

## Book Reviews

### Steven Wheatley: *Democracy, Minorities and International Law*

Cambridge University Press, 2005, XXII + 201 pages, ISBN 0-521-84898-9

As most international lawyers will probably agree, it takes courage for an author to embark, in a book of less than 200 pages, on an examination of both the position of ethno-cultural groups and the meaning of democracy in international law; particularly when, as in the present case, an interdisciplinary approach has been chosen which aims at expanding the scope of the work, at least in part, beyond a purely legal analysis of the issues involved.

It is not only the immense amount of existing scholarly literature on minority rights, self-determination, and democratic governance (the main substantive issues dealt with in Wheatley's book), which seem to make such an endeavour a fairly daunting task, but also – and perhaps even more so – the fact that many of the relevant *termini* and concepts at stake (“minorities”, “peoples”, “self-determination”, “democracy”) are still largely undefined – or at least under-defined – in contemporary international law. Nevertheless, Steven Wheatley, of the University of Leeds, took on this difficult task – and generally succeeds in rising to the challenge.

As explained by the author in the introduction, the major concern of his work is to consider the contribution that international law may make to the resolution of cultural conflicts – that is, political disputes between the members of different ethno-cultural groups – particularly in democracies. Ethno-cultural groups are defined as “groups of persons, predominantly of common descent, who think of themselves as possessing a distinctive cultural identity, which may be based on a particular religion and/or language, and who evidence a desire to transmit their culture to succeeding generations” (page 2). This working definition certainly has its charms. It is broad enough to encompass various

groups recognised, however indeterminately, as minorities, national minorities, indigenous peoples, and peoples in international law and, thus, allows for a holistic approach to the legal and normative question raised by the author. Yet, his related stipulation that these groups are not amenable to an “objective distinction”, may, when applied to specific rights afforded to these groups by international law, cause conceptual problems. We shall return to this in a moment.

The book is divided into three substantive Chapters, supplemented by an introduction and a concluding Chapter. In *Chapter 1* the author examines the protection afforded by the international system to “ethno-cultural minorities”. Translated into the language of the present international legal regime in this area, this means that the focus here is on the rights of “persons belonging to national or ethnic, religious and linguistic minorities” to enjoy their own culture, to profess and practise their own religion, and to use their own language, individually and in community with the other members of their group. Wheatley does not indulge too long in the historic evolution of minority protection on the international plane, which essentially started with the League of Nations’ scheme of minority protection treaties after World War I, but rather tackles head on the relevant international legal instruments developed in the era of the United Nations.

Unsurprisingly, article 27 of the International Covenant on Civil and Political Rights, including its interpretation by the Human Rights Committee, is thereby at the centre of the debate. Due attention is also given to the principles contained in the formally non-binding 1992 UN Declaration on Minorities, adopted by the United Nations’ General Assembly, as well as the more detailed standard-setting regime in the field of minority protection set up in Europe under the auspices of the Council of Europe and the OSCE.

No legal scholar dealing with the protection of minorities on the international plane can escape the perennial debate surrounding the quest for a generally accepted definition of the term “minority”. Wheatley, too, delves into the discussion of this contentious issue and provides the reader with a comprehensive analysis and critique of the well-known definitions proposed by Francesco Capotorti and (later) Jules Deschênes.<sup>1</sup> His conclusion, however, that minorities are “imagined

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<sup>1</sup> F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious, and Linguistic Minorities*, Doc. E/CN.4/Sub.3/384/Add.1-7 (1977), para. 568; J. Deschênes, *Proposal concerning the Definition of the Term ‘Minority’*, Doc. E/CN.4/Sub.2/1985/31 (1985), para. 181.

communities” (a concept originally coined by Benedict Anderson)<sup>2</sup>, which exist “because they fall within the scope of application of Article 27 of the International Covenant on Civil and Political Rights” (page 30), seems to be somewhat foreshortened and does not contribute much to disentangle international law’s definition dilemma in this area.

While, in the respective global and regional instruments, the protection afforded to minorities is generally dealt with in the language of individual rights, their effective realisation necessarily depends on the ability of minority groups to maintain their culture, language or religion. From this position, Wheatley develops his concept of a “right to cultural security”, which essentially requires states to establish an adequate domestic regime for the protection of minority cultures.

