Book Reviews

Michael Banton: International Action Against Racial Discrimination. Clarendon Press, 1996. 362 pages.

Professor Partsch, a long-term member of the Committee on the Elimination of Racial Discrimination, had agreed to review Mr. Banton's book on International Action Against Racial Discrimination. Since Professor Partsch passed away in December 1996, I felt it was my duty to step in for him as his successor in the Committee.

Michael Banton's book deals with the elimination of racial discrimination, in particular with the International Convention on the Elimination of All Forms of Racial Discrimination and the functioning of the Committee established by that Convention as its monitoring body. The author is a member of the Committee. He served for many years as its Rapporteur and was its Chairman in 1996 and 1997.

The book is divided into 13 chapters of different length; it also includes the text of the Convention, selected General Recommendations of the Committee, a description of the election of experts (Appendix III) and several pages on legal and educational measures against racial discrimination (Appendix IV). Hiding these two latter parts in the appendixes may unfortunately turn out to be counterproductive, for they contain pertinent information.

The headings of the 13 chapters, due to their very general wording, do not always give the reader a clear guidance as to the structure of the book. For example, chapter 1 ("Extending the Rule of Law") constitutes an introduction describing how the reports of particular States Parties had been dealt with by the Committee. These cases may not be representative any more, since the attitude of States Parties towards the Committee has changed over the last years, however, they are illustrative as to the difficulties the Committee occasionally faces and particularly faced in the past. Chapters 2 and 3 ("Crimes against Humanity" and "The United Nations") give some basic information on the legal environment in which the Convention has to be seen and the rationale behind its establishment. The drafting history of the Convention is described in chapter 4. In particular

chapters 3 and 4 overlap to a certain extent. Chapter 4 further provides information on the understanding of the notion of racial discrimination without exhausting this issue. This issue comes up again in chapter 5, labelled the "Committee's Inheritance", where one finds ample reference to certain aspects of the legislative history, as well as in chapter 6 ("Laying the Foundations").

Taken together these chapters give valuable information on the legislative history of the Convention. Important as this information is, it nevertheless veils the content of the Convention since even a brief description of the wording of the Convention and its textual analysis is missing. To look for a textual analysis may be a typical lawyer's approach not necessarily followed by a sociologist or a political scientist such as Mr. Banton. However, it is difficult for the reader to understand and to appreciate that the Convention not only prohibits racial discrimination but rather "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin." In particular, the meaning of descent and national or ethnic origin does not receive any clarification in the book. Nor is it clearly stated that this wide definition of racial discrimination has made it unnecessary for the Committee, so far, to further define the notion of racial discrimination. My attempts in that regard, in particular when the Committee discussed whether the remnants of the caste system in India would fall under the Convention, were regarded as academic.

Chapter 6, after dealing with the expectation of States Parties concerning the Convention, analyses the Rules of Procedure as adopted by the Committee. These rules have in the following years been significantly modified and supplemented, reflecting the changing perception of the Committee on its role in the implementation of the Convention. This chapter is a crucial one. By describing the functioning of the Committee when dealing with the first reports, the author skillfully introduces the reader into the progressive development of the reporting system until 1978. At the beginning of chapter 7 ("The Last of the Cold War") the author indicates that one has to distinguish between the period before 1978 and the one between 1979 and 1987. It is certainly true that the East-West confrontation was felt in the Committee. However, the examples given in that chapter show that it was not only that conflict but also the emphasis placed on State sovereignty which curtailed a progressive development of the Committee. Apart from that, budgetary restraints, mentioned only in chapter 8 ("Seizing the Initiative") proved to be a threshold for a more progressive functioning of the Committee.

Chapter 8 deals with new procedural developments undertaken before and after 1979. The representation of the reporting States at the Committee when it discusses reports of States Parties was already accepted in 1972; in 1988 the country-rapporteur system was introduced and, in 1991, a format

for deciding on Concluding Observations was found. However, such procedural innovations were only possible after the Committee accepted the use of information other than that provided by the reporting State for the assessment of reports. This is briefly mentioned under the subheading "Overdue Reports". The Committee has changed its character over the years, a fact which would have been worth further elaborating upon. It has become a forum to discuss with States Parties how to improve the implementation of the Convention. Such implementation procedure belongs — to borrow a term from international environmental law — to a system ensuring compliance by non-confrontational means.

