
Book Reviews

Watson, James Shand. *Theory and Reality in the International Protection of Human Rights*. Ardsley, New York: Transnational Publishers, Inc. 1999. Pp. x, 333. Index. \$115.00.

Unhappy with the acceptance of human rights in international law, James Shand Watson, in his recently published book, attempts to break up the party. In a book openly hostile to the human rights movement, Professor Watson's central claim is that the basic norms of international human rights, such as the right to life, are not valid norms of international law (at 15). In support of this thesis he considers various legal arguments commonly used to validate human rights norms, rejecting each in turn. Generally he argues that supporters of international human rights law misunderstand the nature of the international system, overestimating the capacity of international law to change the behaviour of states.

Central to Watson's critique of human rights is his theoretical understanding of international law. He is a staunch traditionalist for whom international law is a decentralized customary system, containing primary but not secondary rules. As such it is a 'primitive system', to be contrasted with legislative hierarchies. Accordingly, Watson argues that rule creation in this customary system requires first an observable pattern of behaviour and then the consent of states. That disobedience of a rule prompts a sanction is, he adds, a strong indication that a rule is considered binding (at 20–21). For him, this theory is 'the only appropriate [one] for the analysis of the international legal system' (at 35). This account of the international legal system is typical of the entire work: the positions defended are uncompromising, whilst the tone in which they are presented is

polemical. A typical example of Watson's tone is his proclamation early in Chapter 2 that '[i]n view of the fact that millions of people have been killed by their governments concurrently with the existence of "prohibitive" norms, the human rights regime cannot be considered a success by any stretch of the imagination' (at 18). It does not however require any 'stretch of the imagination' to argue that, whilst highly imperfect and as yet incomplete, the human rights regime has been a limited success. For example, 50 years ago human rights violations were not a legitimate subject on the international diplomatic agenda. Now a country that grossly violates the human rights of its citizens will at the very least be called upon to respond to other nations' concerns. Had Watson acknowledged the possibility and reasonableness of such an argument before rejecting its significance he would have been more persuasive. After all, it is quite true that the human rights regime faces an implementation problem of colossal proportions.

Aside from the tone adopted, Watson's desire to yield no ground frequently weakens his argument, when a small concession or more measured phrase might have strengthened it. For example, he remarks repeatedly that 'international law does not operate in a legislative manner' (at 26, also 37, 42), without once mentioning the development of the multilateral treaty, which is arguably the closest the international system gets to legislation. Discussion in this context of trends in international law towards more 'legislative' treaties such as the 1982 United Nations Convention on the Law of the Sea (considered briefly but on a different point at 41) would have strengthened Watson's argument. Equally, Watson argues that state consent is 'not optional' in international rule-making (at 45) without noting the situations in which

states may be bound without it, situations to which Christian Tomuschat devoted a course at the Hague Academy in 1993.¹ This is not to say that Watson is wrong to stress the importance of consent as strongly as he does, but by ignoring obvious objections he opens himself to easy criticism.

Having set out his view of the international system, Watson then applies it to the field of human rights. The priority of social facts to rules which Watson finds in international law presents an insoluble problem for human rights: '[i]f rules precede facts in hierarchy but facts precede rules in custom, how can a horizontal system such as international law tackle a problem that is fact-based?' (at 26). Yet are not all the problems which international law deals with 'fact-based'? One is left wondering whether Watson has any faith in the capacity of international law to regulate state behaviour. Later it becomes clear that he does as, in rejecting the criticism that he is merely asserting that 'might is right', he comments that reciprocity has the effect of ultimately limiting the abuse of power by powerful states (at 42). Yet even with this concession, the normativity Watson is prepared to concede to international law is rather limited. Thus, for Watson, the problems of international human rights are 'traceable to the predominance of social fact as a source of rules in primitive systems, together with the certainty that in international law these facts include significant violations of human rights coupled with a consistent lack of enforcement' (at 26). Watson is thus clear that the social facts he is talking about are not only the human rights violations themselves but also the failure of other states to sanction those same human rights violations. He argues that '[i]f, in 1998, there are twenty substantial violations of human rights occurring and no effective international action is forthcoming, then there are approximately 190 acquiescences multiplied by twenty violations, a total of 3,800 decisions by states to acquiesce' (at

69, also 271). For Watson, occasional attempts at enforcement are insignificant given this degree of acquiescence.