According to the author, international instruments concerning minorities recognise both a negative and a positive aspect of the right to cultural security. Thus, states are not only required to allow persons belonging to minorities to maintain and develop their own ethnic, cultural, linguistic and religious identity; they also have to protect, through appropriate legislative and other measures, “their” minorities and create favourable conditions for the promotion of their identity. Although he views the right of cultural security, thus understood, as accepted by the international community, Wheatley also acknowledges the shortcomings of present international law in this area. Not only does it refrain from precisely defining the beneficiaries of such a right, it also recognises only few positive commitments indicating how exactly this right is to be realised within states. Of course, the same may be said of a further right afforded by international law to certain ethno-cultural collectives, in this case referred to as “peoples”: the right to self-determination, which is dealt with in *Chapter 2* of the book.

In line with any modern treatment of the subject, Wheatley distinguishes, firstly, between colonial and post-colonial and, secondly, between external and internal self-determination. The reader is provided here with a fairly descriptive, yet clear and succinct explanation of the evolution of the self-determination principle from a purely political aspiration to an international legal “right” with *erga omnes* character. As to the continued significance of this right in the post-colonial age, the author argues that international law increasingly recognises that the term “peoples” may – in addition to colonial peoples and peoples under

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<sup>2</sup> B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, revised edition, 1991). Interestingly enough, Wheatley does not expressly refer to Anderson’s seminal study.

alien domination and occupation – also be applied to the populations of sovereign states as well as to ethno-cultural groups within states. Whereas the application of the right to self-determination to the entire population of an existing state can be said to have entered the mainstream of relevant international legal scholarship, the consequences of recognising a group within the state as a “people” are far from clear.

Wheatley’s discussion of possible modes of accommodating claims to (territorial) self-government by ethno-cultural groups within states is one of the most interesting parts of the book. Unfortunately, perhaps the most viable option (if not requirement, particularly in a post-conflict scenario) of a reconfiguration of the overall political and constitutional framework of the state, so as to reflect and preserve its “multination” character, is considered only briefly. Practical examples are mentioned, e.g. the constitutional arrangements of Bosnia and Herzegovina and of the Former Yugoslav Republic of Macedonia, but would deserve a more detailed analysis in light of the pertaining difficulties related to their implementation on the ground. More attention is given to the concept of territorial autonomy, i.e. the granting of a meaningful degree of independence in respect of political decision-making by a state to a part of its territory where a majority of the population belongs to a distinctive ethno-cultural group. The author terms this form of self-determination by non-dominant sub-state groups as “less-than-sovereign” self-determination (page 106), and distinguishes it from cases of “sovereign” self-determination, i.e. acts of (consensual) separation and (unilateral) secession.

With regard to non-consensual sovereign (or external) self-determination, Wheatley outs himself as a supporter of the theory of “remedial secession”. In line with a number of eminent scholars, both from the fields of international law and political science,<sup>3</sup> he holds that “where a territorially concentrated group is systematically excluded [from public life], secession is a potential remedy of last resort, in cases of serious human rights abuses against members of the group” (page 95). In the absence of such a situation, the recognition of the right to self-determination for ethno-cultural groups resident within an independent state is said to have no impact on the territorial integrity of that state (the only additional exception being the claim to external self-

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<sup>3</sup> See, e.g., J. Crawford, “The Right to Self-Determination in International Law: Its Development and Future”, in P. Alston (ed.), *Peoples’ Rights – The State of the Art*, 2001, 7-67 (57); A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, 2004, 331 et seq.

determination by populations of constituent units of an ethnic federation in the process of dissolution – a situation which may be termed the “Socialist Federal Republic of Yugoslavia scenario”). Territorially concentrated groups within states may, however, have recourse to the internal aspect of the right to self-determination. As Wheatley puts it: “The internal aspect is enjoyed by the populations of sovereign and independent States, and by indigenous peoples and peoples recognised as such by the State” (page 125).

This approach to the potential beneficiaries of a right to self-determination may slightly confuse the reader. As already mentioned, Wheatley generally asserts that no objective distinction can be made between groups recognised as minorities, national minorities, indigenous peoples and peoples. Rather, “what distinguishes these groups is the nature of their political demands: simply put, minorities and national minorities demand cultural security; peoples demand recognition of their right to self-determination, or self-government” (page 124).

It is consistent with this line of thought when he further states that the definition of the term “people” in international law “must include both a collective expression of a desire to be self-governing, and a distinctive ethno-cultural identity; [b]eyond this, no criteria for defining the term ‘people’ can be discerned” (page 126). Does this imply that a sub-state group which displays a distinctive ethno-cultural identity is to be regarded as a “people” as soon as it demands political self-government in respect of a particular part of the territory of the state it is residing in? Probably not, as this would be clearly inconsistent with Wheatley’s earlier stipulation that, unless they are recognised as “peoples” by the state in question (or are to be deemed as indigenous peoples), sub-state groups are not entitled to claim a right to internal self-determination.

