the effort will be worthwhile as it offers the opportunity to promote a more nuanced approach to investment law that more closely mirrors reality and normative hopes for the future.

Overall, there is much to commend in *The Public International Law Regime*. Yet, as Socrates gently suggests in Plato's *Crito*, one's greatest strength can also be one's greatest weakness and vice versa.[5] Similarly, Alvarez's effort to bring the public international law elements of investment into sharper focus through the Argentine case study has value—but also a cost. The focus on the Argentine cases, while useful, perhaps detracts from a balanced assessment of the entirety of the international investment system. Contextualization is necessary to clarify what the Argentine cases mean for Argentina specifically, states generally, and, perhaps more interestingly, given the condition of the international economic order, states in the midst of fiscal crises.[6]

Yet Alvarez clearly appreciates the value of a holistic analysis of the investment regime. He identifies the utility of large-scale statistical analyses as well as their inherent limitations. These limitations necessitate the ongoing assessment of the investment treaty system over time. In his discussion of the possibility of bias within the investment regime, Alvarez observes that prior to 2007 "[g]overnments won in 58 per cent of the cases while investors won in 39 per cent; that despite the fact that investors claimed on average US$343 million in damages, tribunals awarded only US$10 million on average" (p. 389).[7] He then observes that further research is required, presumably if one wishes to draw inferences from the totality of the system based upon the specific example of Argentina.

Recent research has taken this call seriously and replicated key aspects of data upon which Alvarez relies—concerning both outcome and

[5] *See* PLATO, APOLOGY, CRITO AND PHÆDO OF SOCRATES 53 (Henry Cary trans., 1897) ("Would, O Crito! that the multitude could effect the greatest evils, that they might also effect the greatest good . . . ."); *see also id.* at 59 (noting that "these multitudes, who rashly put one to death [] would restore one to life").

[6] *See, e.g.*, Noel Maurer, *Argentina Beats ICSID! Seriously, Argentina Beats ICSID. Regularly*, *in* THE POWER AND THE MONEY, *at* http://noelmaurer.typepad.com/aab/2012/06/argentina-beats-icsid-seriously-argentina-beats-icsid.html (providing commentary by Maurer, a Harvard Business School professor, that discusses general statistics about investment treaty disputes and Argentina's experience within the larger framework).

[7] The figures are based upon a dataset that is publicly available and downloadable. *See* http://law.wlu.edu/faculty/page.asp?pageid=1185.

discounts between amounts claimed and awarded—to address questions of systemic bias. A dataset of "Generation 2" public awards prior to 2010,[8] which nearly doubled the cases subject to earlier analysis, found that governments still won 55.6 percent (n=55)[9] of the cases, investors won 38.4 percent (n=38) of the cases, and the remaining cases (n=6) were settled. Other Generation 2 analyses that controlled for inflation[10] found the raw mean amount investors claimed was US$370,898,027 ($n$=79),[11] with a minimum claim of US$202,858 in *Maffezini v. Spain*[12] and a maximum claim of US$11,489,456,522 in *Generational Ukraine Inc. v. Ukraine*.[13] By contrast, the mean amount awarded for all final awards, adjusted for inflation, was US$21,161,794 ($n$=99),[14] with a maximum award in *CME Czech Republic B.V. v. Czech Republic*.[15] Even when focusing on the narrow subset of cases that *only* involved an award in favor of an investor, a substantial—but not as large—discrepancy existed between mean amounts claimed (US$198,233,505; n=33) and awarded (US$53,718,399; n=39).[16] Particularly with a doubling of the population of public awards, the stability of both the win-loss ratio (namely 1–3 percent shifts) and the steep discount between amounts claimed and awarded (a US$350 million difference rather than a US$330 million difference) is remarkable. It also suggests that Alvarez's data-driven responses to critics of the system will remain valuable.

It is curious that, despite Alvarez's appreciation of holistic data and his specific and detailed exposition of Argentina, he does not take the next step and use large-scale quantitative analysis to contextualize the Argentine cases. Given the extensive nature of his undertaking and the need to focus on legal doctrine rather than quantitative analysis, such an omission is understandable. There is, however, value as connecting the dots by reference to Argentina's experience—whether by Alvarez or others—raises a fundamental question, namely, "Is Argentina the tail wagging the dog of the investment regime?"

As a preliminary matter, one may find it easy to recall and instructive to rely upon the Argentine cases. The sheer volume of cases and the amounts at stake warrant individualized attention. Nevertheless, exclusive reliance on Argentina—particularly given that those cases involve a focused set of government measures responding to a severe economic crisis—may have limited inferential value for assertions about the totality of the international investment regime.

Data can help provide an answer and contextualize whether the cases are representative of the larger whole. It is noteworthy that for the top sixteen (T16) awards in the Generation 2 dataset that were over US$20 million (adjusted for inflation),

[8] The Generation 2 dataset involved all publicly available awards as of June 1, 2009. *See id.* A third generation of research to assess awards rendered before January 1, 2012, is underway.

[9] The use of "n" indicates the number of cases.

[10] As in the Generation 1 data, damages were converted to a common U.S. dollar currency at the date of the award. All damage awards were then adjusted for inflation using the consumer price index as of January 1, 2011.

[11] Even when accounting for statistical outliers, the trimmed claimed mean was US$147,352,001 ($n$=72), and the winzorized claimed mean was US$188,198,953 ($n$=79).

[12] *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (NAFTA Ch. 11 Arb. Trib. Nov. 13, 2000), involved an amount claimed of ESP30,000,000, which amounted to the raw amount of US$155,314 at the date of the award.

[13] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), involved a raw claim of US$9,400,000,000.

[14] The raw mean damage award, without adjusting for inflation, was US$18,889,128 ($n$=99). Even accounting for statistical outliers, the trimmed mean award was US$1,266,186 ($n$=82), and the winzorized mean damage was US$3,353,098 ($n$=99).

[15] The tribunal awarded US$269,814,000 on the date of award, which amounts to US$329,788,959.80 when adjusted for inflation.

[16] The raw mean amount claimed for this subset was US$178,607,593, and the raw mean amount awarded was US$47,949,326. The smallest amount awarded was in *Bogdanov v. Republic of Moldova*, Award (Stockholm Chamber of Commerce Arb. Inst. Sept. 22, 2005), with an original award in Moldovan lei of 310,000, which was a raw amount of US$24,603 on the date of the award and an inflation adjusted amount of US$28,336.23.

nine of the T16 cases were rendered against Argentina.[17] These statistics suggest that Alvarez is right to focus on Argentina as it is a key fiscal subcomponent of state liability in the investment regime. Yet Argentina is arguably overrepresented in the most extreme (and most negative) outcomes for states in the entire population. As Argentina therefore constitutes a heavy thumb on the scale, one must be cautious in assessing whether Argentina is a representative example or an unrepresentative subpopulation before drawing broader conclusions about the investment regime.

At least three competing narratives exist. In one narrative, Argentina is an unrepresentative example and, given the unique nature of its experiences, cannot be used to draw valid inferences about the totality of the investment treaty system. The argument is that, due to Argentina's unique experience with the system where it is responsible for more than 50 percent of the T16 awards—and indeed four of the five highest awards—its experience reflects neither the experiences of other states nor a normal distribution and is arguably a statistical outlier. Moreover, Argentina's disputes relate to catastrophic economic events, and the remaining disputes in the population do not share this critical commonality, particularly other T16 awards. Under this narrative, Argentina's experiences must be limited to its unique historical context and should not be used as a basis for generalization about the investment regime.