In attributing a clear meaning to state inaction Watson relies on the significance he attaches to sanctions: a complete failure to sanction the behaviour of one state may properly be considered to show that the world community acquiesces in that behaviour (at 64). The viability of interpreting in this way the failures of states to sanction human rights violations is however open to question. Watson is suspicious of state motives and therefore happy to interpret inaction as acquiescence. He comments that 'it is in the interest of governments not to create a regime of efficacious primary and secondary rules for the protection of human rights' (at 87, also 325). That this position is too simple is clear if one considers the effective system of human rights protection that has been set up by European states. Are European governments misguided and acting contrary to their own interest, or might one concede that governments can sometimes have an interest in human rights protection? The relevance of the example of the successful European system of human rights protection is however only considered much later and is dismissed in three short paragraphs, with the comment that '[c]learly, the European experience is due to the fact that the states involved share the same culture, standard of living and high regard for the rights of the individual'. As this is not the case worldwide, the European Convention is, for Watson, of limited relevance (at 162). Clearly, Watson's admission that European states have a high regard for the rights of the individual sits awkwardly with his earlier generalization that governments have no interest in creating effective systems of human rights protection.

Moreover, the dismissal of the potential global significance of the European experience without discussion or reference to relevant, easily available literature severely weakens

¹ 'Obligations Arising for States without or against Their Will,' 241 *RdC* (1993), at 209 *et seq.*

Watson's position.² Watson is right to observe that in the field of human rights states do not have the same strong practical incentives to cooperate internationally that they have in relation to international air travel or telecommunications (at 75). However, his assumption that there exist fixed state interests, which do not include human rights, is too simple (revealed clearly at 26, second paragraph). Much work has been done, particularly in the field of international relations, suggesting a move away from Realist assumptions that states are all alike and share certain fixed interests towards considering state interests as variables. Watson's book is determinedly not interdisciplinary in its approach, however. It is a work of traditional international legal scholarship, based on the Realist assumptions of that field. This is a weakness at a time when international lawyers and international relations scholars are increasingly pooling their resources. In this context Watson's interpretation of state inaction as acquiescence becomes less compelling. Must one really set aside all verbal expressions of concern by governments and instead look only at the regular failure to send troops? Might inaction not be due to a hundred other factors, rather than a desire to acquiesce in the slaughter? It is submitted that inaction cannot be presumed to imply approval.

Watson is especially critical of the methods of human rights scholars. Chapter 4 stresses the importance of state behaviour in determining custom, and criticizes the tendency in human rights texts to focus in their discussions of custom and customary rules on what states say and sign but not what they do. The point is forcefully argued but with much unnecessary repetition, particularly of statistics as to government-organized violations of the right to life already listed at considerable length in the opening chapter (at 2–12 and 88–102). Chapters 5 and 7, on the use of General Assembly resolutions and subsidiary

sources in human rights argument, respectively, are much more successful. Arguments that General Assembly resolutions such as the Universal Declaration of Human Rights have become international customary law are thoroughly and convincingly rebutted. In Chapter 7, the selective use in human rights scholarship of decisions of the International Court of Justice, and the oversights as to their limited legal consequences, is well discussed. Equally, the bootstrapping involved in the selective citation of previous scholars as authority for positions that many states regularly contest is rightly censured. Watson attacks the lack of empirical data in many works (at 190) and the occasional appeals to the self-evidence of a given proposition (at 201).

As always the tone is caustic, although much of the unfortunate human rights scholarship cited would seem to merit it. However, one is perhaps justified in expecting a high level of scholarship from a professor who engages in such spirited criticism of the quality of the work of his fellow scholars. Unfortunately, this is not always the case. On page 76 Watson states that 'looking for entries under "domestic jurisdiction" or "Article 2(7)" in the indices of most human rights monographs is an exercise in futility'. The relevant footnote refers the reader 'for examples' to Chapter 7 at notes 63 to 67. Surprisingly, given the uncompromising tone of the original assertion, one finds that these notes contain references to only two monographs, with notes 64 to 66 referring back to the first text cited in note 63. Aside from the extremely dubious nature of the original claim, it shows considerable nerve in a book which criticizes scholars for not basing their assertions on empirical fact, to make such a claim on the basis of a sample of two books, the references to which are hidden away in another chapter, and made more numerous by a series of *ibid* notes. Other weak or misleading examples include the discussion of the Amin regime in Uganda (at 4–5) and the British action in the Falkland Islands (at 73).