Moreover, Wheatley agrees that the rights of minorities do not include the right to self-government, either in the form of separation or secession, or territorial autonomy. As noted above, however, he also supports the view that a territorially concentrated, non-dominant group within a state may emerge as a “people”, if the members of the group are systematically discriminated against the rest of the population and, as a result, excluded from any meaningful participation in the political life of the State. Is, then, the permanent exclusion of such a group, if sufficiently proven, not the very factor that enables the international community to recognise it as a “people” with a claim to self-determination (including – in particularly egregious cases of oppression – “sovereign” self-determination), thereby “objectively” distinguishing it from

other ethno-cultural groups whose members may be afforded specific individual rights, but not a collective right to self-determination? Certainly, this is touching on highly controversial terrain with a number of legal pitfalls. It may not be surprising, therefore, perhaps even inevitable, that the part of the book which deals with sub-state groups as possible beneficiaries of the right to self-determination is generally raising more questions than it provides answers.

Ultimately, it is precisely the regime of indeterminacy in relation to the position of ethno-cultural groups in international law which brings the author to shift his focus to domestic institutions and procedures in *Chapter 3*. International law, he argues, has recognised the right of persons belonging to minorities to cultural security and the right of peoples to self-determination; yet, “it has failed [...] to detail the circumstances in which measures to protect and promote cultural security should be introduced, or territorial self-government regimes established” (page 127). As a result, states’ policies concerning ethno-cultural groups will emerge through domestic decision-making procedures, in accordance with internationally recognised principles. For democratic states the “norm of democracy”, which Wheatley considers to be part and parcel of today’s international human rights law, provides the essential parameters of these policies: popular sovereignty and political equality. On the basis of this assumption, he discusses in detail the equal right to political participation enshrined in a number of global and regional human rights treaties, and the specific rights of minorities to effective participation in decisions which affect them. As convincingly shown by the author, a state’s respect for participatory rights does not *ipso facto* guarantee that persons belonging to minorities will be able to influence the results of domestic decision-making processes, even where issues affecting fundamental interests of the group are under consideration. Where democracy is defined by reference to majority rule, Wheatley notes, “numerical [...] minorities are unlikely to have their cultural interests and preferences recognised by the State” (page 189).

Based on this assessment, the final sections of the book are devoted to “alternative” understandings of democracy. The author begins by considering two institutional responses to the limits of equal participation and procedural inclusion, namely consociational and integrative models of democracy. His examination of the main features of consociational (or power-sharing) democracy, the famous model suggested by

Arend Lijphart,<sup>4</sup> assesses the extent to which these features are compatible with international law. Wheatley concludes that the consociational model is in fact incompatible with international norms, as the human right to democracy “does not allow for political leaders to decide in advance who will share power” (page 166). From the point of view of international law, integrative responses to the realities of multicultural democratic polities seem to be more promising.

By referring to a number of empirical examples, Wheatley highlights the necessary building blocks of an effective integrative model of constitutional engineering in deeply divided societies. At the same time, however, he is aware of the inherent limitations of institutional and/or procedural approaches when it comes to the lasting prevention of internal ethno-cultural conflict in democratic states. Therefore, he suggests that the democracy norm should be interpreted and applied along the lines of a deliberative model of democracy, the key elements of which are inclusion, reasoned political debate and an attempt to reach consensus amongst all participants on relevant policy issues. States should be discouraged to regulate cultural practice in the face of opposition from the representatives of the ethno-cultural group concerned. If a state does regulate cultural conduct “it must accept that others, including those in the international community, may question the legitimacy of the relevant measure” (page 190).

It is obvious that the final part of Wheatley’s treatise was written from a normative rather than a strictly legal perspective. It is also in this part that the multi-disciplinary approach taken by the author becomes most tangible. Many of the insights and suggestions offered in *Chapter 3*, as well as the conclusions in *Chapter 4*, are rather tentative, but this is to be expected from a book of this size in which so many fundamental issues cutting across various academic disciplines are tackled.

Overall, the work is informative, clearly structured (only a bibliography is painfully missing) and accessible not just to international lawyers but also to political scientists and scholars of international relations, as well as to advanced students in these disciplines. In sum, it is an extremely valuable read for anyone who seeks to better understand the relevance of international law to the accommodation of cultural diversity in the domestic sphere of states and, in this context, the complex interrelationship between minority rights, the right to self-determination and the emerging norm of democracy. The reader must be aware,

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<sup>4</sup> A. Lijphart, “Consociational Democracy”, *World Politics* 21 (1969), 207-225.

however, that Wheatley has limited his analysis almost exclusively to democratic states. He thus leaves open the question of whether, or to what extent, international law contributes to the resolution of conflicts between state authorities and ethno-cultural minorities in a non-democratic environment. It would certainly be interesting to see this question addressed in a future work or, possibly, a second edition of this highly relevant book.

