

R. St. J. Macdonald & Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*. The Hague: Martinus Nijhoff, 1983. Pp. 1234. \$120.00.

Reviewed by Anthony D'Amato

Sometimes we can get a useful perspective on an issue by simply imagining that we are seeing it through the eyes of someone who has absolutely no preconceptions. Let us thus imagine that we are in communication with another galaxy, and one of the minor interactions resulting therefrom is a visit by one of their law professors interested in our curriculum. I would imagine that the provincialism of our course of law study would be one of the first-noticed items. While we look at purely American law in dozens of different ways and relate it to dozens of different disciplines, the United States, after all, is just one country in an interdependent world, a world threatened by nuclear proliferation and nuclear mutually assured destruction, environmental degradation, demands from starving people, medical needs, population and food pressures, giant shifts in trade patterns, increasing emigration, the exploitation of the oceans (that cover 71 percent of the planet's surface), the arctic regions, and outer space. How can it be that most American law students are not exposed to courses in international law?

On further inquiry, our alien visitor would learn that the reason for this state of curricular affairs is not entirely chauvinistic myopia. One "explanation" proffered is that international law is like sports law or entertainment law—not a distinct field of intellectual inquiry but rather an area in which lawyers apply regular concepts of contracts, torts, and code law. Anything above these concepts, the visitor is told, is "political" and not "legal." A second "explanation," which our perspicacious visitor immediately recognizes as contradicting the first one, is that the "sources" of international law are strange and fuzzy. The notion of customary international law is quite unlike any domestic analogue; the idea that states are both the creators and the subjects of the laws they create is remote from the American legal experience; the peculiarities of treaties and treaty interpretation fit uneasily the well-examined paths of contract law; the problems of concurrent and extraterritorial jurisdiction seem unsatisfying and even messy when compared with a federalist model under a single constitution. Our visitor could hardly be criticized for summarizing these two explanations as follows: International law is exactly like American domestic law except where it is different; and where it is different, it is wrong.

This conclusion might support the charge of chauvinistic myopia after all, except that I believe the fault lies more with those who teach the subject than those who refuse to accept it. We teachers of international law have generally failed to provide a sound, consistent theoretical underpinning of the law we teach, and the unsatisfactory result does not go unnoticed by our colleagues who on occasion do read our articles. Many if not most articles and books on international law *are* frustrating because they lack scientific

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foundation. This shortfall is usually papered over by gargantuan footnotes, a dense prose style in round-about third person, impressive recitations of minutiae, and a general bravado that steamrolls ahead over a landscape covering hidden mines of ambiguous concepts and logical inconsistencies. Experts in the field don't fool each other; they just recognize when the game is well played. But outsiders don't have as highly developed a sense of sportsmanship, and they simply relegate public and private international law to second-class citizenship in the law school curriculum.

We need a major effort to examine the theoretical understructure of international law and place it on a consistent and satisfactory footing. To do so, we must attract colleagues, both established and new, into the field, because the undertaking is a vast one. We can't just appeal to the importance of international law because that importance is quite obvious—even to our imagined extraterrestrial visitor. But we can appeal to the intellectual challenges waiting resolution. For one thing, international law challenges the student to come to grips with “pure” law as contrasted with learning the rules enforced by domestic political authorities. International law is a lot closer to right-makes-might, and contrasts with the might-makes-right positivism of most areas of domestic law. Second, how do international rules “spread” and “survive,” after originating in the interactions of a handful of states? Third, what is the mechanism underlying a self-created and self-regulating set of legal rules? Fourth, how does a jurisdiction of consent and reciprocity work when we are accustomed to a more vertical system of determinate jurisdiction and superior-court resolution of jurisdictional conflicts? Fifth, how are international rules enforced when there is no world policing authority? This last question turns many people off; they say that international law isn't really “law.” But if it isn't, how do we account for the fact that the nations of the world regard it as law, settle nearly all their disputes these days not by force but by teams of lawyers arguing and resolving positions or advising their political clients how to resolve the positions, and have evolved highly complex reciprocal retaliations and reprisals (usually not needed) to engender respect for international rules? To be sure, there are from time to time highly publicized incidents of violations of international law, but we should keep in perspective Professor Henkin's observation that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹ *Why* nations do this, and *how*, and what those principles and obligations are, and how they can be construed are the stuff of international law.

In addition to international law per se is the vast area of the interface between domestic and international law. Here the questions are highly complex and usually constitutional. For example, does anyone know what the “act of state doctrine” really means? No court seems to know, and any essay you read deals at best with only a facet of the issue. I suspect that much of the confusion surrounding the act-of-state doctrine stems from most scholars who have examined it knowing a lot about constitutional law and very little about international law. Or take questions of extraterritorial

1. Louis Henkin, *How Nations Behave* 42 (New York, 1968).

legislative conflicts, self-executing treaties, the power of customary international law in American courts, or the impact of international human rights law on the rights of citizens as well as aliens in this country, and you have a growing list of intellectual challenges to the law student which are every bit as "real" and "complex" as those of any other course of study.