Chapter 8 deals at great length with the phenomenon of overdue reports. The Committee had agreed in 1988 that after the submission of initial comprehensive reports States should submit further comprehensive reports at four-year intervals. Nevertheless, the backlog of reports is substantial. The Committee has developed a system which puts some pressure upon States to live up to their reporting obligations. This system, which has been adopted by several other treaty bodies, is explained in detail. The remarks on individual communications are limited, which may be due to the fact that the Committee, so far, has not often been called upon to decide on individual communications. It would have been worthwhile considering why the Human Rights Committee has quite a different experience with individual communications. Banton elaborately explains the Preventive Action procedure which the Committee adopted and the initiatives taken on the basis thereof. It would have been interesting to learn how the author assesses the current procedure, since it seems as if the Committee has lost some of its initial enthusiasm in that respect. In recent sessions the deliberations on critical situations such as in Liberia, Rwanda and Burundi were cut short. No further spectacular decision has been taken by the Committee under this procedure.

Chapters 9, 10, 11 and 12 deal with the dialogue of European, American, African and Asian States; East European States are missing as a separate chapter. It is obviously the underlying assumption that each region has its own particularities which can be explained most appropriately in different chapters. It is questionable whether this is fully correct. The Committee always stresses that all States Parties are to be treated equally. The author deals with the European States article by article and thus gives a very careful and differentiated picture of how the Convention is implemented in Europe. The treatment of the reports from American States is different. Here only one aspect is highlighted, namely the situation of indigenous peoples. It is true that the Committee has focused upon this aspect when, for example, it considered the reports of Chile, Peru, Mexico and Guatemala. However, other issues were also raised. As far as African States are concerned, yet another approach is taken. This part very much concen-

trates on Rwanda and Burundi. However, it fails to address in depth the pertinent question as to whether this conflict is to be regarded as an ethnic one, which has frequently been denied by the government of Burundi. Apart from that, the Committee has often been faced with the problem of convincing representatives of States Parties that in a certain situation an ethnic component was involved.

The book has bright points and shadows. It provides an in-depth and vivid description of the functioning of the Committee on the Elimination of Racial Discrimination. In that respect it constitutes a milestone and will certainly add to the reputation of the Committee. It does not, however, systematically inform about the content of the Convention on the Elimination of All Forms of Racial Discrimination and, therefore, it is difficult for the reader to assess the potential which still rests in the Committee. Finally, given the broad title of the book, the reader may expect information on the activities of the Commission on Human Rights . In particular, the Special Rapporteur on Racism of the Commission on Human Rights has only briefly been mentioned. A comparison of his reports on Brazil or Germany, for example, with the assessments of the Committee might have enriched the informative value of the book.

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Milton J. Esman and Shibley Telhami (eds): International Organizations and Ethnic Conflict. Cornell University Press, 1995. 343 pages.

Two assistant professors of political science at Cornell University in the United States seized the initiative and persuaded not only one fellow political scientist at Cornell but no fewer than nine colleagues from other American universities to address the problem of the role of international organizations in ethnic conflicts. The editors selected primarily those colleagues who had already evidenced their interest in the topic by recent related publications. The result is a comprehensive volume with articles from thirteen authors.

Unfortunately the authors agreed to only two case studies, quite different from each other, as the basis for their approach to the subject: civil war in Lebanon and the disintegration of Yugoslavia. It would not have been difficult to treat the new problems arising from each situation in general articles or in the evaluation of existing literature that has already addressed these two cases. However, because it was important to the authors to address current problems, dealing with situations for which solutions had not yet been found, could not be avoided. (Introduction, pp. 1–17).

At the time, the scope of intervention by the United Nations and other organs of international organizations was without precedent. This allows inquiry as to whether such intervention was just a temporary phenomenon, an actual expansion that would not hold, or a structural transforma-

tion. J. Donnelley attributes the growth to a shifting of the division of power between the affected subjects of international law, comparable to the shift that occurred in the transition from the League of Nations to the United Nations. In the new post-Cold War regime priorities had to be arranged differently. This development can be seen much more clearly in the 1970 intervention by the Arab League and Syria in Lebanon than in the Yugoslav conflict of 1991/92.