Under a second narrative, Argentina is a proper, representative, and necessary case study. This narrative recognizes that, based upon Generation 2 data, Argentina is responsible for 19 percent of the total investment treaty caseload,[18] and therefore making inferences about the population seems reasonable. This narrative suggests that Argentina shares critical and representative characteristics

[17] The nine cases out of the top sixteen awards (i.e., awards that were over US$20 million when adjusted for inflation to 2011) were (1) *Siemens A.G. v. Argentine Republic*, ICSID No. ARB/02/8, Award (Feb. 6, 2007) (original award: US$217,838,439.00; inflation adjusted: US$236,287,570.80); (2) *BG Group PLC v. Argentine Republic*, Final Award (UNCITRAL Arb. Trib. Dec. 24, 2007) (original award: US$185,285,485.85; inflation adjusted: US$200,977,649.30); (3) *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006) (original award: US$165,240,753.00; inflation adjusted: US$184,384,248.80); (4) *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) (original award: US$133,200,000.00; inflation adjusted: US$153,411,584.00); (5) *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) (original award: US$128,250,462.00; inflation adjusted: US$139,112,225.80); (6) *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3. Award (May 22, 2007) (original award: US$106,200,000.00; inflation adjusted: US$115,194,270.30); (7) *Compañia de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) (original award: US$105,000,000.00; inflation adjusted: US$113,892,640.10); (8) *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 25, 2007) (original award: US$57,400,000.00; inflation adjusted: US$62,261,309.93); and (9) *National Grid PLC v. Argentine Republic*, Award (UNCITRAL Arb. Trib. Nov. 3, 2008) (original award: US$38,800,000.00; inflation adjusted: US$40,530,051.09). Of the top sixteen award, the seven remaining awards where investors were awarded over US$20 million when adjusted for inflation were (1) *CME Czech Republic B.V. v. Czech Republic*, Final Award (UNCITRAL Mar. 14, 2003) (original award: US$269,814,000.00; inflation adjusted: US$329,788,959.80); (2) *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008) (original award: US$125,000,000.00; inflation adjusted: US$130,573,618.20); (3) *Occidental Exploration and Production Co. v. Republic of Ecuador*, Award (London Ct. Int'l Arb. July 1, 2004) (original award: US$71,533,549.00; inflation adjusted: US$85,161,691.65); (4) *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006) (original award: US$76,200,000.00; inflation adjusted: US$85,027,933.52); (5) *Eastern Sugar B.V. v. Czech Republic*, Partial Award (Stockholm Chamber of Commerce Arb. Inst. Mar. 27, 2007) (original award: US$33,746,200.00; inflation adjusted: US$36,604,226.78); (6) *Archer Daniels Midland Co. v. Mexico*, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007) (original award: US$33,510,091.00; inflation adjusted: US$36,348,121.28); and (7) *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) (original award: US$16,685,000.00; inflation adjusted: US$21,792,534.41). Interestingly, out of the top six awards, five were against Argentina, but the largest award was rendered against the Czech Republic in *CME Czech Republic B.V.*

[18] Generation 2 data, which relates to all disputes with at least one publicly available award, reveals that Argentina has the largest caseload of any state ($n=26$). Mexico is the next largest ($n=12$; 8.8%), and the United States has the third largest number of awards ($n=9$; 6.6%). The average number of disputes brought against a state is 2.85.

with other states. Specifically, Argentina's World Bank development status is similar to that of other states within the general population and also the specific subset of awards rendered against the states. Notably, with the exception of two cases—one case against the Czech Republic when it was a high-income respondent and another case against Ecuador when it was a lower-middle–income respondent—when the awards were made, all of the T16 awards were made against upper-middle–income countries. In other words, while Argentina may be unusual in its claims deriving from a financial crisis, it generally *does* share its development status with other states that have received the short end of the investment arbitration stick. Moreover, Argentina, like other upper-middle–income states, has also won cases. These similarities form a basis for suggesting that Argentina's disputes can be used to make valid inferences about the overall population.

A third, hybrid narrative balances these two previous perspectives. Under this view, Argentina should be appreciated within its unique context, but inferences related to the remainder of the population must be made with caution and with recognition that inferences may not hold true in the future. This assessment requires simultaneous appreciation of the limitations of the macrolevel inferences and respect for the unique microexperience of Argentina. Put another way, it will be critical to address, or at least control for, a possible "Argentina effect." As the population of investment treaty awards continues to expand, time will tell whether the Argentine cases are a representative example of the system's functionality or a proverbial blip that is tied to unique and nonreplicable economic, political, and historic circumstances or some combination thereof.

In the interim, Alvarez's use of the Argentine cases to explore the unique reflexive insights—both that public law has for international investment law and that investment law has for public law—provides considerable, and compelling, food for thought. As the intersection of competing public law regimes continues to expand, including areas related to the environment, labor law, criminal law, and human rights, Alvarez's insights should form a baseline for future analysis of the investment treaty regime. As he reminds us in his closing comments, international investment law is not alone in finding new value by crossing scholarly divides when evaluating complex social, political, economic, and legal phenomena.

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International Civil Tribunals and Armed Conflict. By Michael J. Matheson. Leiden, Boston: Martinus Nijhoff Publishers, 2012. Pp. xv, 382. Index. $185.

This book is a remarkable analysis of the decisions of international civil tribunals—notably the International Court of Justice (ICJ) and arbitral tribunals—with respect to both the legality of recent armed conflicts and the legality of actions during those conflicts. Professor Michael Matheson of the George Washington University Law School participated as a lawyer for the U.S. State Department in some of these legal proceedings, but he has, in the judgment of this reviewer, dealt with them here instead from an academic perspective. This timely book presents a fine summary and analysis of the decisions and awards of these international civil tribunals. It should be of high value to all who want to keep current with developments in the international law relevant to armed conflict.

During the 1960s and 1970s when this reviewer was deeply involved as a lawyer for the United States in the application and development of the laws of war, our focus was first on our efforts to promote better compliance with these laws by our armed forces and those of our allies and then, with more difficulty and less success, by our adversaries. On the basis of that experience, we turned to efforts to improve the laws, including new provisions that might improve compliance, through the negotiation of new agreements. Those efforts led to the adoption of Geneva Protocols I and II in 1977. However, we certainly never anticipated that international civil litigation and arbitration would be likely to play any significant role in interpreting or affecting compliance with the law. Nevertheless, as Matheson describes, the three decades beginning in the 1980s have shown a significant and valuable addition of relevant decisions or

That there were so many of them is also surprising to this reviewer. That this book helps to make them accessible is quite important, and anyone interested in the law of armed conflict will welcome this guide to and analysis of those recent decisions.

GEORGE H. ALDRICH
Of the Board of Editors

The Vienna Conventions on the Law of Treaties: A Commentary. Edited by Olivier Corten and Pierre Klein. Oxford, New York: Oxford University Press, 2011. 2 vols. Pp. lxxxiii, 2071. Index. $750.

The Vienna Conventions on the Law of Treaties: A Commentary (*Commentary*) is a revised English version of *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (*Commentaire*) and reflects developments that occurred since the publication of the original French version in 2006. Edited by Professors Olivier Corten and Pierre Klein of the International Law Center of the Université Libre de Bruxelles, both versions contain commentaries on each article of the Vienna Conventions on the Law of Treaties (Vienna Conventions).[1] Most of the 80 contributors to the first edition agreed to participate in the English version and provided updated and edited versions of their original commentaries. Where the original authors were not in a position to do so, new authors carried the project forward, resulting in 102 total contributors to the *Commentary*. There are 176 commentaries in the *Commentary*: 2 for the preambles, 85 for the 1969 Convention, 86 for the 1986 Convention, 2 for the annexes, and 1 for the declaration on the prohibition of coercion from the Final Act of the 1969 Conference. The *Commentary* under review is the fourth commentary on the Vienna Conventions.[2]

As noted in the preface, the article-by-article commentaries for the Vienna Conventions have been presented in as uniform a manner as possible. Each commentary is organized into parts, beginning with the text of the relevant article. It is followed by an outline of the contents of that commentary. A bibliography relating to the articles of the 1969 Convention and, to a lesser extent, those in the 1986 Convention typically follows and contains the leading English, French, and German sources and often those in other languages as well. A section on the article's object and purpose and possible customary international law status is also included; the section often indicates where the article is discussed in the relevant annual reports of the International Law Commission (ILC). Specific problems of interpretation relating to the article are then considered. Where appropriate, the commentary concludes with an evaluation of the article and its connection to the other articles of the Vienna Conventions. The sources on which the contributors draw include the work of the ILC, the proceedings of the Vienna Conferences on the Law of Treaties, and the practice subsequent to the adoption of the Conventions, covering applicable case law.

The unprecedented growth of treaty making over the last four decades and the establishment by states of international tribunals with jurisdiction to decide certain disputes that were unlikely to have been brought before the International Court of Justice (ICJ) have resulted in a much larger body of treaty law cases than existed in 1969. The most important cases are discussed in the commentaries on the articles to which they relate.

The need for the *Commentary* can perhaps best be demonstrated by comparing it to the length of and the number of cases cited in the commentaries prepared by the ILC on the draft articles of the 1969 and 1986 Conventions. The combined ILC commentaries total 157 pages in the 1966 and 1982 *Yearbooks of the International Law Commission*.[3] Those in the *Commentary* comprise 1867

[1] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* Mar. 21, 1986, 25 ILM 543 (1986) (not yet in force).