The need for clarity in the sources, evidence, and proof of international law has reached crisis proportions. Thus when a book comes along that contains 1,234 pages and 38 essays by international legal scholars from all over the world, and has as promising a title as *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory*, one turns to it with high hopes of salvation. After reading it, all I can say is that we really are in a crisis.

Many of the essays in the book exemplify—are even caricatures of—all the things that are wrong with the way international law is written. Pomposity and prolixity predominate. The cost of the book exceeds that of six Chinese dinners, and right after reading it you're hungry again. But enough negativism; let me mention some of the good features of the book.

One essay challenges my contention that we need greater attention to theoretical clarity. Myres McDougal and W. Michael Reisman, perhaps more explicitly than in their past writings, call for a description of the flows of international decisions, and say that that description constitutes international law. These decisions combine authority and control:

Authority would be conceived in terms of community expectations about future decision, and control in terms of actual participation in decision. With such empirical reference for both authority and control, there would be no need of an infinitely regressive search for the 'bases of obligation' or 'binding force' of law; an inquirer would need, as others have noted, only to open his eyes and observe what patterns in expectations and practices of control in fact prevail.²

But opening my eyes as far as I can, I see nothing but confusion and contention in determining what are "patterns in expectation and practices of control." These terms, like those of "authority" and "actual participation in decision," seem highly problematic. Moreover, I cannot see how international law can be reduced to description. To take an absurd example, suppose the United States drops a nuclear bomb on Nicaragua. Is this "legal," according to McDougal and Reisman, because it was reached by the United States "authority" and fulfilled a "pattern of expectation" preached by extremist right wingers? If more of a pattern is needed, would the practice be more "legal" if the United States blew up a few other countries as well? How can law be reduced to a description of what decision makers do?

McDougal and Reisman have many excellent things to say about newly emerging law and its conflict with state-based sovereignty. "The New International Economic Order, for example, is in many ways a throw-back to nineteenth century conceptions; it demands nearly complete prescriptive and applicative competence for the nation-state."³ One always learns from

2. Myres McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, at 113.

3. *Id.* at 107.

the writings of McDougal, Reisman, and their associates, but I think the biggest failing is in a lack of clarity about how they prove what any rule of international law is.

A clear essay by Julius Stone is highly critical of the "policy-oriented jurisprudence" of McDougal and his associates. He finds that in order to make room for their conception of values, they redefine international law "in a way that makes unanswerable even straightforward questions of whether conduct is legal or not."⁴ Most of Stone's points have previously been made by other writers, but his essay is a useful compilation.

Bengt Broms, professor of international law at Helsinki, contributes a fine essay on the subjects of international law, demonstrating that the rules of international law apply of course to states, but also to individuals, special entities (condominiums, the Holy See, the International Red Cross, the United Nations), colonies, protectorates, mandated and trust territories, and groups (such as minorities). The essay is a useful addition to the pioneering book by Lauterpacht, which the essay unaccountably does not cite.⁵

Some grand themes emerge when you have such a collection of writings from all over the world. The willingness to treat individuals as subjects of international law is somewhat surprising, given our usual impression that scholars in this field as a whole tend to be classicists. I was also interested to learn that the leading contemporary figure in international law in the world today, judging from the impact upon the writers in this book, is Richard Falk (who, incidentally, does not have an essay in this collection).

A number of essays contain sharp observations on matters of interest to specialists: Bruno Simma (Munich) on aspects of treaty interpretation; Bin Cheng (London) on customary law; Oscar Schachter on multilateral codifications; and Louis Sohn on the importance (more than we usually think) of international advisory opinions. Among other writers represented here, I profited from the essays of R. P. Anand, Ian Brownlie, Ion Diaconu (Romania), Douglas Johnston and R. St. J. Macdonald (Canada), Vratislav Pechota, M.C.W. Pinto (Sri Lanka), K. Venkata Raman (Queens University), W. Riphagen (The Netherlands), Shabtai Rosenne (Israel), and Vladimir A. Kartashkin (Moscow), and W. L. Morison (Australia).

But the essays as a whole are more a "bloomin', buzzin' confusion" than a clear presentation of the structure and process of international law. The essays talk past one another, they seem to be whatever the authors submitted, with no editorial reworking or intercommunication of authors.

International law is important. It works. It is real. And it is challenging. But it is in search of a theory. A book such as the one under review might actually have the unintended effect of encouraging people to work out a consistent theory of international law for themselves, and then to share it with the world community.

4. Julius Stone, *A Sociological Perspective on International Law*, at 263, 272.

5. Hersch Lauterpacht, *International Law and Human Rights* (New York, 1950).