To give an idea of what role international organizations played in the post-Cold War era, the book provides an overview of measures taken and also describes the conditions under which these measures were possible and how successful they were. Here it was important to analyze carefully which measures were tied to the Cold War and which could still be drawn upon after it ended. In this manner it could be made clear that both the continuation of the Cold War and membership in the United Nations with its accompanying duties (e.g. in the area of development assistance) left available only a very limited scope of ways to fight the problem of ethnic conflict. This approach shows starkly the extent to which mid-size and small states, themselves among the 180 members of the United Nations, were called upon in the interest of other areas that had become sovereign. Thus it was necessary in 1992 to draw upon 32 states to come up with the essential means for normalizing life in Somalia. A private organisation (CARE) had to be called upon to distribute food in areas threatened by famine. To obtain information on the areas that had become ungovernable, United Nations organs were dependent on the national governments of neighboring states. In many cases of emergency assistance, regional organisations were more of a hindrance than a help. The success with the Albanian-speaking population in Kosovo provided a happy exception.

These experiences notwithstanding, the authors hope that the United Nations can prove itself to be more effective as an international organization.

In the last century Lebanon survived two periods of turbulent political upheaval: From 1931 – 1941 the Egyptian occupations, when Ibrahim Pascha was Viceroy. To be sure, this so-called 'Golden Age' was also characterized by a tendency toward communal conflict. Chronologically this instable period was followed by the era of Ottoman rule (1939 – 1956) in which the Ottoman administrators actively remembered their administrative powers in military and tax matters.

In discussing the current conflicts in the territory of the former Yugoslavia, its historical roots are first examined. (V.B. Gagnon, Cornell). In order to realize the romantic ideal of a unified state for all of Southern Slovenia, the form of a multiracial state ('Vielvölkerstaat') was deliberately chosen. Truly different groups were thus brought together and it was to be expected that conflicts requiring resolution would arise between them.

The author for this topic revisits the Austro-Hungarian monarchy, in which he finds a modus vivendi for the varied groups.

During the Second World War the differences between the two main groups were partially bridged by the common creed of Communism under Tito. At the same time, however, the tensions were rendered considerably more difficult by the Croatians taking their own path. Only the excommunication of this multiracial state from the Soviet Union in 1948 and the development of its own economic system of 'workers self-management' made a common life possible. This was because now the essential economic decisions which were made at the federal level — that is, the Republic — could be made more under the influence of economic efficiency than ideological dogma. It was not easy to keep these two foundational ideas clearly separated from each other while applying them contemporaneously. An essential clarification came only with the constitutional revision of 1971–72, which guaranteed stronger autonomy for the six republics and the two provinces. In any case, it must be kept in mind that the existence of a common army with its own economic needs often required compromises to be reached.

With this historical background, Yugoslavia had to survive difficult times in which only 20% of the population could maintain its standard of living while 80% were dependent on means of support such as those from the IMF, which were only guaranteed under specific conditions.

In 1993 and 1994 numerous plans for the pacification of the embattled areas of the former Yugoslavia were proposed, either by individual states (the United States, the United Kingdom, France) or by organs of international organizations (the UN Security Council, NATO; the European Union). Revised borders in a transition period were spoken of (S.C. Woodward): what results the violent conflicts, which aroused considerable attention at the international level, were to have in the end cannot be learned from this presentation.

The last article on Yugoslavia is dedicated to the problem of how the international community addressed the situation (Steven L. Barg, Brandeis). In August 1992 an International Conference on the Former Yugoslavia (ICFY) brought all interested parties together in London to discuss the conflict. A wide range of opinions was evident. Although a few participants called for direct military intervention by an international force, there was nonetheless no readiness to deny the United Nations Security Council the competence to set such an action in motion.

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(Translated by Betsy Röben)

Martin Scheinin (ed.): International Human Rights Norms in the Nordic and Baltic Countries. Martinus Nijhoff Publishers, 1996. 309 pages.