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**Tullio Treves: Diritto Internazionale. Problemi Fondamentali**

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Tullio Treves' book addresses the principal problems of international law, giving the reader a comprehensive review in thirteen Chapters. Due to space constraints, not all the Chapters will be discussed and analysed in detail.

In **Chapter I**, the author traces the origins of international law, examining the evolution of state practices as well as the doctrinal developments. Although international law only really came into existence in the 17th century with the Treaty of Westphalia, in the 16th century, the studies of theologians F. de Vitoria and F. Suárez already represented first attempts at formulating autonomous theories. Hugo Grotius conducted the first systematic study on international law, with his famous *De Iure Belli ac Pacis*, followed by theories by S. von Pufendorf and C. Wolff. World War I gave rise to an attempt to establish a new international law of peace with the creation of the League of Nations, and the Charter of the United Nations in 1945.

**Chapter II** examines the subjects of international law. Treves focuses on states as the primary actors in international relations and analyses aspects of statehood, including the significance of state recognition and the consequences of revolutionary overthrow and territorial changes.

**Chapter III** deals with state succession. Treves distinguishes succession in fact from succession in law; the latter term refers to the continuity of titles and duties from predecessor to successor state. Treves points out the absence of general customary law rules regulating all aspects of legal succession (pp. 85-87). Where succession in treaties is concerned,



the 1978 Vienna Convention on Succession of States in Respect of Treaties is a useful source to ascertain the law in spite of its limited direct applicability. Legal succession as such mostly relies on principles of customary law (pp. 87-90).

The practices of newly independent states range from rejection of all treaties not signed by their own governments, to the conclusion of treaties of devolution through which the new state assumes all titles and duties that belonged to its predecessor. Whether treaties give rise to automatic transferral of titles and duties to newly independent states is controversial, as treaties are not considered to be binding upon third party states. The third approach taken by new states is to make unilateral declarations clarifying their attitude towards treaty provisions. However, these declarations have no binding effect (pp. 90-95).

In the case of bilateral agreements, especially those involving a decolonised state, the treaty continues if the two parties so agree. In order to continue a multilateral treaty, the new state may make ordinary acts of accession and declarations of succession, which are delivered to the depository of the treaty (pp. 95-97). Questions about the continuity of treaties are of particular relevance in cases of merger, separation and dissolution of states, especially as they occurred in Eastern Europe (p. 97). Border treaties, localised treaties and human rights treaties represent exceptions to the rule against automatic succession (pp. 101-104).

For succession in other matters, there are two points of reference: the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, and a Resolution of the Institut de Droit International from 2001. Treves confirms the existence of a rule for the succession of state property and archives, but is reluctant to confirm a similar rule for debts (pp. 104-111).

**Chapter IV** discusses international organisations. Treves describes the emergence and development over time of international organisations and discusses the extent to which they changed the traditional structure of the international community. Furthermore, Treves writes about international organisations' internal law and concludes with an analysis of non-governmental organisations.

In **Chapter V**, Treves examines the structure of other subjects of international law, e.g., the Holy See, the Sovereign Order of Malta and the so-called "governments in exile." The qualification "subject of International Law" is tied to problems of self-determination of peoples and territorial integrity, both examined by the author in the last paragraph of the Chapter.

The principle of self-determination, often seen as a moral and legal right, asserts that every nation is entitled to a sovereign territorial state, and that every specifically identifiable population should be able to choose to which state it would like to belong. The principle is commonly used to justify the aspirations of ethnic groups that self-identify as nations toward forming independent sovereign states. Although there is consensus that international law recognises the principle of self-determination, the principle does not, by itself, define which group are nations, which groups are entitled to sovereignty, or what territories they should receive. Moreover, its application in international law often creates tension with the principles of territorial integrity and non-intervention in internal affairs.

Treves further explains that the principle of self-determination formally expresses a central claim of nationalism, namely the entitlement of each nation to its own nation state and has become a typical demand of nationalist movements. However, the formal expression of the principle post-dated the nationalist movements and the formation of the first nation-states. In the 20th century, the self-determination principle was central to the process of decolonisation, but its use has not been limited to contesting colonialist or imperialist rule. Finally, the principle is given different ethical interpretations. Some treat it as a translation or extension of the universal rights of individuals (political freedom, freedom of religion, freedom of speech) to the group. Some interpretations treat it exclusively as a collective right, distinct from individual rights. Moreover, even its existence is disputed, with some arguing that no such entitlement exists, other than perhaps the right to resist or secede from tyranny.