[2] In addition to the original 2006 French version, the others are MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009), and VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

[3] Yearbooks of the International Law Commission are available online at http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm.

pages, almost twelve times the combined length of the originals. The 1966 *Yearbook* cited 54 cases from the Permanent Court of International Justice (PCIJ), the ICJ, arbitral tribunals, and domestic courts. The ILC's 1982 *Yearbook* added another 7 international cases, including 4 European Court of Justice cases. In comparison, the *Commentary* cites 420 cases, with those cases before the International Court of Justice alone (82 cases) being more than all the cases cited by the ILC in its two yearbooks. In addition to the PCIJ and ICJ, the *Commentary* cites cases before seventeen other international bodies, many of which did not exist in 1966 and some of which did not exist in 1986. Although the *Commentaire* listed 26 treaty cases decided by domestic courts in ten countries, by the publication of the *Commentary* five years later the totals had risen to 57 treaty cases decided by domestic courts in fifteen countries.

In the years that followed the adoption of the 1969 Vienna Convention, some Conference participants wrote books on the law of treaties that supplemented or replaced earlier standard texts such as those by Charles Rousseau and Arnold McNair.[4] *The Modern Law of Treaties*, written by T. O. Elias in 1974, and *The Vienna Convention on the Law of Treaties*, updated by Ian Sinclair in 1984,[5] were among the first to appear in English. Shabtai Rosenne followed up in 1989 with *Developments in the Law of Treaties 1945–1986*, and in 1995 Paul Reuter published the English version of his *Introduction au droit de traités*.[6] But the developments in treaty law over the last four decades have long needed a modern scholarly text. Corten and Klein's *Commentaire* in 2006 was the first to meet that need. It was followed in 2009 by Mark Villiger's *Commentary on the 1969 Vienna Convention on the Law of Treaties*, an impressive single-volume treatise by a distinguished Swiss scholar.[7] Corten and Klein's *Commentary* is one of the most recent additions to this list.

In his review of the *Commentaire* in 2006, P. M. Eisemann wondered whether the article-by-article commentary approach was the best to illustrate problems relating to the law of treaties.[8] He stated that the separate treatment of each article had a fragmenting effect.[9] Eisemann also noted that had those responsible for the work added an analytical index it would certainly have ameliorated some disadvantages of the article-by-article approach.[10]

The addition of a comprehensive index of almost two hundred pages at the end of the updated *Commentary* meets Eisemann's concern. The user-friendly index should markedly enhance the ability of a researcher to pinpoint quickly the location of related information elsewhere in the *Commentary* and to access that material by eliminating the need to check for additional sources at the beginning of his or her research. For example, in addressing paragraph 4 of Article 24 on entry into force in the 1969 Convention, the *Commentary* states that "the most obvious matters which have to be attended to so that the treaty can enter into force will apply from the time of the adoption of the text of the treaty" (p. 637). Thus, a reader who wants to know whether paragraph 4 of Article 24 applies to the provisional application of treaties could check the index to determine whether the commentary on that subject (Article 25) discusses the matter and, if so, where it does so.

Access to relevant information is further facilitated in the *Commentary* by the insertion of numbers that the publisher calls "margin numbers." For the *Commentary*, Oxford University Press placed a margin number at the beginning of a paragraph rather than in the margin as is done in many other European texts. Oxford has applied the same system to the table of cases and table of instruments, resulting in an index of unusual depth, which takes up almost 10 percent of the 2071 pages. This extraordinarily detailed index should permit a reader to locate information more quickly

[4] *E.g.*, CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC (1971); ARNOLD MCNAIR, THE LAW OF TREATIES (1961).

[5] The second edition of this work in 1984 substantially expanded Sinclair's original treatise on the Convention published in 1973.

[6] PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES (José Mico & Peter Haggenmacher trans., 2d ed. 1995) (English translation).

[7] VILLIGER, *supra* note 2.

[8] Pierre Michel Eisemann, *Bibliographie critique: Sources*, 52 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 875 (2006) (book review).

[9] *Id.* at 875–76.

[10] *Id.*

than the index of any other treaty book with which this reviewer is familiar. For example, four main index headings exist for *jus cogens*, which is examined in the *Commentary* in approximately fifty of the individual commentaries, in addition to the principal treatment in the commentaries to Articles 53 and 64 of both Conventions. Between thirty-one and fifty-five subheadings exist under each of the four main index headings for *jus cogens*. In each of those commentaries, the margin number indicates where the *jus cogens* aspect is discussed. Thus the index should enable a reader to determine whether the *Commentary* contains any additional information needed and, if so, to locate it.[11]

Other features in the *Commentary* provide further value. For example, in each commentary where relevant, cases are listed under the headings of jurisdictions in which they were brought. The work also includes brief biographical information on the contributors, three tables of cases (from the ICJ, PCIJ, and other bodies), a table of instruments with references from the text to treaties and other documents, such as the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation,[12] that are not international agreements under the Vienna Convention definition.

The authors of the individual commentaries range from ICJ judges and ILC members to scholars who may not be as well known. But the quality of the commentaries and the consistency with which the authors conform to the standards established for the work are impressive, and the editors are to be commended for this result. As the preface indicates,

> [T]he present work is premised on a strictly positivist approach and not upon the philosophy or sociology of international law. Each provision of the Conventions is examined from a *lege lata* perspective, and is not subjected to value judgements. Use has therefore been made mostly of the principles of interpretation enshrined in Article 31 and 32 of both Conventions: reference to the object and purpose of the provision, to the context, subsequent practice, and *travaux préparatoires*. (P. vii)

While, as noted, most of the contributors to the *Commentaire* provided updated and edited versions of their original commentaries to the *Commentary*, this reviewer identified several chapters in which a new contributor made substantial changes to the original version. For example, Heywood Anderson notes in his commentaries on Articles 5 that the position of the European Community has changed since the publication of the *Commentaire* in 2006. Accordingly, he eliminated the detailed review of European Economic Community (EEC) practice that had been included in the original version of the commentary on Article 5, noted the EEC's replacement by the European Union, and updated the bibliographies.

Article 5 of the 1969 Vienna Convention and Article 5 of the 1986 Vienna Convention bear a common title: "Treaties Constituting International Organizations and Treaties Adopted Within an International Organization." As Anderson points out at the beginning of his commentary on the 1969 text, the two classes of treaties have a different character: "[T]he general law on international organizations plays a more prominent role in regard to interpretation and application of treaties which are the constituent instruments of international organizations than it does in the case of treaties adopted within such organizations" (p. 88). Nevertheless, after examining the context, he concludes that, as an introductory article, Article 5 has a general scope, thus averting the need to insert special provisions for various treaties elsewhere in the 1969 Convention. For practical reasons, it was necessary exceptionally to include a separate provision (Article 20, paragraph 3) on reservations to a treaty that is a constituent instrument of an international organization in the 1986 Convention. However, that paragraph did not affect Anderson's conclusion that Article 5 constitutes a "general reservation" (p. 91), creating a *lex specialis* for the benefit of international organizations, and "has caused few if any practical

[11] The *Commentary* explains the combination of article and margin number references (pp. lix, 1879).

[12] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (Oct. 24, 1970), *available at* http://www.unhcr.org/refworld/docid/3dda1f104.html.

problems for international organizations and their member States" (p. 98).

As David Müller explains at the beginning of his commentary on Article 20 of the 1969 Convention, "Acceptance of and Objection to Reservations," that article, in particular its paragraph 4, is consistent with the approach to reservations recommended by the ICJ in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[13] (p. 490). In Part E of his commentary, he notes that the "main objective of Article 20, paragraph 4 is to determine the effects of an acceptance of a reservation, on the one hand, and of an objection to a reservation, on the other hand, on the entry into force of the treaty" (p. 525). Indeed, as he adds, paragraph 4 does not mention the permissibility of the reservation, which is addressed in Article 19. Müller divides the discussion in Part E under two subtopics: "The Effects of Acceptances and Objections on the Entry into Force of the Treaty" (*id.*) and "The Variable Effects of Objections" (p. 530). He concludes the first discussion by setting forth the text of the ILC's Guideline 4.5.2, "Status of the Author of an Invalid Reservation in Relation to the Treaty," provisionally adopted by the ILC at its 2010 session and then published.[14] His commentary on the effects of acceptances is consistent with that text.