For many years, the legal status of international human rights treaties in the domestic legal orders of the Nordic countries was characterized by the fact that — with the exception of Finland —their substantive provisions were considered not to be directly applicable and, thus, could not be invoked by individuals in their dealings with state authorities and courts. This raised considerable problems in particular with regard to the European Convention on Human Rights (ECHR) notwithstanding the general tendency of the courts to apply and interpret norms of domestic law in such a way as to guarantee, as far as possible, their conformity with the provisions of such international human rights treaties. This general situation has, however, most considerably changed during the last years. Since the adoption of the 1992 Danish Act Incorporating the European Convention on Human Rights, steps have been taken in all Nordic countries to incorporate human rights treaties — or, at least, the ECHR — into their respective domestic legal orders. Since, possibly due to linguistic constraints, this development does not seem to have been sufficiently noted outside the Nordic countries, the publication of the present book is much to be welcomed. Its value is further enhanced by the fact that it also contains reports on the legal status of such human rights treaties in the domestic legal orders of the Baltic countries information on which has been particularly scarce in non-Baltic languages.

In his general introduction to the topic of the reports collected in this book (pp. 11–26), *Martin Scheinin* points out, inter alia, the above-mentioned recent developments and the crucial role of the domestic courts as regards the future implementation of international human rights norms into the domestic legal orders. As to Estonia (pp. 27–72), *Aap Neljas* stresses that, in order to make the provisions of an international human rights treaty directly applicable, the Estonian *Riigikogu* (Parliament) must pass a specific act incorporating that treaty into the Estonian legal order; this is usually done in connection with the approval of the act allowing for the ratification of that treaty. In her report on Latvia (pp. 73–110), *Ineta Ziemele* discusses the two possibilities offered by Latvian constitutional law to ensure the domestic application of international human rights treaties: either, the Constitution could be amended in such a way as to generally accord such treaties direct applicablity, or Parliament would have to adopt specific acts individually incorporating such treaties into the domestic legal system; in order to ensure that international human rights norms will clearly prevail over domestic statute law, she proposes that the first alternative be chosen. The very instructive report by *Vilenas Vadapalas* on the situation in Lithuania (pp. 111–168) might be summarized as

follows: Only ratified treaties form a constituent part of the Lithuanian legal system; Parliament ratifies a treaty by enacting a resolution on ratification which makes the treaty directly applicable in domestic law. The situation in Iceland (pp. 169–202), as described by *Stefan Stefansson* and *Ragnar Adalsteinsson*, is characterized by two recent developments: First, the 1994 European Convention on Human Rights Act that incorporated the ECHR into domestic Icelandic law and, thus, resulted in its internal direct applicablity, and, second, the 1995 Constitutional Bill that added a modern human rights catalogue to the Icelandic Constitution; it should be stressed, however, that so far no measures have been taken in order to incorporate human rights treaties other than the ECHR into Icelandic domestic law. *Kyrre Eggen* reports that important developments concerning the status of human rights treaties have recently taken place in Norway (pp. 203–226): Pursuant to the recommendations of a public committee (the *Menneskerettighetslovutvalget*), the Norwegian Parliament adopted, in 1994, a new Section 110 C of the Norwegian Constitution that obliges state authorities to respect and ensure human rights and further states that provisions concerning the implementation of (human rights) treaties shall be laid down by an act of Parliament; in the latter context, the committee proposed that human rights conventions, in particular the ECHR, should be made directly applicable in Norway by means of passing a specific act of incorparation. With respect to Denmark (pp. 227–256), *Birgitte Kofod Olsen* describes the development that resulted in the above-mentioned adoption of the 1992 Act Incorporating the European Convention on Human Rights and states that there are no similar plans as regards other human rights instruments. She notes, moreover, that, since 1992, numerous decisions of the Supreme Court have been based upon the ECHR. Since, as stated above, human rights treaties have been traditionally accorded, usually by means of incorporation, direct applicablity in Finland (pp. 257–294), *Martin Scheinin* focusses on the relevant jurisprudence of, in particular, the Supreme Administrative Court and the Supreme Court that show the most considerable relevance attached to human rights treaties in Finnish court practice. Finally (pp. 295–305), *Göran Melander* reports that, as of 1 January 1995, the ECHR has been incorporated into Swedish law by means of a specific act of Parliament passed in 1994 and has, thus, been made directly applicable; furthermore, he urges the Swedish *Riksdag* also to incorporate other major human rights treaties into Swedish domestic law.