In Chapter 6 Watson discusses treaties, which would seem to provide the greatest

² See Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997), at 273–391, discussing this precise point.

problems for his thesis as to the general invalidity of international human rights norms. Here too the scholarship is not always of the highest standard. He comments at one point that '[b]y voting inconsistently in the committees set up by treaty, states are ensuring that a set of binding secondary norms is not being built up' (at 157). The error here is that the committees set up under the various human rights treaties are made up of independent experts and not state representatives. As regards the substantive argument, Watson's bold conclusion is 'that the norms of the broad, universal human rights treaties are not considered binding even on ratifying states, a position that is empirically verifiable' (at 168). His reasoning is that, given the level of violations, the customary norm of *pacta sunt servanda* should not be considered to apply to international human rights treaties. *Pacta sunt servanda* applies to traditional reciprocal treaties but not, he suggests, to unilateral human rights treaties (at 168). This is a further example of Watson overplaying his hand, for the position he arrives at in order to avoid compromising his original thesis seems unsustainable on any reasonable account of international law (including his own). If a state's representative signs a document in which the state in question considers itself to have undertaken a legal obligation, is Professor Watson in a position to say that he knows better and that they have done no such thing? Watson could have simply accepted that human rights treaties are formally valid international law norms, and then argued that states have intentionally limited the importance of this regime, intending to use the norms as a smokescreen for their continued bad behaviour. In this context he could have considered the extensive reservations made to human rights treaties by some governments. A slightly less ambitious argument, whilst attracting less attention, would have deserved more serious consideration.

Chapter 7 reiterates the continuing validity in international law of Article 2(7) of the UN Charter, already much approved in Chapter 4. Of course there is plenty of support for such a proposition but one is nonetheless left won-

dering, especially given recent developments in Kosovo and East Timor, whether international legal realities might not be moving in a different direction. This doubt is also present in relation to the following chapter, which rejects the existence of a doctrine of humanitarian intervention. It is headed with a quotation from an essay by Professor Brownlie, published in 1974, denying the existence of a right to forcible humanitarian intervention, with Watson arguing that things have not changed. After a useful discussion of natural law, the book concludes with a final chapter stressing that serious human rights issues require domestic political solutions (at 316). The effective implementation of international human rights would, he argues, require a supranational system which governments will never tolerate. This is a perfectly plausible argument but it would have been more persuasive had the potential global significance of the growing regional mechanisms of supranational human rights protection been discussed.

There is a considerable need in the human rights movement for critical discussion of the often unchallenged orthodoxy as to the desirability of the international human rights regime. Frequently this book provides challenging arguments of the kind required, but ultimately it is prone to exaggeration in its tone and conclusions. This lack of nuance undermines the utility of the work for it allows human rights lawyers to challenge the accuracy of Watson's criticisms, rather than being forced to reconsider their own arguments. In focusing exclusively on 'international' human rights, Watson devotes insufficient attention to regional human rights mechanisms which, it can be argued, encourage more optimistic assessments of the utility of treaties in protecting human rights. Equally, the work seems somewhat dated in its assumptions about state interests, often suggesting that states can have no interest in implementing human rights. An openness to insights from other disciplines, such as international relations, would have helped in this respect. Finally, in an age of globalization and increased interdependence, Watson's analysis

of the international system seems to suffer from the same weakness he finds in human rights scholarship: focusing too much on paper rules, in Watson's case Articles 2(4) and 2(7), whilst ignoring the realities of state practice.

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Palmeter, David and Petros C. Mavroidis. *Dispute Settlement in the World Trade Organization – Practice and Procedure*. The Hague, London, Boston: Kluwer Law International, 1999; Pp. xvi, 313. Index.

One of the greatest achievements of the Uruguay Round of Multilateral Trade Negotiations which led to the establishment of the World Trade Organization in 1995 was the creation of a new, uniform and binding dispute settlement mechanism. Codified in the Dispute Settlement Understanding (DSU), this Agreement modifies and elaborates Articles XXII and XXIII of GATT 1947, which had hitherto governed the settlement of disputes between members of the GATT. Two key features of the new system are especially important: firstly, the DSU is applicable to disputes under any of the Multilateral Trade Agreements within the WTO framework. Thus, the phenomenon called 'GATT *à la carte*' – i.e. the members themselves could decide which Agreements to join – which impaired the functioning of the old dispute settlement mechanism, has come to an end, also with regard to dispute settlement. Secondly, the establishment of a Panel as well as the adoption of the Panel (and Appellate Body) Reports no longer require consensus among the contracting parties of the GATT but, by contrast, unanimity is needed to prevent the adoption of a Report by the General Council in its guise as Dispute Settlement Body (DSB). This introduction of 'negative consensus' can be regarded as one of the most dramatic changes in the GATT system. Since the winning party can always block negative consensus with its vote, this means that there is now an obligatory quasi-judicial dispute settlement pro-

cedure for economic disputes on a worldwide scale.