**Chapter VI** deals with Human Rights and international crimes. Treves discusses questions of responsibility and urges the necessity of establishing international tribunals to prosecute the perpetrators.

In **Chapter VII**, Treves discusses characteristics of the different kinds of rules in international law, focusing on the two principle categories of customary/general international law and the law of treaties. General principles of law play a subsidiary role (pp. 221, 222).

Although the existence of customary rules of universal validity has never been contested, both their nature and origin have been subjects of heated debate. Nonetheless, disagreements over their origins do not detract from their pervasiveness or effectiveness. Treves describes the two elements – state practice and *opinio juris* – required by the prevailing doctrine for a norm to constitute customary law; in his view, however, these two elements fail to explain the ways in which customary law

evolves over time. According to Treves, the formation and evolution of customary law now happens in a spontaneous, flexible and informal way. In the past, customary rules came into existence only over long periods of time; today, they can evolve within a few years, if applied by a group of states adequate in number and representative of all different interests, e.g., both developed and developing countries.

Treves claims that states that deviate from the law and initiate new customary rules cannot possibly be convinced of the legal necessity of their actions. Thus, he does not see *opinio juris* as a reliable element; instead, states use it intentionally to modify the law, declaring that they are acting under a legal obligation without being convinced of it. He suggests that an assessment of state practice, i.e., states' actions and expressions of opinion, remains the best way to ascertain customary international law. However, even though state practice and expression of legal opinion are more and more frequently aimed at influencing the law's development, relying on *opinio juris* is the most convincing way to establish the content of customary law. For example, sometimes an infringement of the law turns out to be a correct interpretation of changed needs within the community of states and is endorsed by other states. In other cases, it is simply a violation (pp. 222-233).

Furthermore, Treves rejects the existence of "primary" or "constitutional" international rules, suggesting that there is no criterion to distinguish ordinary customary law from these superior rules. He insists that, in any case, the UN Charter does not represent such a superior norm. Finally, he argues that the term is misleading, as it was developed in and is best adapted to the national context (pp. 237-239).

On the nature of treaties, Treves points out that they originate from and are influenced by norms of customary law. He compares treaties to contracts, but rejects the assumption that treaties are exclusive sources of law in a technical sense in the same way that contracts are (pp. 239-242). Treves emphasises the fact that treaties are put in effect following rules of customary law, indicating a certain priority position of customary law, but without implying any greater normative effectiveness (pp. 245-248). Regarding general principles of law, Treves mentions the historical, but declining, significance of national principles in the development of customary rules of international law. Today, the transfer of national principles to the international level is only admissible if the possibility is contemplated by the treaty, as is the case e.g. under Article 38 (1) c.) of the Statute of the ICJ, which bestows upon the Court the competence to progressively develop the law (pp. 248-255).

International organisations have significant influence on the law of treaties but also contribute to the development of the law through their decisions and the rules they set (pp. 255-259). For example, organs of international organisations, especially the Security Council and the General Assembly of the United Nations, inspire new customary rules through their actions (pp. 259-262). Treves also examines whether the General Assembly's Declarations of Principles can be seen as new legislative or quasi-legislative sources of law and answers this question in the negative. At the same time, he acknowledges the excellent compliance rate of these and other soft-law instruments, which is achieved, in cases of non-compliance, through enforcement by mutual pressure (pp. 262-267).

Treves concludes Chapter VII by asserting that international law manifests the characteristics and structure of the society of states on a normative level. The lack of an international legislator leads to a lack in international legislation, although the term is used to describe the most significant multilateral "law-making treaties" (pp. 267-269).

**Chapter VIII** deals with the process used to ascertain whether customary law exists, its contents and its codification. Ascertaining the law requires a thorough analysis of the manifestations of the international practices of states and international organisations, as well as judicial and arbitral decisions. International courts and tribunals, especially the ICJ jurisprudence also help to reveal the rules. The doctrine's role today is limited to describing and classifying rules.

The sheer number of manifestations makes the actual law difficult to fathom (pp. 279-286). Frequent contradictions between and ambivalences among these manifestations may be hard to resolve. For instance, the repeated inclusion of certain obligations in treaties would seem to indicate the lack of customary rules regarding the contents, as rules would make the treaties superfluous. Instead, this repetition often serves as evidence of the existence of a customary rule. Caution is also required when analysing state practices, because state actions may reflect what the state considers to be the law, or what it wishes the law to be. Thus, the whole picture must be taken into account in order to arrive at a balanced assessment (pp. 286-289).