All these reports contain very useful additional information such as quite detailed analyses of the pertinent jurisprudence of the courts of the respective countries and extensive references to relevant literature. Moreover, they include annexes to the major legal texts such as excerpts from the various constitutions and reprints of incorporation acts, all in English

translation. In sum: This is a book of high relevance to lawyers interested in the legal relationship between international human rights law and domestic legal systems.

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Moshe Hirsch (ed.): The Responsibility of International Organizations Toward Third Parties: Some Basic Principles. Martinus Nijhoff Publishers, 1995. 220 pages.

The question of responsibility of international organizations and their member states has become a relevant and popular topic, particularly as a result of the Tin Council Case. The question, however, has yet to find a satisfactory answer, and therefore, it still attracts further interest. The book under review makes a contribution to the discussion.

It is subdivided into six chapters. The first introduces the subject, the second deals with the first element of responsibility, i.e. the breach of an international obligation. Here, the author analyses how responsibility is attributed with respect to the various sources of international law. As for international treaties he focuses mainly on the problem of multilateral agreements and reaches the conclusion that in cases where the attribution of competences between the organization and its members is clear the responsibilities will follow the competences, otherwise an injured party has the right to require clarification, firstly from the international organization, then from the member states. If the information requested is not given, the international organization and its member states shall be held responsible. This solution is mainly derived from the principles established by Chapter IX of the United Nations Convention on the Law of the Sea. With reference to the responsibilities established by the law of war which were recognized by the United Nations in its military activities, the author states that there is also a responsibility of international organizations under international customary law. Special attention is paid to obligations relating to national powers which are transferred to international organizations. This approach is surprising because it does not fit the other criteria under which a breach of an international obligation is examined, i.e. the different sources of international law. Clearly, the question of the transfer of competences is of utmost importance for the evaluation of responsibility in international law; however, it does not concern breach of an international obligation, but is closely linked to the question of attribution of responsibility as dealt with in chapter four of the book. With respect to the distribution of responsibilities between the state transferring its functions and the international organization toward third parties, with which the state concluded a treaty prior to the transfer, the author establishes that the state shall not be absolved from its obligations unless the international organization is legally bound to comply with them; the international

organization shall be bound as far as it receives substantial obligations undertaken by all member states; with respect to procedural mechanisms of such treaties concluded by the member states, it has to negotiate with the third parties which take part in them. As far as the obligations undertaken by the member states are inconsistent, third parties shall first address the international organization and if it refuses, the respective states.

The third chapter is dedicated to the question of "attribution in the responsibility of international organizations"; here, in the first place, the acts of state organs placed at the disposal of international organizations are analysed, with special reference to the practice of the United Nations Forces and armed forces of other international organizations. The author establishes that the attribution of control will essentially depend on who exercises the control over the respective state organs. With respect to the territorial link of a breach of international law, it is shown that a state on whose territory such an act is committed generally is not held responsible, unless it violates obligations to prevent such a breach. As for the implementation of acts of international organizations, the author, basing his considerations on the practice of the European Communities, comes to the conclusion that the implementing state shall be held responsible only insofar as it has a discretion with respect to the implementation. Finally, the author states that the responsibility of the international organization is not set aside if their organs act ultra vires. A third party will share the loss resulting from the wrongful act if it knew the violation of competence rules and could have avoided it.

Certainly, the most interesting part of the book concerns the responsibility of members of international organizations. Here, international treaties which tackle this problem are briefly listed; treaty law is considered to be quite fruitless for shaping an argument for or against member state responsibilities, as special treaty provisions excluding such responsibility cannot be applied vis-à-vis third parties, and, as far as they are not contained in a constituent instrument of an international organization, a conclusion that member states must be held responsible is not admissible. The analysis of the judicial decisions in the field — Westland Case and Tin Council Case — leads to the statement that a general line with respect to member states responsibility cannot be perceived; furthermore, the national courts involved in these cases generally applied national law. The author comes to the conclusion that the practice of states and of international organizations only indicates that the regime of concurrent responsibility is rejected; beyond this "negative statement" no conclusion can be drawn from international practice. Due to their large variety in the field of limited responsibility, general principles of law are qualified as quite useless in the detecting of basic rules which may help to shape a regime of member states' responsibility. At the end of chapter four the author gives

a short resumé of the most important writers who dealt with the question of the responsibility of member states, concluding that most lawyers, in one way or another, favour a responsibility of member states of international organizations.