Certainly, however, the new dispute settlement system can only meet all expectations if its provisions are fully understood by those who must use it. Thus, Palmeter and Mavroidis, in their newly published book, aim to provide a manual for 'practitioners, for diplomats and government lawyers who prepare and present cases to dispute settlement panels' of the WTO. These authors are exceptionally suited to this task since they have worked both as scholars and as practitioners in the field for a long time.

The first chapter of the book provides a historical introduction, starting with the failed attempts to create an International Trade Organization (ITO), moving on to the negotiation of GATT and finally to the WTO. The authors then examine in detail the jurisdiction of the Dispute Settlement Body under the DSU. In Chapter 3 the sources of law relevant to the settlement of disputes are analysed, following the order established in Article 38(1) of the Statute of the International Court of Justice. On this basis the authors go on to explain each stage of the panel process in one chapter. Chapter 4 thus examines the panel process itself and addresses the legal problems that have been raised, such as burden of proof and standard of review issues. The next chapter is devoted to special rules and procedures for developing countries and under each of the Multilateral and Plurilateral Trade Agreements covered by the DSU. The appellate process is set out in Chapter 6, followed by a chapter on adoption and implementation of reports and another on remedies. Chapter 9 sums up some of the findings in a short conclusion. The book closes with a table of cases, a bibliography, an index and appendices containing relevant excerpts from the texts of the Agreements.

What Palmeter and Mavroidis have achieved is the first complete and systematic introduction to the WTO dispute settlement system. Although this is by no means the first book on the subject, earlier publications have dealt largely with the old GATT system, case law and policy questions (most notably E.-U.

Petersmann's *The GATT/WTO Dispute Settlement System*) or international dispute settlement in general (including J. G. Merrills' *International Dispute Settlement*). Palmetier and Mavroidis focus exclusively on the new system, without discussing in depth academic questions and policy issues related to international dispute settlement and the way these questions were solved (or not solved) in the DSU. This lack of scholarly 'depth' (exemplified by a chapter entitled 'Conclusion', which is a mere two pages long) can be regarded as a shortcoming of the work. Issues like the appropriate standard of review in panel proceedings, which are the subject of dozens of articles in all relevant periodicals, are treated in two paragraphs without quoting any literature for further reading (the bibliography is also very 'concise'). But then the book is not a comprehensive and conclusive commentary on the law of the DSU, nor does it purport to be one. Palmetier and Mavroidis intended to produce a manual for practitioners. With their well-written, clearly-structured and easily accessible book they have certainly fulfilled this objective.

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de Hoogh, André. *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*. The Hague, London, Boston: Kluwer Law International, 1996. Pp. xxiii, 444, Index. NLG 275, £110.25, \$184.

Ragazzi, Maurizio. *The Concept of International Obligations Erga Omnes*. Oxford: Clarendon Press, 1997. Pp. xl, 260. Index. £50, \$98.

Almost 30 years after the International Court of Justice more or less 'created' the category of 'obligations *erga omnes*' in its famous *obiter*

dictum in the *Barcelona Traction* judgment,³ the existence, meaning and impact of obligations 'towards the international community as a whole' are still the subject of heated dispute and controversy. The books under review aim to bring some light into the darkness of a concept which Professor Brownlie once called 'very mysterious indeed'.⁴ Despite a vast bibliography already in existence,⁵ they seem to be the first monographs in the English language on the subject.⁶

As is to be expected in an area in which divergent concepts abound, these authors' approaches could not be more different. Ragazzi seeks to limit himself to the treatment of 'the concept' of obligations *erga omnes* based on the practice of states, the International Court of Justice and the work of the International Law Commission. He aims to separate the criteria of identification of obligations *erga omnes* from the 'corresponding rights and remedies', which he believes too controversial to be treated at the present stage (at xii). De Hoogh does not share these concerns, taking as his point of departure the remedies for violations of obligations *erga omnes* and the work of the International Law Commission on international crimes of state. His emphasis is on theory, not on state practice. Unfortunately, the closing date of his study was 30

³ *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, ICJ Reports (1970) 32, at paras. 33–34.