In August 2011, following the publication of the *Commentary*, the ILC adopted the final text of the Guidelines to Reservations. In addition to renumbering what had been Guideline 4.5.2 in the provisional text as Guideline 4.5.3, the ILC made material changes in the formulation of the new guideline as explained in the related commentary.[15] Discussion of the ramifications of the changes is likely to lead to further scholarly examination of the topic, which is beyond the scope of this review.

Like Villiger's *Commentary on the 1969 Vienna Convention on the Law of Treaties*[16] or Justice Joseph Story's *Commentaries on the Constitution of the United States*,[17] commentaries on documents prepared by a single author either incorporate what a reader needs to know to understand a particular provision as part of the initial discussion or insert it later in the text where it requires mention. But in an age of collective scholarship where, as here, a work has over one hundred contributors, it is not possible to expect each contributor to know all the other articles to which cross-references should be made. Indeed, most contributors may not be aware of the contents of the other commentaries.

In some reference materials such as the *Max Planck Encyclopedia of Public International Law*,[18] the editors insert cross-references to other articles that they believe a reader may wish to access in the event that supplemental information on a specific point is needed. This reviewer believes that in a collection of commentaries such cross-references would be distracting. Yet the user of a commentary may not fully understand a concept that is treated in greater detail in the commentary to an article to which it is more closely related. As the editors have done here, indexing—rather than cross-referencing—seems to provide a better model. For example, in the application of treaties, interplay between domestic law and international law often occurs. Article 27 of the Vienna Conventions governs one aspect of that interplay but does not use the term *domestic law*. If a reader searched for domestic law in the index to the *Commentary*, he or she would be referred to the entry for "internal law," which lists the articles in which the concept is discussed, including Article 27 (p. 1932). A second example is "solemn form, treaties in" and "simplified form, treaties in," both of which appear on page 2034 of the index; the term "solemn form" is almost never used in U.S. law and thus is a concept that would likely be confusing to

[13] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ REP. 15 (May 28).

[14] Official Records of the General Assembly, Sixty-Fifth Session, Supp. No. 10 (A/65/10, p. 192).

[15] Official Records of the General Assembly, Sixty-Sixth Session, Supp. No. 10 (A/66/10 and Add. 1, pp. 26, 524–542).

[16] VILLIGER, *supra* note 2.

[17] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1851).

[18] THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW is available online at www.mpepil.com.

particular readers. As a third example, some commentaries refer to monist and dualist approaches to international law. Information on all three subjects can be found through the index. Indeed, although the editors of and the contributors to the *Commentary* did not set out to prepare a treatise on treaty law and practice, the essential elements for such a document are included in the information on treaty law and practice that appears in the two volumes and is accessible through the index.

An example of the structure and richness of the commentaries is the one by Jean Salmon on Article 26 on *pacta sunt servanda*. Most public international lawyers realize that this principle is fundamental for treaty law. Eschewing the references to the sanctity of the rule, Salmon provides a masterful treatment of the subject that would meet the needs of almost anyone who needs to know why treaties are binding.

Given the success of the Vienna Conventions, it is not surprising to find that most of the commentaries show support for the articles to which they relate, even though some commentators may indicate that they would have preferred a different formulation with respect to one or more of the less important provisions of a complicated article. The interesting, incisive commentary of Bruno Simma and Christian J. Tams on Article 60 on termination or suspension of the operation of a treaty as a consequence of its breach is in sharp contrast to that pattern. They begin by noting that the idea underlying Article 60 is the principle that a party cannot be required to respect its treaty obligations if the other party refuses to honor them and that the obligations are reciprocal and embody similar rights. Thus, they add that the principle underlying Article 60 "modifies the strict rule of *pacta sunt servanda* by incorporating an idea of negative reciprocity" (p. 1353). They see as the main features of the complicated regime "the restriction to qualified (material) breaches as a precondition of the right to suspend or terminate, the elaboration of an ambitious procedural 'straitjacket' governing the responses, and the preference given to collective rather than individual responses within the regime for multilateral treaties" (p. 1354).

Although they accept the principle expressed in Article 60, paragraph 1, that a "material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part," Simma and Tams criticize all but one of the four remaining paragraphs. As to the multilateral treaties governed by paragraph 2(b), they note that the concept of a party "specially affected" by the breach is unclear (p. 1364). They seek further clarity in paragraph 2(c) as to what impact a material breach of an integral treaty, such as a multilateral disarmament treaty, "must have had in order 'radically to change' the position of every other party" (p. 1365). They describe the definition in paragraph 3 of "material breach" for the purposes of Article 60 as "rather curious" (p. 1359). In addition, they find it difficult to understand the scope of the exception concerning humanitarian treaties in paragraph 5.[19]

Simma and Tams end their largely negative commentary by summarizing some of the wider shortcomings that they see in Article 60. The drafters left several problems unaddressed: the definition of "material breach" is vague, the article deviates from reciprocity in some respects, and the omission of rules of proportionality causes some difficulties. They add that the rules in Article 60 are not exclusive because "the parallel existence of countermeasures and reactions based on Article 60 of the Convention is recognized in international practice" (p. 1377). In their view,

> Article 60 is one of the provisions with regard to which the limited scope of the Vienna Convention is felt most clearly. As the provision does not regulate responses to treaty violations in a truly comprehensive manner, Article 60 can only be understood if read in line with the law of countermeasures. The separation of both concepts—brought about *inter alia* by the limited approach of the Vienna Convention—severely undermines the regime adopted in Article 60. (P. 1378)

[19] For a discussion of an effort to apply Article 60, paragraphs 2(b), (c), and 3, of the Vienna Convention on the Law of Treaties to Russia's suspension of its obligations under the Conventional Armed Forces in Europe Treaty, see John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 61 AJIL 138, 166–67 (2012).

This reviewer is struck by the extent to which the commentaries include information that one might not find in most existing treatises. This comprehensiveness is probably attributable to the contributors being experts in their specific subjects who are able to discuss the latest developments, whereas the treatise writer may be a generalist who is unaware of recent developments. Many of the commentaries explain concepts or terms that are either new or relatively obscure. By relying on the index, a reader of the *Commentary* is likely to find clear explanations of concepts or definitions relating to treaties without needing to turn to other sources.

The success of the 1969 Vienna Convention, the growing importance of treaties, and the development of treaty law over the ensuing decades led to the monumental work of Corten and Klein and the issuance of other commentaries and collected chapters on various aspects of treaty law, some of which were prompted by conferences held in connection with the fortieth anniversary of the adoption of the 1969 Convention. This "second spring" of treaty law scholarship allows comparison of the abundant current practice with the modicum of sources available to the ILC when in 1966 it completed its commentary on what was to become the 1969 Vienna Convention. This Convention has now been ratified by 111 states and is recognized in many respects as customary international law by states that have not ratified it, such as France, Pakistan, and the United States. The commentators discuss relevant available domestic cases, without regard to when a case was decided or whether a state has ratified the Convention. They also consider similar cases decided by a total of nineteen international tribunals or bodies.

Where, as in most cases, the respective diplomatic conferences adopted texts proposed by the ILC, its commentary is likely to clarify any ambiguity in the Conventions. (The *travaux préparatoires*, including the ILC material and the records of the diplomatic conferences, are available on the website of the United Nations.[20]) But where amendments were adopted at the diplomatic conferences, the *travaux* are likely to be limited. Future commentators on those articles and on articles where the drafters and the conferences have left certain issues unaddressed have a responsibility to convey to their readers as much background information as possible and rigorously review any relevant practice, as Theodore Christakis has done in his commentary on Article 56 on denunciation or withdrawal from a treaty containing no provision on the subject.

In his foreword to the *Commentaire*, which is reprinted in the *Commentary*, Sinclair states that the book "displays all the characteristics of what is likely to become an essential tool for all scholars and practitioners of international law, to whom it will provide a detailed and updated analysis of the 1969 and 1986 Vienna Conventions" (p. vi). This reviewer, a long-term practitioner of treaty law, used the *Commentaire* between its publication in 2006 and the publication of the updated and enhanced *Commentary* in 2011. He consistently found the commentaries useful and the bibliographies helpful. He has used the *Commentary* since it became available and found it to be exceptionally valuable in researching treaty questions. Ultimately, the magisterial *Commentary* is an indispensable, authoritative reference source for the scholar, foreign ministry official, or other practitioner of international law seeking to determine the current status of any issue addressed by the Vienna Conventions.

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The Elusive Promise of Indigenous Development: Rights, Culture, Strategy. By Karen Engle. Durham NC, London: Duke University Press, 2010. Pp. xvi, 402. Index. $94.95, cloth; $26.95, paper.