Moreover, the expansion of the international society of states in the decades following World War II increased the perceived necessity to codify international law through negotiations and conclusion of treaties by states. States expected that codification would facilitate increased knowledge of the law and promote legal certainty (pp. 291-294). The ILC played a particularly important role in the development and codi-

fication processes (pp. 298-300). Even where these codifications do not enter into force or are ratified by a small or unrepresentative number of states, they are an important point of reference to establish the existence and content of customary law. Finally, Treves distinguishes three different relationships between codifications and customary law: codification of a pre-existing customary rule, a convention as crystallisation of an emerging customary rule, and a convention as a factor generating a customary rule. On the other hand, customary rules that have been codified may lose their customary nature (pp. 306-311).

In **Chapter IX**, which addresses the law of treaties and its codification, Treves thoroughly examines the Vienna Convention on the Law of Treaties, as an essential point of reference. He also provides an overview of all different phases of a treaty, from its negotiation, conclusion, entry into force, amendment and modification, to its invalidity, termination or suspension (p. 313 et seq.).

Writing on the meaning of the rule of *pacta sunt servanda* for non-binding international agreements, Treves leaves open the question of its applicability (pp. 360, 361). He then discusses the different rules of treaty interpretation, stressing the importance of the teleological method and of ascertaining the intentions of the parties, while at the same time taking into consideration the evolution of the law since the treaty's conclusion. These rules are applied in addition to the literal interpretation (pp. 385-390). Treves also describes ways of addressing specific challenges that occur when a treaty is authentic in several languages or when a treaty is the founding instrument of an international organisation (pp. 393-397).

With respect to the effect armed conflicts have on treaties, Treves suggests that they usually suspend the applicability of multilateral treaties and terminate bilateral agreements between opposing states. However, he acknowledges existing ambiguities in the practices in this field (pp. 439, 440). Finally, regarding treaties between international organisations, Treves mentions the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as containing rules that are, for the most part, customary (pp. 442, 443).

**Chapter X** examines the use of force and its limits under international law. Treves stresses that violations of the prohibition against the use of force are not so numerous as to make the existence of the rule doubtful. Alleged violators are careful to justify their actions with legal arguments, a practice that affirms the validity of the rule (pp. 445, 446).

Treves describes current changes in attitudes in international law towards the use of force. The earlier Natural Law Doctrine considered war to be generally evil, but just, and therefore lawful, when it redressed an injustice (p. 446). Although positivists in the 19th and early 20th centuries did recognise certain obligations during violent conflicts, they saw the use of force as a right belonging to sovereign states (*jus ad bellum*), insusceptible to any regulation under international law. It was not until after the World War I, and even more so after World War II, that war came to be seen as a “scourge” that must be eradicated (p. 447).

However, the League of Nations did not provide an absolute prohibition against the use of force, only requiring a procedure to be undertaken before resorting to it. The Briand-Kellogg Pact condemned the use of force, and the UN Charter finally proclaimed a clear prohibition not only against war, but against any threat or use of force, with limited exceptions, and provided an institutional framework for the application of the prohibition (p. 448). The maintenance of peace became the principle objective of the UN, and the prohibition against force assumed the status of a customary and compulsory rule (p. 449).

However, resolutions that have clarified this principle have left some important questions unanswered, such as: Can pre-emptive self-defence be legitimate? Is the use of force permitted for the protection of a state’s citizens abroad? May force be used to support national liberation movements or peoples under foreign or racist rule (pp. 449-452)?

Treves suggests that the extension of the notion of “legitimate self-defence” to include the use of force against state-supported terrorists and infiltrators, ideological subversion, attacks on citizens abroad or any pre-emptive force goes beyond plausible and reasonable applications of the term. He goes on to assert that these attempts to extend the notion reflect the difficulty of addressing new modalities in the use of force that do not adapt well to the text of Article 51 of the Charter (p. 453).

Treves explains that the primary responsibility for maintaining peace and security is entrusted to the Security Council. The UN’s monopoly on the use of force, reserved by the Charter, and the proceedings under Chapter VII seem to indicate that the Charter adopts a notion of “procedurally just war” (p. 455). He suggests that it is, however, legitimate to question whether the decisions to use force are “just” in the light of moral or political values. Moreover, the strict, step-by-step procedure as it appears in Chapter VII has rarely been applied in practice. Instead, Security Council decisions depend on the relations between its mem-

bers and the political feasibility of its decisions. The failure to comply with Arts 43, 45, 47 can lead to further difficulties (p. 456).