⁴ Brownlie, 'To what Extent are the Traditional Categories of *Lex Lata* and *Lex Ferenda* Still Viable?', in A. Cassese and J. Weiler (eds), *Change and Stability in International Law-Making* (1988), at 71.

⁵ Ragazzi's bibliography counts 42 pages of small print, de Hoogh's 20; see also Spinedi, 'International Crimes of State Bibliography 1946–1984', in J. Weiler, M. Spinedi and A. Cassese (eds), *International Crimes of State* (1989), at 339–352.

⁶ For books in other languages, see C. Annacker, *Die Durchsetzung von erga omnes Verpflichtungen vor dem internationalen Gerichtshof* (1994); C. Günther, *Die Klagebefugnis der Staaten in internationalen Streitbelegungsverfahren* (1999) (reviewed in this issue, at 814–816).

June 1995, which means that he was not able to deal with the text as adopted by the Commission on first reading and the ILC deliberations thereafter.⁷

Ragazzi's book begins with an analysis of the *Barcelona* dictum of the International Court. He deduces two elements of obligations *erga omnes* from the dictum: universality, i.e. their bindingness on all states, and solidarity, i.e., the legal interest of every state in their protection. In his view, the latter element is in tension with the decentralized structure of the international community which is based on the consent of its members. In view of the fact that obligations *erga omnes* basically refer to a special regime of consequences for the breach of obligations of a fundamental character for the international community, his separation of the 'concept' of obligations *erga omnes* from the remedies for their violation is somewhat artificial.

As 'prefigurations' of obligations *erga omnes*, Ragazzi discusses 'objective regimes' such as state servitudes which are opposable to all states, and *jus cogens*. The author fails to spell out, let alone to discuss, his implicit assumption that obligations *erga omnes* (and *jus cogens*) modify the classic sources doctrine by excluding 'persistent objection' by a limited number of states. Do we first need a universally recognized obligation to assume that we are in the presence of an obligation *erga omnes*, or can those obligations be developed even despite the objections of individual states? As common elements between *jus cogens* and obligations *erga omnes*, Ragazzi identifies the objective of the protection of common interests and basic moral values, the identity of the classic examples of these categories as well as the similarity between some of their elements,

such as the notion of 'international community as a whole'. But he believes obligations *erga omnes* to be more precisely defined by the examples given by the Court.

Ragazzi proceeds with an analysis of these examples, namely the prohibition of aggression, the outlawing of genocide, and protection from slavery and racial discrimination. His analysis is largely based on judgments of the Court and the respective pleadings of states. Strangely enough, although he discusses the case in other respects, Ragazzi does not include in his list the *erga omnes* character of the right to self-determination which the Court expressly dealt with in the *East Timor* case.⁸ As common characteristics of the *erga omnes* obligations mentioned by the Court, the author lists their narrow definition, their character as prohibitions, their hard law nature, their derivation from rules of general international law belonging to *jus cogens* and embodied in widely ratified international treaties, and their importance for the realization of principal political objectives and basic moral values. The author sees the ultimate rationale of obligations *erga omnes* and their universal opposability 'in the recognition of the universal validity of the basic moral values that these obligations are meant to protect' (at 183). In his opinion, these obligations are independent from consent and are non-derogable. Based on this assessment, Ragazzi takes issue with de Hoogh's claim that there are no criteria for identifying the *erga omnes* character of an obligation. However, the generality of the criteria mentioned hardly justifies this conclusion. Ragazzi's 'tests' are unable to conclusively identify further 'candidates' for *erga omnes* obligations in the areas of human rights, environmental law and the law of development.

During the discussion, it turns out that the author cannot maintain his reluctance to precisely define the concept of obligations *erga omnes* and the remedies attached to them. For instance, his criticism of the International

⁷ See Report of the International Law Commission on the Work of its Forty-eighth Session (1996), *General Assembly, Official Records*, 51st Session, Suppl. No. 10, UN Doc. A/51/10, at 125 *et seq.* On the most recent discussion of the ILC on the matter, see Simma, 'The Work of the International Law Commission at Its Fiftieth Session (1998)', 67 *Nordic Journal of International Law* (1998) 431, at 446 *et seq.*

⁸ ICJ Reports (1995) 90, at 102 (para. 29).

Law Commission's view that it is *jus cogens*, and not obligations *erga omnes*, which limits consent and necessity as circumstances precluding wrongfulness could only be justified by a precise delimitation of the concepts.