Karen Engle's latest book *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* offers a comprehensive account of international legal initiatives, policies, and indigenous social movements, primarily in the Americas, that have characterized the past four decades of indigenous advocacy. As the Minerva House Drysdale Regents Chair in Law and as the founder and codirector of the Bernard and Audre Rapoport Center

[20] Information relating to the work of the United Nations is available online at www.un.org.

for Human Rights and Justice at the University of Texas School of Law, Engle is well suited for this undertaking. She sketches a compelling narrative of how, as indigenous policies have changed, indigenous advocates have—with endless ingenuity—resorted to new strategies in their quest to improve the internal and external conditions of indigenous communities. Yet, as she effectively demonstrates, this goal remains persistently beyond the reach of these communities due to the unpredictable and unintended consequences of chosen strategies, as well as the structural oppression to which indigenous peoples have been subjected since the settlement era.

Much of the narrative outlined by Engle is, of course, familiar from the vast literature addressing both historical encounters and contemporary realities of indigenous communities. However, she makes a significant contribution to this scholarship in part because of the diligence with which she connects different advocate strategies to distinct pieces of legislation or policy—Conventions 107 and 169 of the International Labour Organization, and the International Convention on Civil and Political Rights (ICCPR), to mention just a few—given her analytical approach that transgresses narrow disciplinary borders and reveals previously unexplored insights.

The Elusive Promise of Indigenous Development matches the expectations raised by Engle's earlier scholarship. Her scholarly roots are in critical legal studies, which in this book are reflected particularly in her emphasis of the "dark sides" of advocate strategies, an expression that she borrows from her long-term mentor David Kennedy.[1] Her longstanding research interests have been situated within human rights, especially on their cross-cultural applicability.[2] These interests have led to her continued engagement with anthropological scholarship,[3] which in this book has led her to consider the kinds of roles that anthropologists assume as they become engaged in indigenous activism. She considers, in particular, how they could escape—what she sees in part as imagined—demands for essentialist cultural representations and concludes the book by suggesting an answer.

Engle's text is packed with details, and her accessible writing style is paired up with her sharp but empathetic gaze, a combination that makes the book a rewarding read for both the beginner and the expert. As this book's reviewer, perhaps due to my own background in anthropology, critical legal studies, indigenous affairs, and human rights, I find that the book's most fascinating elements are the questions that it raises implicitly. I will address them by focusing on the central themes in Engle's analysis: the invisible asterisk, the romanticizing of indigenous communities, the relationship of advocates and indigenous communities, and the advocates' motivations for international advocacy. I will mirror these themes against Gayatri Spivak's famous question: "Can the subaltern speak?"[4] a question to which Engle repeatedly returns. Finally, I will assess whether, despite the gloomy predicaments of indigenous advocacy, Engle is fundamentally an optimist or a pessimist in her engagement.

As she demonstrates, contemporary indigenous activism is still largely a response to the historic oppression of indigenous peoples. The origins of this oppression are, particularly in the Americas, primarily assigned to the concept of *terra nullius*, on which settlers relied as they sought control over indigenous lands, first through military invasion,

[1] DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

[2] *E.g.*, Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (2000).

[3] *See, e.g.*, Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999*, 23 HUM. RTS. Q. 536 (2001) (noting the changed attitude of the American Anthropological Association (AAA) from its 1947 Statement on Human Rights—a critical document toward to the eventual Universal Declaration of Human Rights from 1948—to the AAA's 1999 Declaration, which showed clear alliance with the human rights discourse); American Anthropological Ass'n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539 (1947); American Anthropological Ass'n Committee for Human Rights, Declaration on Anthropology and Human Rights (1999) [hereinafter 1999 Declaration], *available at* http://www.aaanet.org/stmts/humanrts.htm.

[4] Gayatri Chakravorty Spivak, *Can the Subaltern Speak?, in* MARXISM AND THE INTERPRETATION OF CULTURE 271, 296–97 (Cary Nelson & Lawrence Grossberg eds., 1988).

then by the "trail of broken treaties" (p. 53).[5] Engle nuances this familiar narrative by introducing scholarship on how the acquisition of land and resources was the primary goal for English and French settlers in North America, whereas for the Spanish and Portuguese settlers in Latin America, conquest became defined in cultural terms, primarily by the extent to which certain indigenous practices departed from the "universal norms—which in effect are Spanish practices" (p. 20).[6] She draws an interesting continuum of this difference to contemporary indigenous strategies that have focused, on the one hand, on internal and/or external self-determination, and, on the other, on the rights to culture.

According to Engle, although the previously predominant self-determination claims may be resurfacing, culture arguments have dominated the past two decades of international indigenous advocacy. This time frame coincides with the general advance of concern for international human rights: although human rights began their rise as the defining global ideology in the 1970s, compellingly demonstrated by Samuel Moyn,[7] their final breakthrough into ideological trump cards occurred merely at the end of the Cold War.[8] Consequently, alongside indigenous claims, a vast array of concerns has in the past few decades become translated into the language of human rights, including environmental issues, as well as the concerns of lesbian, gay, transsexual, bisexual, and intrasexual (LGTBI) groups, and people with disabilities, to mention merely a few.[9]

This translation process induces distinct foreseen and unforeseen consequences that for indigenous affairs embody themselves in what Engle calls the "invisible asterisk" (p. 7). She borrows this term from Elizabeth Povinelli's analysis on how acceptance of Aboriginal customs within the Australian multicultural society is modified by an invisible asterisk, embodied in the clause "*provided [they] . . . are not so repugnant*" (p. 133, emphasis added).[10] Engle reminds readers of how, in the past, the not-so-invisible asterisk was reflected in overt attempts to Christianize, civilize, or assimilate indigenous populations and thus save them from their "barbaric" customs.[11]

In the contemporary era, the asterisk has become less conspicuous, but, as Engle shows, it continually hovers over indigenous claims for self-determination, especially in instances where collective (land) rights might be seen as conflicting with the human rights of individual indigenous community members. She highlights the 1999 Declaration on Anthropology and Human Rights by the American Anthropological Association's Committee for Human Rights as an example of a context in which the asterisk might appear. Whereas the declaration begins with an open meaning of culture, it closes with a restrictive clause emphasizing that cultural practices may not "diminish the same capacities of others" (p. 134).[12]

Engle interprets this statement to allow for the possibility that group rights might prevail in the case of conflict, yet she considers this prospect less likely for the international legal institutions that she examines. These institutions include the International Labour Organization, which shows firm reliance on individualistic liberal rights discourse, and the Human Rights Committee of the Office of the United Nations High Commissioner for Human Rights, which has directly emphasized

[5] Quoting VINE DELORIA JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974).

[6] Quoting ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 22 (2005).

[7] SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

[8] The triumph of human rights as well as this translation process is the topic of vast scholarship. *E.g.*, MIIA HALME-TUOMISAARI, HUMAN RIGHTS IN ACTION: LEARNING EXPERT KNOWLEDGE (2010).

[9] *Id.* at 57–74.

[10] Quoting ELIZABETH A. POVINELLI, THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM 12, 176 (2002). Engle adds that this "repugnant" language comes from the Australian High Court decision *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, para. 68 (Austl.).

[11] As Engle demonstrates, behind assimilation policies were, of course, also other desires such as hopes to incorporate indigenous communities into economically productive parts of liberal societies.

[12] 1999 Declaration, *supra* note 3.

that the protection of culture does not trump the individual rights protected by the ICCPR.

In particular, the asterisk emerges in contexts relating to the position of indigenous women. Engle illustrates this outcome with the 1993 decision of the Inter-American Court of Human Rights, which addressed polygamy among the Saramaka people in Suriname.[13] In addition to restricting tribal customs to conform to the individual rights recognized by the American Convention of Human Rights, the court insisted that, in referring to "ascendants," no distinctions be made on the basis of sex, "even if that might be contrary to Saramaka custom" (p. 136).[14] Engle connects this ruling to recent scholarship on multiculturalism—some of the most extreme works questioning whether subversive communities are even justified to continue existing[15] —and shows how this scholarship embodies Spivak's characterization where white men (and women) seek to "sav[e] brown women from brown men" (p. 137).[16]

The traps set by the invisible asterisk embody some of the gravest dark sides that indigenous advocates need to avoid while they labor on behalf of indigenous peoples in various international and national contexts. However, as Engle illustrates, avoidance is complicated by their fluidity: the dark sides will inevitably find new incarnations to match the altered strategies that advocates create. Engle illustrates this outcome with three different articulations of culture that she assigns to recent indigenous advocacy: culture as heritage, culture as land, and culture as development.