In terms of peace-keeping operations, these are authorised by the Security Council, but the legal bases for these authorisations derive from the scope and functions of the UN in terms to preserve international peace, as well as the consensus of Member States (p. 457). However, the boundaries between peacekeeping operations and the use of force pursuant to Chapter VII became increasingly blurred, especially since the end of the Cold War, during the failed missions in Yugoslavia and Somalia. In those cases, Treves suggests that the mandates did not suffice to fulfil the given tasks (p. 458). The main characteristics continue to be: impartiality, consensus of the parties and use of force only in self-defence (p. 459).

The end of the Cold War did, however, make the utilisation of Chapter VII possible (p. 460). Moreover, the interpretation of the term "threat to the peace" in Article 39 has expanded to include internal situations, and the Security Council has attempted to justify this expansion by citing international consequences, such as the movements of refugees. The term has also come to encompass terrorist acts, i.e., acts by non-state actors (pp. 460, 461). The compatibility of the method to authorise "coalitions of the willing," which operate without any control of the UN is doubtful (p. 461, 462).

Treves points to another innovation which has led to accusations that the Security Council exceeded its powers: the establishment of judicial and administrative institutions with jurisdiction over territories where serious conflicts have occurred. He mentions, for example, the Courts for Yugoslavia, Rwanda, and Cambodia and the administration of East Timor and Kosovo (pp. 462, 463).

As examples of the use of force in contravention of the prohibition, Treves offers NATO's use of force against Yugoslavia in 1999. He rejects both justifications of implicit authorisation and humanitarian intervention. Even if the concept of humanitarian intervention is accepted generally, he suggests that it was not necessary or applied in a proportionate way in that case. Treves also rejects the legality of the use of force against Afghanistan in 2002 as well as against Iraq in 2003. For Treves, the weakness of the argument that the authorisation contained in Resolution 678 from 1990 was reopened by Resolution 1441 is apparent in view of the failure of the United States and the United Kingdom to obtain the explicit authorisation of the Security Council. He also rejects the justification of pre-emptive self-defence and sees the uses of force in Afghanistan and Iraq as precedent dangerous to the

survival of the Charter's system for maintaining international peace and security. Finally, Treves addresses the fact that the Security Council confirmed ex-post the presence of the occupying forces in Iraq. Considering this divergence between the Charter's prescription and the reality of practice, Treves sees it as the task of lawyers to identify the adaptations of law that are made necessary by changed situations and values and that can be brought about through interpretation or reform. At the same time, lawyers must remember the value of reliable rules of law that can be referred to independently of political arguments (pp. 464-472).

The law of State Responsibility, together with an analysis of the elements of a breach of an international obligation, is the focus of **Chapter XI**. A key issue is the imputation of acts to state parties in the context of international law. For example, the question of state responsibility may revolve around whether the act of a state body can be imputed to the state, or whether an official acting outside his or her authority can breach treaties in a manner that will lead to the state being found responsible. A central question in the law of State Responsibility is whether fault, a subjective element of breach, is required for the state to be held responsible, or if liability is purely objective. Case law generally tends to support the objective school (see, for example, the *Caire* case). Whether or not fault is required may vary depending on the obligation alleged to have been violated and whether the state is being held responsible for damage caused by another party.

**Chapter XII** deals with international disputes and their resolution. In his definition of the term "international dispute," Treves emphasises the requirement of states' conflicting attitudes, as opposed to mere contrasting interests. These attitudes can concern either legal or factual matters (pp. 575, 576). The international community's awareness of the importance of preventing and resolving disputes is reflected in particular in Article 2 (3) UN Charter, which is also a customary rule and requires states to resolve disputes peacefully. This obligation extends beyond simply refraining from violent actions. In fact, however, its meaning is limited by the principle that each state may freely choose the peaceful means it wishes to use; thus, the rule equates to a mere prohibition of the use of force (p. 577).

The necessity of preventing disputes and minimising their negative repercussions has traditionally attracted less attention from the legal community than the resolution of disputes. This is changing now, and rules for inter-state consultations and preventive notifications, as well as institutionalised cooperation, are becoming more and more widely



used, especially in the environmental field (p. 579). Compliance mechanisms provided in multilateral conventions help to address non-compliance with non-confrontational means. The existence of mechanisms for compulsory resolution of conflicts also has a preventive effect, as it dissuades states from actions that might provoke disputes (p. 580). Treves suggests that, as a result of the equality of states, the intentions of the parties to a dispute are always reflected in its resolution, either in a direct way, when parties agree to a treaty, or in an indirect way, when parties agree to have a third party make a judgment. These two, exclusive ways of resolving a dispute, however, do not necessarily end it, particularly where sensitive political or security interests are involved (p. 581).