In the final chapter, Ragazzi compares obligations *erga omnes* with the related concepts of *jus cogens* and *actio popularis*, but still considers a comprehensive comparison 'inappropriate'. Finally, the author also distinguishes between obligations of general international law on the one hand and true obligations *erga omnes* on the other, the latter creating a bilateral relationship between the state concerned and the international community as a whole. However, the author does not take a definitive stand on the question of the mutual relationship of obligations *erga omnes* and *jus cogens*.

In light of the text of the *Barcelona* dictum that 'all States can be held to have a legal interest' in the protection of obligations *erga omnes*, it is surprising that Ragazzi finds it 'wholly unacceptable to suggest in general terms ... that the defining characteristic of obligations *erga omnes* is that their breach affects all States ...' (at 202). He argues that such a 'technical' view would disregard the moral purpose of the concept. But one might also argue that the 'technical' legal consequences attached to obligations *erga omnes* constitute precisely the reason why obligations *erga omnes* are to be considered a legal – as opposed to a purely moral – concept. Only in one respect does Ragazzi take a clear stand: in his view, *actio popularis* does not constitute a necessary implication of obligations *erga omnes*. However, obligations *erga omnes* are thus almost completely deprived of any legal effect.

Therefore, Ragazzi's limited approach to his topic, especially the exclusion of the question of remedies, has mixed results. On the one hand, he contributes to the clarification of criteria and candidates for obligations *erga omnes* beyond the *dictum* of the Court. On the other hand, his reluctance to engage in a discussion on the appropriate remedies leaves the reader wondering what the concept of *erga omnes* obligations is all about.

André de Hoogh takes an entirely different approach. Proceeding from the famous speech of US President Bush on the 'new world order', his treatment of obligations *erga omnes* is centred on the ILC Draft Articles on State Responsibility. He identifies the legal interest of all states in the performance of obligations *erga omnes* with the right of a state to demand performance of an international obligation. In the following, he analyses ILC Draft Article 19 (defining international crimes) and what is now Draft Article 40 (meaning of injured state) but also deals with *jus cogens* in and beyond the 1969 and 1986 Vienna Conventions on the Law of Treaties and, of course, the Court's *dictum* on obligations *erga omnes*. In de Hoogh's view, obligations *erga omnes*, just like peremptory norms, are subject to the recognition of the international community. In the last resort, he regards the contents of the two categories as identical. He criticizes the Commission for relying solely on international crimes and rejecting the interest of all states in the protection of all peremptory norms. Concerning the list of examples of international crimes in ILC Draft Article 19, he approves the inclusion of the prohibition of aggression, serious breaches of international obligations to safeguard the right of self-determination and core human rights, but regards as premature the inclusion of 'an international obligation of essential importance for the safeguarding and preservation of the human environment'. Thus, de Hoogh largely concentrates on aggression and the protection of core human rights. Revitalizing the eternal debate on fault as an element of international responsibility, he demands that intention be established for the commission of an international crime of state.

De Hoogh then deals with community enforcement of the concept of crimes of state. This author holds that the commission of an international crime does not only justify unilateral countermeasures by states individually, but also collective enforcement by the United Nations as the embodiment of the international community. He argues that community enforcement and the centralization of the enforcement function in an inter-

national organization are different sides of the same coin. Still, he has to admit that not all 'international crimes of state' fall into the ambit of Security Council competence under Chapter VII of the UN Charter.

The author's main example of collective enforcement of responsibility for an international crime is Security Council Resolution 687 (1991), which terminated the second Gulf War. Guarantees of non-repetition are said to include the call for a change of regime, but these should emanate only from the Security Council. Ultimately, de Hoogh calls for the development of international law to allow for humanitarian intervention, including the unilateral use of force in the event of the commission of genocide and other widespread breaches of basic human rights obligations. However, he is rightly sceptical of an involvement on the part of the International Court of Justice when urgent measures are required.

In de Hoogh's perspective, the UN system of collective security is transformed into a regime for the enforcement of obligations *erga omnes*. Consequently, he considers the rules of state responsibility to be directly binding on the Security Council when acting under Chapter VII of the Charter. However, as the author has to admit, the Security Council is not in all cases the competent body for the sanctioning of international crimes of states.