Of these approaches, the notion of culture as heritage is most interesting due to its innate contradiction: instead of conceptualizing indigenous communities through the denigrating "invisible asterisk," this approach emphasizes cultural restoration and rejuvenation by romanticizing indigenous cultures and elevating them to symbols of national pride. Engle describes how this arrangement manifested itself, for example, in the "performance of harmony" in the opening ceremony of the Sydney Olympics in 2000: despite being fraught with internal debates about who would represent the country, the opening ceremony showcased Aboriginal dance and rituals as prided national assets (p. 152).

Yet this exposition does not mean that the invisible asterisk disappears. As the celebration of heritage relies on a relatively "thin" notion of culture—emphasizing indigenous dress, custom, and art—heritage claims are commonly separated from indigenous land claims. Consequently, the approach makes few concrete demands on states, simultaneously remaining relatively toothless in establishing real improvements for indigenous communities. Engle explains that "the idea that culture as heritage fits the neoliberal model well, both nationally and internationally. . . . [I]t offers states and international institutions a way both to protect and share in the wealth of indigenous culture" (p. 157).

Further, as heritage becomes defined as an "alienable" entity that is in itself worthy of protection, its conservation may be hijacked from indigenous people. Engle describes the dispute between the government of Peru and Yale University over Machu Picchu items deposited at the university. Peru sought to have the items returned, arguing that its current government represents the descendants of the people who originally crafted the items. When Yale declined, the government of Peru filed suit in 2008 in U.S. federal court, relying on international legal instruments. The university rejected Peru's demands and argued, instead, that it was the most competent representative of universal mankind to protect this common heritage. The disagreement ended finally in February 2011 as Yale agreed to return the objects to Peru.[17]

[13] Aloeboetoe v. Suriname, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

[14] Quoting *id.*, para. 62.

[15] Engle quotes Susan Muller Okin's controversial argument regarding female members of "more patriarchal societies" according to which these members "*might* be much better off if the culture into which they were born were either to become extinct . . . or preferably, to be encouraged to alter itself so as to reinforce the equality of women." Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 22–23 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999).

[16] Spivak, *supra* note 4, at 296–97.

[17] *Yale Agrees to Return Machu Picchu Artefacts to Peru*, BBC NEWS, Feb. 12, 2011, *available at* http://www.bbc.co.uk/news/world-latin-america-12438695.

Thus, ironically, as Engle points out, culture as heritage leads indigenous peoples into another bind: the extent of their internal autonomy becomes conditioned by an invisible asterisk that questions their capabilities to protect *themselves*, or at least the elements of their cultures that outsiders—as "representatives of humanity"—assess as worthy of protection. Simultaneously, these representatives can suppress the elements of which they do not approve. Curiously, the same outcome characterizes instances where advocates educate indigenous peoples on how to be "proper natives," for example, through their use of environmentally sustainable agricultural practices.

Engle exemplifies this approach with a case where an international nongovernmental organization (NGO) began assisting indigenous peoples to avoid dislocation from the Montes Azules Integral Biosphere Reserve in Mexico by the Mexican government.[18] Whereas, in this instance, education was inspired by such benevolent motivations as assisting indigenous communities to gain title over the lands that they inhabited, the dark sides of education are dire: they create a hierarchy between advocates and indigenous populations, elevating the former as the legitimate guardians of indigenous cultural preservation, not merely in different international and national contexts but also within indigenous communities themselves.

These conditions generate internal conflict as Engle demonstrates with the case of Afro-Descendant land rights in Colombia. When, as proposed by advocates, indigenous peoples seek collective title and fail, community members lose any possibilities for individual land titles. Thus the interests of indigenous peoples may clash with, or at worst be totally undermined by, the strategies supported by advocates. These realizations give rise to the questions: Who are indigenous advocates, and what are their relationships to indigenous communities? Engle refrains from a systematic answer, but her discussion shows how advocate profiles vary; they include "internal" actors such as indigenous leaders, as well as "external" people such as academics, NGO workers, and human rights lawyers.

Often advocate profiles reflect both "inside" and "outside" status; they are *intermediaries* who are both fluent in the practices and languages of international advocacy as well as the practices of local communities.[19] This duality is exemplified by James Anaya, whom Engle sees as "representative of a legal, political, and discursive shift away from . . . self-determination, and toward an invocation of indigenous rights" (p. 99). Anaya is a Harvard-educated law professor, a globally cited authority on indigenous rights, an influential practitioner of indigenous law, and the United Nations Special Rapporteur on the Rights of Indigenous Peoples. His status as a legitimate representative of indigenous concerns appears to be further strengthened by his "inside" status of being of indigenous descent as he is commonly cited an "indigenous scholar" even though he has not emphasized his ancestry.[20]

The ability to speak the languages of international advocacy and lawmaking—both figuratively and concretely—alters the status of intermediaries and introduces yet another twist to the story of indigenous activism: advocates, including those of indigenous ancestry, are no longer subaltern, contrary to the peoples whom they represent. Thus advocates will be less affected by the dark sides of activist strategies than the indigenous community members whose lives their strategies seek to improve.

[18] In the area, a group called the Lacandones was recognized by the government as the main indigenous group of the area, whereas the presence of numerous other groups was challenged.

[19] SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); *see also* Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006). Merry's work is regrettably absent from Engle's otherwise voluminous bibliography.

[20] Information about James Anaya is available online at http://unsr.jamesanaya.org/sja/biographical-information, and http://unsr.jamesanaya.org/docs/data/sja-cv-01-2011.pdf (curriculum vitae). He is of Apache and Purépecha origin, but neither his online biography nor his online CV makes any mention of ancestral origin. *See* Interview by Michel Martin with James Anaya, in Wash., D.C. (May 9, 2012), *at* http://www.npr.org/2012/05/09/152341530/un-explores-native-american-rights-in-us; *see also* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d. ed. 2004).

These insights raise further questions: How can advocates be sure that in their engagement the consequences of their actions avoid the dark sides that Engle outlines? Toward what ends are advocates working? Whereas motivations are again likely diverse, Engle sketches a few possible answers with the help of relevant scholarship. These answers show how advocates—both with and without indigenous origin—often hold romanticized notions of "pure" indigeneity as offering a radical alternative and challenge to predominant (Western) societal and cultural features, most importantly neoliberalism, capitalism, and individualism.[21] Engle recounts how advocates may be surprised, even disappointed, when indigenous people express the need for capitalism and wage labor, rather than the more "traditional" communal economic arrangements favored by advocates "such as small-scale agriculture, whale hunting, reindeer herding, and fishing . . ." (p. 190). This choice offers the final twist to the invisible asterisk: even to advocates, indigenous peoples may ultimately be worthy of protection not because of what and who they actually are, but because of what activists wished they were.

What do indigenous peoples themselves think of the constantly changing advocate strategies accompanied by invisible asterisks and dark sides? Here Engle refrains from attempting an answer as the book primarily maintains a respectful distance from the peoples about whom all the described action relates. She relies, with the notable exception of the situation of Afro-Descendants in Colombia, on secondary accounts of the indigenous experience. The search for an answer is further complicated by her practice of referring to the categories of indigenous peoples and advocates at times by clearly distinguishing the two groups from each other and, at other times, by addressing the groups interchangeably.

Thus a reader is left wondering whether an intensified engagement with international advocacy and standard setting is fully in accordance with the diverse, even conflicting, interests of indigenous peoples at large. To restate Spivak's question, does the subaltern *want* to speak the language of transnational activism? After all, there is always the additional risk that as they "will be heard" collectively and labeled as having lost their distinct indigeneity.[22] Even further, as Engle points out, assuming that only one indigenous "voice" exists ignores the internal dynamics and power struggles both between different indigenous peoples and within communities. Yet, if indigenous peoples choose not to speak for themselves, their issues will be pursued by outside advocates—by individuals whom indigenous peoples may not have chosen as their representatives—and thus indigenous peoples will be subjected to the advocates' conceptions on how to be proper natives.

This outcome reproduces earlier patterns of dependency resting on benevolent paternalism, another legacy of which indigenous peoples may understandably be wary. Intensified engagement with international advocacy also increases the general dependency of indigenous communities on outsiders; certainly, it is an unwelcome corollary to peoples who have historically been insistent on minimizing outside interference in their internal affairs.