According to the author the research shows that international law does not offer an answer to the crucial question of whether member states should be considered responsible for the acts of international organizations. Nevertheless, he reaches the conclusion — evidently based on wishful thinking — that international law points to the responsibility of the member states.

Following this line of thought, in the fifth chapter the author tries to develop his own concept of the relationship between the responsibility of international organizations and their member states. In this attempt he is guided by common sense and the idea of an equitable solution. After having rejected a limited responsibility of the member states — because it deprives the injured person of creditors — ; a concurrent responsibility — because this would inspire member states to get involved in the management of the international organization and endanger the independence of the latter —; secondary responsibility, indirect responsibility — because of the uncertainty whether the member states will fulfil their obligations towards the international organization to enable it to meet its obligations toward third parties —; responsibility according to the intention of the parties, because such common intention is only fictitious; — and the responsibility toward third parties in accordance with responsibility toward the organization — because it would presuppose a knowledge as to the extent of the responsibility — the author proposes a different approach. Firstly, common intentions of the parties, i.e. the member states, the international organization and third parties, should be respected; furthermore, member states shall have an indirect responsibility to third parties which voluntarily entered into contacts with an international organization from which the wrongful acts resulted, i.e. member states shall, internally, according to the constituent instruments, cover the obligations of the international organization toward third parties. Finally, the member states shall be held secondarily responsible toward third parties, which suffered an injury which does not result from a voluntary relationship with the international organization; in this case, the burden shall be divided between the member states according to the relative contribution of each member state to the organization's budget. The member states shall be jointly and severally responsible towards the injured third state. Exceptions to these general rules will be admitted in cases in which the international organization is accused of illegal acts by the member states or in order to evade legal obligations; once these conditions are met, the veil of the international organization will be pierced.

The book contains quite interesting material concerning the question of responsibility of international organizations and their member states. However, it certainly does not examine all events and legal considerations which could help in understanding the present situation; i.e. it does not examine commodity agreements, and it does not analyse the Certain Expenses Case at all, which could give valuable clues concerning the relation of member states and international organizations toward third parties. Although the statement that international law does not offer a fully fledged system on how to handle the responsibility of member states toward third parties, is completely correct, it nevertheless raises more questions which could be used for the development of an answer than the book leads us to believe. The author once having stated that salvation cannot be found in the existing international law, searches for rescue in his common sense and uses as a leading point of reference the idea of equitable principles which he expands with his own thought. Of course, it cannot be denied that a lawyer is wiser than the law, and the solutions he offers will in quality prevail over those established in the existing law. However, there is a presumption, that the solutions fit better within the entire system if they try to refer to the existing law and to be in tune with it. Apart from this remark, one notices that the author is not as free from pre-existing concepts as he pretends to be. For example, he refuses the general principles of law as source because of the variety of common resp. civil law concepts on corporations. Nevertheless, he uses such notions as "piercing the veil", "abuse of the separate personality", "evasion of legal obligations" which are pure inventions of civil/common law.

The book could have made a more important contribution to the topic in question, if it had tried to analyse the basic concepts of attribution of responsibility of the actual international law more profoundly, i.e. the linkage of control and responsibility or state function and inherent state responsibility. Furthermore, the concept of international organizations deserved a closer examination; to reduce them to entities which consist exclusively of treaty links, as the author does when dealing with the problem of transfer of state functions, is certainly not an opinion which will be shared by the majority of international lawyers, nor can it be based on practice.

Referring more closely to current international law when developing its solution to the problem, the book could have been considered not only as the expression of a vision of international law to come but also as a helpful guide in practical cases of today, in a time before the vision is realised.

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