The author considers – and seeks to deal with – almost all the 'hot topics' of international law that are relevant to international crimes. For instance, he discusses the rules on the use of armed force, the judicial review of Security Council resolutions, and the binding nature of provisional measures of the International Court, albeit in a cursory fashion. Indeed, the book runs to more than 400 pages in small print. In addition, the rather apodictic and technical style of writing makes for labour-intensive reading. Less would probably have been more.

De Hoogh's overly technical and apolitical approach fails to grasp the revolutionary political impact of the establishment of an institutional apparatus to deal with international crimes. Such an approach has

already contributed to the failure of Special Rapporteur Arangio-Ruiz's proposals in the International Law Commission.⁹ In the words of Professor Tomuschat: '[A] viable regime for international crimes requires not only vision and ambition, but also a clear understanding of political realities which make up the constitutional ambiente of the international community.'¹⁰ Thus, de Hoogh fails to discuss the widespread objection to the very concept of 'international crimes of state'. As he rightly observes at the end of his study, the effective suppression of the commission of international crimes largely depends on the future institutional development of the United Nations. This insight, however, seems to be in conflict with any extensive understanding of the concept of 'state crimes'.

These books by Ragazzi and de Hoogh represent two possible ways of dealing with obligations *erga omnes*. The first, with its timid, careful not to go beyond state practice approach, results in a work which goes little beyond the assertion that the concept has, indeed, somehow come into existence, and comprises obligations of a highly moral character. The second, bolder volume asserts that the only consequent view consists in extending the right to invoke the international responsibility of another state for crimes to all states and that, in the final resort, the United Nations is the proper forum within which to enforce obligations *erga omnes*. The latter viewpoint, however, cannot escape the fact that indirectly injured states rarely, if at all, invoke obligations claimed to be *erga omnes* of other states, and that the Security Council is exercising its broad discretion under Article 39 of the United Nations Charter on the basis of political, non-legal criteria. Ultimately, the 'bold' view demands the

⁹ See, e.g., the debate in the ILC referred to by Simma, *supra* note 7, and the discussion in the Symposium on State Responsibility, 10 *EJIL* (1999) 339.

¹⁰ Tomuschat, 'International Crimes by States: An Endangered Species', in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998) 253, at 265.

emergence of a 'new world order' truly deserving that name.

In the Editor's Preface to Ragazzi's book, Professor Brownlie expresses his belief that the book 'will retain its status as the definitive work for quite some time'. With all respect, in view of the difficulties and intricacies involved in the concept of obligations *erga omnes* – which finds its expression in the fact that the present Special Rapporteur on State Responsibility seems to want to avoid the codification of international crimes of state in the ILC Draft Articles¹¹ – the present reviewer doubts whether it is possible to write anything definitive on the subject at all at the present moment. It is not surprising, then, that both Ragazzi and de Hoogh had some difficulty presenting a coherent and at the same time comprehensive account of the concept and the issues involved. Nevertheless, their works mark a considerable contribution to the task of bringing at least some order into a subject which concerns no less than the 'international community as a whole'.

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Günther, Carsten Alexander. *Die Klagebefugnis der Staaten in internationalen*

Streitbeilegungsverfahren. Köln, Berlin, Bonn, München: Carl Heymanns Verlag, 1999; Pp xiii, 306.

In the book under review, Carsten Alexander Günther analyses the requirement of standing in cases before international courts and tribunals. The study is one of the first in the German literature to address judicial enforcement of obligations *erga omnes*, thus filling a significant gap.

Günther has divided his study into four chapters. In Chapter 1, he qualifies the problem of standing as one of the relationship between the claimant and the claimed right

and presents the different regulations of this problem in national legal orders. After a brief treatment of the question of standing of states in cases involving their own legal interests (Chapter 2), Günther addresses the right of states to bring claims based on *erga omnes* norms (Chapter 3). A cursory outline of the development of public interest norms in international society is followed by an analysis of the structure and content of *erga omnes* norms. Günther correctly distinguishes these norms from 'classical' norms operating in bilateral inter-state relations. Unlike many other writers, he argues that there exists a subjective right (in the broader sense) of each state to the observance of *erga omnes* norms under general international law, and of state parties to conventions safeguarding the public interest. In his view, this 'subjective right in the broader sense' cannot be distinguished from the 'classical' subjective rights of states arising from bilateral inter-state relations. Based on this assumption, Günther describes the relationship between *erga omnes* and *jus cogens* norms. He observes that the latter are always binding *erga omnes*. In his view, all universal *erga omnes* norms are also part of *jus cogens*, for they cannot be modified by simple agreement between two or more states because they are owed to the community of states.