What about Engle's own take on indigenous advocacy and its possibilities to improve the conditions of indigenous societies? Here, in spite of her concerns, Engle appears to remain an optimist. This hypothesis is evidenced by her discussion of the constructivist understanding of culture. She sees this conception as offering an alternative to the dominant essentialist understandings relied on by activist academics, and she argues that it offers a possible escape from some of the dark sides that she has described. Simultaneously, Engle sees this avenue as introducing a real promise of indigenous development, although she fully realizes how much this term is contested.

[21] Ronald Niezen, *The Indigenous Claim for Recognition in the International Public Sphere*, 17 FLA. J. INT'L L. 583 (2005).

[22] This remark refers to the dynamic compellingly discussed in *At the Risk of Being Heard*. As indigenous peoples make representations in such "nonindigenous" contexts such as the United Nations and succeed, they risk being labeled as being inauthentic and nonindigenous. AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, AND POSTCOLONIAL STATES 1 (Bartholomew Dean & Jerome M. Levi eds., 2003) (addressing the book's primary theme).

A skeptical reader may wonder if Engle's optimism might be unwarranted given that any new cultural understanding will likewise be paired up with the dark sides as long as the patterns of structural oppression remain unaltered, a reality that Engle also recognizes in her multifaceted analysis. Thus perhaps her book will gain unexpected significance here as a guide for future advocates on how to avoid the numerous traps that she has listed. Whether she planned on such a practical role for her book and whether this role could result in concrete (intended) outcomes remain uncertain. Yet this reviewer suspects that the advocate in Engle would be pleased.

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The Slave Trade and the Origins of International Human Rights Law. By Jenny S. Martinez. Oxford, New York: Oxford University Press, 2012. Pp. 254. Index. $29.95.

Should the genealogy of international human rights law predate both the Nuremberg trials and the UN Charter by some 150 years and trace its origins to the nineteenth-century suppression of the slave trade at sea? Jenny S. Martinez, the Warren Christopher Professor in the Practice of International Law and Diplomacy at Stanford Law School, believes so.

In *The Slave Trade and the Origins of International Human Rights Law*, Martinez links the abolition of the slave trade in the nineteenth century to contemporary international human rights. By pushing back the genesis of international human rights law to this earlier period, she shows how the United Kingdom, a dominant state, was able to use selective gunboat diplomacy to create a sea change: what had been considered legitimate commerce at the end of the Napoleonic Wars in 1815 was, by the Brussels Conference of 1890,[1] an odious trafficking of human chattel. Consequently, "close examination of the history of the abolition of the slave trade should cause international legal scholars to rethink the relationship between power, ideas, and international legal institutions" (p. 165).

While Martinez puts forward lessons to be learned and thus provides much food for thought, the main contribution of *The Slave Trade* is its historical research into the courts of mixed commission established to determine the fate of ships seized that were suspected of involvement in the slave trade. In the evocative opening chapter, Martinez uses the tale of the 1822 capture of Portuguese slavers by Captain Henry Leeke of the British Navy and their subsequent two-month journey to be adjudicated in Sierra Leone as a means of setting out the regime of bilateral treaties that allowed naval ships to suppress the slave trade through the "right to visit" ships suspected of involvement in the slave trade and the courts of mixed commission to decide the fate of seized ships and crews. Martinez even shares the story of one of the more than 80,000 slaves who were freed as a result of these bilateral courts. Adjai, a slave boy who was released from the Portuguese slave ship, would be reunited with Leeke some forty-two years later at Canterbury Cathedral when Adjai[2] was ordained as the first African bishop of the Anglican Church.

In the two chapters that follow, *The Slave Trade* charts a course along various legal markers to reach the courts of mixed commission. Chapter 2 describes late eighteenth-century Britain as setting the tone for the abolition of slavery due in great part to its supremacy of the seas, which was confirmed at the Battle of Trafalgar in 1805. As a result of its military might, Britain was able to move its antislavery stance onto the international agenda. During the Napoleonic Wars from 1803 to 1815, with no country able to challenge it at sea, the British Navy not only stepped up its right to visit any ship at sea to search for contraband but also invoked a natural-right-based "right to visit" to suppress the slave trade. Such visits and the resulting seizure of American sailors led, in part,

[1] The Brussels Conference of 1890 produced the Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition and Spirituous Liquors General Act for the Repression of African Slave Trade, July 2, 1890, 27 Stat. 886 [hereinafter Brussels Convention]. The United States was one of the treaty signatories.

[2] At the time of his baptism in 1825, Adjai took the name Samuel (Adjai) Crowther.

to the War of 1812. In the subsequent peace treaty, the 1814 Treaty of Ghent,[3] both countries pledged that they would abolish the slave trade as "the traffic in slaves is irreconcilable with the principles of humanity and justice"[4] (p. 30). Unfortunately, as Martinez notes, "[T]he treaty did not include particular mechanisms for enforcing this promise" (*id.*).

In chapter 3, she characterizes the United States during the early part of the nineteenth century as "an ambivalent foe" to the slave trade (p. 38). Although the United States criminalized the slave trade, due to its own antebellum tensions it remained aloof to the growing regime of bilateral treaties concluded by the United Kingdom to allow for a right to visit ships to suppress the slave trade at sea. Yet, in 1820, the U.S. Congress defined piracy as either involving robbery at sea or participation in the slave trade at sea; U.S. citizens were to face the death penalty if found guilty. Despite the United Kingdom's continued pressure on the United States to ratify a bilateral treaty allowing for the mutual right to visit ships to suppress the slave trade, the U.S. response was the 1823 Monroe Doctrine, which in part asserted disentanglement from European affairs. Secretary of State John Quincy Adams was at pains to acknowledge that while both the United Kingdom and the United States had assimilated the slave trade to piracy, their actions did not create universal jurisdiction over the slave trade: "[T]he distinction between piracy by the law of nations and piracy by statute . . . [was that] while the former subjects the transgressor guilty of it to the jurisdiction of any and every country into which he may be brought, . . . the latter forms a part of the municipal code of the country where it is enacted and can be tried only by its own courts" (p. 61).[5] While the United States pledged to hold its citizens to account for the slave trade at sea (and one individual was hanged for the offense in 1862), the United Kingdom, in contrast, signed bilateral treaties with the Netherlands, Portugal, and Spain to establish courts of mixed commission.

The epicenter of these courts was Freetown, Sierra Leone—the British West African colony—as the bilateral treaties required that each party establish a court under its own jurisdiction. The British, for their part, rolled their courts into one location, while others were established in Suriname, Rio de Janeiro, and Havana. These courts were followed in 1826 by an Anglo-Brazilian court (based in Freetown and a postindependent Rio de Janeiro) and in 1842 with an Anglo-Portuguese court (based in Freetown, Luanda, Boa Vista, Spanish Town, and Cape Town). Martinez's strength as a legal historian comes to the fore here. She lays out the numbers of cases (500), ships seized (225), and persons freed (more than 80,000). Of this last figure, Martinez rightly explains that "[i]n sheer human impact, no other international court has directly affected so many individuals" (p. 85).

Likewise, she demonstrates the influence of these courts at the height of naval operations when "an average of one out of every five or six vessels known to have been engaged in the transatlantic trade was brought for trial in the courts of mixed commission, with the highest annual percentage occurring in 1835 when some 39 percent of known slave ship voyages that departed that year ended up in the mixed courts" (p. 80). Beyond the direct impact of tens of thousands freed by the court proceedings, Martinez speaks to the further impact of sea patrols and mixed commissions as "some underwriters began including clauses in their insurance policies exempting from insurance ships seized under the [bilateral] treaties" (p. 83).

Between 1837 and 1862, the United States agreed in principle to the suppression of the slave trade, though it held, above all, to the Grotian

[3] Treaty of Peace and Amity, U.S.-UK, Dec. 24, 1814, 8 Stat. 218 [hereinafter Treaty of Ghent].

[4] Article 10 of the Treaty of Ghent provides in full: "Whereas the Traffic in Slaves is irreconcilable with the principles of humanity and Justice, and whereas both His Majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavours to accomplish so desirable an object."

[5] Quoting 7 JOHN QUINCY ADAMS, THE WRITINGS OF JOHN QUINCY ADAMS 501–02 (Worthington Chancey Ford ed., 1917) (statement of Adams to Viscount Stratford Canning).

concept that the seas were open to all, with jurisdiction remaining the exclusive domain of the flag state. In exercising its own jurisdiction, the U.S. Navy seized 105 American-flagged ships during this period. The United States eventually joined in the international antislavery efforts, agreeing in 1862 to establish courts of mixed commission in Sierra Leone, New York, and Cape Town, though these courts never heard a case.

