

Chester Brown. ***A Common Law of International Adjudication***. New York City: Oxford University Press, 2007. Pp. 303. \$145.00. ISBN: 9780199206506.

The proliferation of international courts and tribunals in the past decade has attracted a wide range of scholarly analysis from academics as well as from judges and arbitrators who are facing the practical problems associated with this development.

While the first-generation analysis focused on mapping out the actual existence and extent of the proliferation of international courts and tribunals (Romano),¹ the second-

¹ Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *NYU J Int'l L & Policy* (1999) 709 (1999).

generation analysis has turned towards the problems associated with this proliferation and possible solutions to them (Shany;² Lavranos³). One aspect which has particularly attracted the interest of these scholars is the issue of overlapping or competing jurisdictions between various international and/or national courts and tribunals (Sauer,⁴ recently reviewed in this Journal). The main conclusion in short has been that competing jurisdictions, and thus potentially conflicting judgments, cannot be avoided on the basis of hard-law treaty-based solutions, but rather can only be mitigated to some extent by soft-law solutions such as, for instance, the application of the principle of comity.

The approach of Chester Brown, who is Assistant Legal Advisor at the British Foreign and Commonwealth Office, is different in that he tries to overcome the existing differences of the many international courts and tribunals by researching the commonalities between them regarding several crucial procedural issues that most, if not all, courts and tribunals have to deal with when faced with a dispute which could also potentially be brought before another court or tribunal.

The book, which is a revised and expanded version of his PhD dissertation submitted to the Law Faculty at the University of Cambridge in November 2004, is divided into eight main chapters. The first two chapters provide the framework of his analysis. The first chapter describes the development of the proliferation

of international courts and tribunals and the dangers of fragmentation. The second chapter discusses the methods used by international courts to engage in cross-fertilization by learning from each other, exchanging views, and copying from each other solutions to certain common problems. This chapter focuses on the sources of law that may be applied or taken into account by the various international courts and tribunals and their inherent powers, such as the power to determine procedural aspects, to review and revise their own jurisprudence, and to define their scope of jurisdiction *vis-à-vis* the other international courts and tribunals. The following chapters examine in detail several procedural issues, such as aspects of evidence, power to provide for provisional measures, competence to interpret and revise judgments and awards, and power to provide for remedies. The last two chapters are of a more conclusive nature, as they discuss the reasons for and limitations of a common law of adjudication and the practical and theoretical implications of it.

The analytical approach of Brown is clear from the outset, namely, to find persuasive and conclusive evidence for a common law of international adjudication. In this context, it is important to note that the term 'common law' is not to be understood as referring to the Anglo-American legal system but rather 'to the emergence of an increasingly homogeneous body of rules applied by international courts and tribunals relating to issues of procedure and remedies, both in cases where their constitutive instruments make provision for certain procedures and remedies, but also in cases where there are *lacunae* in their statutes and rules' (at 5).

The main characteristic of Brown's analysis is the examination of an impressive amount of relevant international and national legal literature and jurisprudence, which dates back to the times of the Permanent Court of International Justice (PCIJ). The literature covers mainly the jurisprudence of the ICJ, WTO, ICSID, ICTY, ECtHR, and arbitral tribunals established under UNCLOS.

In essence, and based on this extensive analysis, Brown unsurprisingly comes to

² Y. Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007); Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals* (2003).

³ Lavranos, 'The MOX Plant and Ijzeren Rijn Disputes: Which Court is the Supreme Arbiter?', 19 *Leiden J Int'l L* (2006) 223, at 223–246.

⁴ Sauer, 'Jurisdiktionskonflikte in Mehrebenen-systemen: Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen', *International and European Law Book Reviews Online NYU School of Law*, available at: www.europeanlawbooks.org/reviews/detail.asp?id=436 and 19 *EJIL* (2008) 875.

the conclusion that there is indeed sufficient evidence that points to common approaches adopted by the various international courts and tribunals when it comes to the core procedural issues that all courts and tribunals are usually faced with. Brown is able to point to an extensive amount of jurisprudence and scholarly writing that provides support for his main argument that there is actually already a common procedural law for international courts and tribunals.

In addition, Brown finds no fewer than 12 reasons that underpin his main conclusion. Essentially, they all boil down to the fact that most, if not all, international courts and tribunals have institutional and personal linkages, which naturally provide for a climate of common approaches, especially if they have been successfully tested, which are then transplanted into newly established courts and tribunals. This can already be detected at the stage of drawing up the constitutive instruments of courts and tribunals, which are often quite similar and copied from each other, and continues to the fact that the circle of international judges and arbitrators is very small. Accordingly, the same people rotate and sit on the benches of the various courts and tribunals. Besides, the very same people are often also highly distinguished scholars who contribute through their writings to the development of a common approach regarding procedural issues. Moreover, the use of separate and dissenting opinions appears to be a useful and effective tool in supporting this convergence towards a common law of international adjudication. In particular, these opinions stimulate the discussion and point towards possible solutions, which are often subsequently adopted in judgments and awards of the respective courts and tribunals.

In short, it is not so surprising that the conditions for a common approach are quite fruitful, in particular if it is taken into account that most constitutive instruments do not explicitly regulate many procedural issues, but leave them to the courts and tribunals to develop and apply as they think most fitting. In the process of finding the most suitable rules and procedures, international courts

and tribunals naturally borrow from each other's experience.

Thus, Brown is able to present a persuasive and exhaustive body of jurisprudence and legal literature that supports his main points. Clearly, for the sake of consistency and uniformity – within the existing diversity of the various courts and tribunals – and legal certainty as well as transparency, a common procedural law for all international courts and tribunals should be welcomed. Indeed, as Brown rightly points out, such a common approach may be an effective tool in reducing the negative effects associated with the proliferation of international courts and tribunals and the potential danger of the fragmentation of international law.

While I could not agree more with this point, there is realistically speaking still a long way to go. In particular, it may be questioned whether it is indeed always to be welcomed that all courts and tribunals should follow each other's approach. The *Bosphorus* judgment of the European Court of Human Rights illustrates this point. While the ECtHR was able to neatly separate the jurisdictions of the European Court of Justice (ECJ) and itself by refusing to exercise its jurisdiction over 'EC law related cases' (unless the fundamental rights protection within the EC is 'manifestly deficient'), it thereby effectively denies individual complainants a final instance of judicial review. It is submitted that if all other international courts and tribunals were to follow this approach by showing such an extensive level of deference, the rule of law and justice would not be well served.

Another point that may be raised is whether it would not be systematically more appropriate to use several sub-categories for the various courts and tribunals, such as human rights courts/tribunals, trade and investment courts/tribunals, etc. Moreover, a distinction between permanent and *ad hoc* courts and tribunals may also be warranted in view of their distinctive tasks, competences, and institutional embeddedness. Indeed, it seems at times too far-stretched to throw all the very different courts and tribunals into one basket. In my view, the claim for a common approach

would be even stronger if it were first shown that a common approach exists in the various sub-categories, which in addition appears to be – to a large extent – similar and thus of a general and overarching nature.

But these are only minor points of critique, which in no way mitigate the well-deserved praise for Chester Brown's effort to show that despite the proliferation of international courts and tribunals, the procedural differences are not that big. As a result, a common procedural law may assist in interpreting similar or comparable substantive rules in the same way and thereby help in reducing the negative effects that are associated with the proliferation of international courts and tribunals, in particular because very often procedural and substantive rules are closely connected with each other.

His analysis is an excellent and an important contribution to the understanding of the complex issues associated with the proliferation of international courts and tribunals, competing jurisdictions, and fragmentation of international law.

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