After outlining examples of *erga omnes* norms under present international law, Günther examines whether these norms can be enforced through action before the ICJ. He concisely presents the various cases in which the Court has dealt with *erga omnes* norms. This review of various ICJ decisions and individual opinions between 1970 and 1995 leads to the conclusion that a majority of judges assumed that in cases involving *erga omnes* norms all states should have standing – a conclusion which, of course, has yet to be confirmed in reality, as the Court has not decided any cases to date based on *erga omnes* norms. This conclusion is discussed in relation to the discussions within the International Law Commission and in legal literature. Günther draws on the debates on the right of third states to take reprisals in cases of viol-

¹¹ J. Crawford, 'First Report on State Responsibility' (1998), paras. 97 *et seq.*, UN Doc. A/CN.4/490/Add. 1, at 9–10.

ations of *erga omnes* norms. In his view, the most important argument against the legality of third party reprisals – namely, the threat to stability – does not apply to the issue of standing. Günther therefore concludes that in cases of alleged violations of *erga omnes* norms, every state has standing to bring a claim, provided that jurisdiction of the Court has been established.

In the last part of Chapter 3, Günther addresses various procedural difficulties that may often arise in cases involving *erga omnes* norms, including the issue of the absent third state. In Chapter 4, he analyses procedures before other international judicial institutions, such as the European Communities' Court and WTO panels, as well as monitoring mechanisms under human rights treaties.

In sum, Günther has written a very interesting study, whose main conclusion on the right of all states to enforce *erga omnes* norms through judicial action can be fully endorsed. Given the increasing importance of norms in the public interest, the book will attract a large number of readers amongst academics as well as legal practitioners.

Less persuasive is Günther's line of reasoning behind his thesis that all states possess a 'subjective right in the broader sense' to the observance of *erga omnes* obligations (at 89–99). While it is conceded that the relationship between 'injury' (Article 40 of the ILC Draft Articles on State Responsibility), 'legal interest' and 'subjective right' is probably one of the most difficult topics of the whole problem of *erga omnes* norms, Günther does not seem to analyse the relevant provisions with the necessary care. For example, he does not point to the problematic omission of any reference to *erga omnes* norms in Article 40 of the ILC Draft Articles. This raises the argument that violations of obligations *erga omnes* only injure the direct victim of the breach (unless they are human rights norms or amount to international crimes). Unfortunately, Günther does not deal with this argument, which seriously undermines his thesis. As regards the much-debated question as to whether it is possible to distinguish between direct and indirectly injured states, Günther, in the pre-

sent reviewer's opinion, overly relies on the position adopted by the ILC. For example, he does not mention that nearly all governments, in responding to the ILC's position, have argued for a differentiation between the rights of directly and indirectly injured states. The conclusions on the 'subjective right in the broader sense' are therefore less convincing than other parts of his study.

In addition, some further shortcomings need to be mentioned. Firstly, in a study devoted to enforcement through judicial action, one might have hoped for a clearer assessment of the effectiveness of judicial claims in international law. In particular, this enforcement mechanism suffers from the fact that there is no compulsory jurisdiction in international law – an obvious fact that is only mentioned in a cursory manner (at 168, 227). Secondly, the treatment of the ILC Draft Articles on State Responsibility is not well structured. The Draft Articles are mentioned various times (at 94 *et seq.*, 171 *et seq.*), but one looks in vain for a general assessment of their relevance to the subject of the study. Important features are only referred to in passing, such as the fact that the notion of 'injury' in Article 40 is similar to the legal interest in raising a claim (at 193). Finally, the study (completed in 1998) would have benefited greatly if account had been taken of some recent books on similar subjects. In particular, it is regretful that André de Hoogh's study on *Obligations Erga Omnes and International Crimes* was not referred to. It would also have been interesting to compare Günther's very broad concept of *erga omnes* norms with the rather restrictive view that Maurizio Ragazzi has taken in his book *The Concept of International Obligations Erga Omnes*.¹²

Notwithstanding these shortcomings, Günther's work adds much to the present discussion on the enforceability of *erga omnes* norms. It makes a considerable contribution to a clearer understanding of the topic of 'standing', which is complicated by and overloaded with domestic law analogies. In the

¹² See the review in this issue, at 810–814.

end, it is the enforcement of international law through judicial means – albeit of limited effectiveness in current international law – that will be of greatest importance in an

international community governed by the rule of law.

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