Treves then describes the procedures for attaining resolution, i.e., negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement, as listed in Article 33 UN Charter. He classifies the procedures in two different ways. The first classification depends on whether or not there is third party involvement. Second, he distinguishes binding decisions from diplomatic proceedings, which aim at facilitating agreements between the parties (pp. 582, 583). Negotiation is the most commonly used procedure (pp. 585, 586). However, it is not always possible to find a clear distinction between the different procedures with third party involvement, which are also used preventively, where the third party helps to start or resume communication on one side (p. 587, 588). A mediator plays a significant role in facilitating negotiations, making proposals and using his organisation's or state's political clout to convince the other side (p. 589).

When a dispute revolves around a differing view about facts, parties can make use of an inquiry or fact-finding procedure undertaken by a third party, possibly in the form of a commission (pp. 589-591).

Conciliation is also undertaken by a third party, which may be an individual or a commission, who does not represent any state or organisation. The third party examines the dispute and formulates proposals for its resolution in a report (p. 592).

Arbitration is a proceeding in which the parties to the dispute choose the arbitrator and agree to be bound by its decision. Because the so-called "consultative arbitrations" lack binding decisions, Treves groups them with conciliations (pp. 596-601). The main difference between arbitration and a judicial proceeding is that international courts and tribunals are pre-constituted, not chosen by the parties.

Treves distinguishes two different notions of international courts and tribunals. More generally, the term refers to organs of a pre-constituted nature and permanent structure, made up of independent individuals of diverse nationalities whose function is to work towards the resolution of disputes. They are established under an international instrument (a treaty or binding resolution of an international organisation) and apply international law. Under a more restrictive definition, courts and tribunals have as their objective the resolution of international disputes, i.e., disputes between states and other subjects of international law. Treves focuses on these latter organs, namely, the ICJ, the ITLOS and the WTO Appellate Body (pp. 601-603). He emphasises the importance of examining whether rules on conflicts of jurisdiction are emerging analogously to those known in private international law, or whether any “criteria of comity” among tribunals or of economy of judicial activity exist that might evolve into rules. Such rules are needed because of the multiplication of courts and tribunals (pp. 604-606).

Treves describes the functions, composition, rules for jurisdiction and procedures of the ICJ (pp. 606-623). He emphasises the final and binding nature *inter partes* of the judgments, as well as the lack of a principle of *stare decisis*. The latter does not, however, prevent the Court from paying attention to its own precedents. Judgments are usually complied with, and, if not, states must justify their non-compliance by making legal arguments (pp. 624-627).

He describes the statutes and rules of jurisdiction for ITLOS and the WTO Appellate Body (pp. 627-632). He also refers to permanent regional or specialised tribunals, primarily the Human Rights Courts in Europe, America and Africa. He emphasises that these courts not only have the ability to review complaints from individuals against states for alleged violations of human rights, but also to decide interstate disputes and to perform consultative functions (p. 635). Treves describes the contributions of the European Court of Justice in the field of international customary law as limited and disappointing, as the Court tends to draw only on community law, even where customary international law seems to be relevant (p. 638).

He also notes the continuing distrust by states of judicial and arbitral proceedings, and, in fact, of the involvement of any third party, but this distrust is currently diminishing (pp. 639-642). This is true even though sometimes courts are asked to decide cases merely to attract the attention of the international community rather than to obtain a favourable judgment (p. 642). Finally, Treves states that concerns that the

proliferation of international courts may threaten the unity of international law are premature and exaggerated (p. 643).

In **Chapter XIII**, the author examines the relationship between international and domestic law, which is governed by various theories, including monism, dualism, transformation, delegation and harmonisation. International law supersedes domestic law in the sense that the breach of an international obligation cannot be justified by a state's pursuance of its own domestic laws. The presence or absence of a particular provision within a state's domestic laws, including its constitution if there is one, cannot be used to evade an international obligation.

In conclusion, Treves' book provides a comprehensive overview of all important aspects of international law. He thoroughly summarises and analyses sources of law, international cases and doctrinal positions, and his writing is well-argued and structured. The attractiveness of the publication lies essentially in the conceptualisation of the main problems of international law, with particular attention to the case law that has strongly influenced its evolution.

The book is certainly an indispensable instrument, not only for students but also for scholars, international lawyers, legal advisers and jurists who seek an up-to-date and complete framework of international law. It is hoped that an English translation will soon be available.

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