Does the history of the courts of mixed commission justify the claim that they were the antecedent of international human rights law? The question might be better framed as, "Why have those writing about the evolution of international human rights law not harked back to the courts of mixed commission and the suppression of the slave trade at sea?" The answer, it seems to me, may be found in what transpired between the end of the slave trade at sea and Nuremberg.

In *The Slave Trade*, Martinez seeks to explain the origins of universal jurisdiction and, in chapter 6, entitled "*Hostis Humani Generis*: Enemies of Mankind," she writes: "The link between slave trading and piracy, and between slave trading and universal jurisdiction, has not been entirely forgotten in international law, but unfortunately it has often been misunderstood. This chapter seeks to clarify that link" (p. 115). Pointing to the U.S. Alien Tort Statute, originally enacted in 1789, and noting the more recent *Filártiga v. Peña-Irala* case, decided in 1980, which stated that "for the purpose of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"[6] (p. 116), Martinez points out that "the treatment of pirates and slave traders under international law [is often] cited as the main precedents for the contemporary doctrine of universal jurisdiction" (*id.*).

Working through the evidence, however, Martinez notes that, despite "a number of countries . . . [having] declared the slave trade piracy by treaty, it was apparently not enough to persuade some commentators in the mid-nineteenth century that slave trading was piracy by the law of nations" (p. 130). Moreover, towards the latter half of the century, "[o]thers, particularly American writers, continued to maintain that the slave trade was not piracy under the law of nations" (p. 133). Ultimately, she concludes:

> Attempts to subject the slave trade to universal jurisdiction by declaring it piracy foreshadowed this development [that sovereignty is semipermeable where violations of international human right law are concerned,] but [these attempts] were not entirely successful. The seed of the idea was planted in the nineteenth-century actions against the slave trade, but it was not until Nuremberg that the barrier [of sovereignty] would be shattered. (Pp. 138–39)

Through the equating of the slave trade to piracy as *hostis humani generis* and the discussion of universal jurisdiction, Martinez seeks to show that the seeds of international human rights law are to be found in a realization that such antislavery efforts demonstrated that states "could legitimately be concerned with the welfare of individual persons in other states and could covenant with one another to protect the rights of those individuals" (p. 139). Here is one of the thought-provoking elements of *The Slave Trade*: if we date international human rights law to the time of the suppression of the slave trade, then its emergence is drawn from the same normative pool as the U.S. Declaration of Independence, and the natural rights that "inspired and informed the American Revolution" (p. 160) also influenced international law:

> The same philosophers who posited the existence of a natural law that encompassed unalienable rights also saw the law of nations as part of that fabric of natural law transcending nation-states. During the nineteenth century, the United States and other nations agreed that they could voluntarily consent to make the behavior of their citizens on their ships the concern of other nations. (*Id.*)

From Martinez's vantage point, the seeds of international human rights law were planted during the era of the abolition of the slave trade and bore fruit from Nuremberg onwards.

Yet, another historical narrative serves as a counterargument against this proposition. That

[6] Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

narrative starts from a fundamental basis: the slave trade was never recognized as being equated to piracy in international law, as being *hostis humani generis*, or as having attached to it universal jurisdiction. These three elements are, of course, interrelated: by declaring slave traders to be enemies of mankind—like pirates—meant that anybody could act to suppress them, resulting in universal jurisdiction. The problem with this narrative is that it fails to provide an accurate picture of the final abolition of the slave trade. Martinez provides an account of the end of the slave trade that appears to be almost an afterthought in chapter 7, as it is merely eight pages in length and is silent on both the outcome of the Brussels Conference of 1890[7] and the role that France played in the latter half of the nineteenth century with regard to the slave trade at sea.

The outcome of the Brussels Conference was the Brussels Convention, the first international legal instrument to circumscribe the slave trade. Far from equating the slave trade at sea to piracy, being *hostis humani generis*, or establishing universal jurisdiction, the Convention allowed for the right to visit—and to search ships and to detain slavers—but only in a specific maritime zone off Eastern Africa and into the Red Sea and the Persian Gulf, while being only applicable to "native vessels" of limited tonnage, that is the vessels of the local inhabitants.[8] Even these restrictions on maritime commerce were too much for France; it attached a reservation to certain provisions, opting out of the regime of suppression of the slave trade at sea. The fact that France never accepted that naval ships of one state could stop and visit ships of another state to suppress the slave trade, coupled with other states, including the United States, denying that any such right could exist short of a formal treaty, meant that an international custom that might have granted universal jurisdiction for such suppression never emerged.

The death knell marking the end of the international slave trade at sea was sounded in 1905 by the *Muscat Dhows* case before the Permanent Court of Arbitration. In that case, the court determined that, due to the very limited obligations that France had undertaken at the Brussels Conference, vessels from modern-day Oman could only benefit from the protection and use of the French flag in the Indian Ocean.[9] As a result, the award of the Permanent Court meant that the last flag under which the slave trade could persist within the maritime zones established by the 1890 Brussels Conference would end at the death of the vessels' designated captains or destruction of the vessels themselves.

This historical narrative also reaches well into the twentieth century, as the United Kingdom tenaciously held on to its desire to assimilate the slave trade to piracy. However, such interests were considered and rejected both in 1926 during the negotiation of the Slavery Convention and in 1956 during the negotiations of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.[10] The International Law Commission, for its part, set out the existing law in the lead-up to the 1958 Convention on the High Seas:

> States were not prepared to go nearly so far in the case of the slave trade as in the case of piracy. In the one case [relating to the slave trade] they had limited the right of approach to specified zones, but not in the other [relating to piracy]. [The Special Rapporteur] did not think that the two questions could be lumped together, unless the law governing the slave trade were substantially widened, in which case the Commission would no longer be codifying existing law.[11]

Contemporary international law reflects these differences between piracy and the slave trade. While Article 105 of the 1982 Law of the Sea

[7] Brussels Convention, *supra* note 1.

[8] *Id.*, Arts. XXI, XXIII, XXXI.

[9] Muscat Dhows Case (Fr. v. Gr. Brit.), Hague Ct. Rep. (Scott) 93 (Perm. Ct. Arb. 1905); *see also* Jean Allain, *Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, 2008 BRIT. Y.B. INT'L L. 342.

[10] Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 212 UNTS 17; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Apr. 30, 1956, 266 UNTS 3.

[11] Régime of the High Seas, para. 76, *in* [1951] 1 Y.B. INT'L L. COMM'N 346, 350, UN Doc. A/CN.4/SR.123, *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_sr123.pdf.

Convention allows any state vessel to seize a pirate ship, Article 110 dealing with the slave trade, by contrast, reinforces the rights of flag states. Under Article 110, the boarding of a ship suspected of being engaged in the slave trade is open to all states, but such a visit may only proceed so as to ascertain the fraudulent use of a flag, not actually to suppress the slave trade, which is a right falling exclusively within the jurisdiction of the flag state.[12]

When the historical narrative that has just been laid out is coupled with the following doubts to which Martinez points as to why scholars have been unwilling to regard the slave trade as the genesis of international human rights law, her line of argument regarding the starting point of international human rights law being pushed back 150 years has diminishing returns:

> Perhaps the shameful complicity of so many nation-states in the institution of slavery makes this story less appealing than the Nuremberg narrative, which conveniently attributes responsibility for the Holocaust to a handful of individuals from a losing nation (Germany). The British abolitionist discourse contains embarrassing overtones of the "white man's burden" and the controversial history of colonialism extended for a hundred years after the abolition of slavery. For scholars in the United States, perhaps America's problematic (but eerily familiar) role as the reluctant outsider in the anti-slavery regime is less appealing than its starring turn at Nuremberg with Justice Jackson's eloquent speeches as chief prosecutor. (Pp. 154–55)

Ultimately, Martinez has brought to light and engaged with a very interesting, if not well-known, area of international law, and, for this achievement, she should be commended. Likewise, she is to be applauded for raising thought-provoking issues in seeking to call attention to the place of courts of mixed commission and the abolition of the slave trade at sea in the evolution of human rights law. Her historical account is compelling. Only time will tell if it will become part of the discourse that would have international human rights law trace its history back to a time when countries cooperated to free more than 80,000 human beings.

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[12] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Arts. 105, 110, 1833 UNTS 396; *see also* JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 98–104 (2012).

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