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## Editorial

### **EJIL Roll of Honour; 2021 EJIL Peer Reviewer Prize; Changes in the Masthead; Germany v Italy: Jurisdictional Immunities – Redux (and Redux and Redux); 10 Good Reads; Rabia Balkhi – The Legacy of a Medieval Poet in Afghanistan; In This Issue; In This Issue – Reviews**

#### **EJIL Roll of Honour**

*EJIL* relies on the good will of colleagues in the international law community who generously devote their time and energy to act as peer reviewers for the large number of submissions we receive. Without their efforts our Journal would not be able to maintain the excellent standards to which we strive. A lion's share of the burden is borne by members of our Boards, but we also turn to many colleagues in the broader community. We thank the following colleagues for their contribution to *EJIL*'s peer review process in 2021:

Andrew Allan, Stephen Allen, Julian Arato, Dafina Atanasova, Danae Azaria, Rémi Bachand, Amrita Bahri, Kees Bastmeijer, Andrea Bianchi, Christina Binder, Catherine Brölmann, Marco Bronckers, Russell Buchan, Damian Chalmers, Yifeng Chen, Bhupinder Chimni, Mikkel Christensen, Eunice Chua, Kathleen Claussen, Richard Clements, Thomas Cottier, Kristina Daugirdas, Natalie Davidson, Ana Gerda de Borja Mercereau, Andre de Hoogh, Simon de Smet, Francois Delerue, Saverio Di Benedetto, Thomas Diez, Viviane Dittrich, Shai Dothan, Gabriel Eckstein, Cliff Farhang, Veronika Fikfak, Malgosia Firzmaurice, Serena Forlati, Steven Freeland, Bryant Garth, Janneke Gerards, Jola Gjuzi, Geoff Gordon, Thomas Grant, Leena Grover, Weixia Gu, Douglas Guilfoyle, Michaela Hailbronner, Adil Haque, Nobuo Hayashi, Tore Henriksen, Gleider Hernández, Ellen Hey, Lawrence Hill-Cawthorne, Duncan Hollis, Stephen Humphreys, Francesca Iurlaro, Fleur Johns, Natalie Jones, Nidal Jurdi, Ioannis Kalpouzos, Emily Kidd White, Robert Knox, Tor Krever, Dino Kritsiotis, Andreas Kulick, Mattias Kumm, Raffaella Kunz, Jurgen Kurtz, Emily Laidlaw, Molly Land, Gabriel Lentner, George Letsas, Lauri Mälksoo, Itamar Mann, Anna Marhold, Petros Mavroidis, Benoit Mayer, Matt McDonald, Tim McFarland, Owen McIntyre, Mark McLaughlin, Frédéric Mégret, Panos Merkouris, Timothy Meyer, Alex Mills, Violeta Moreno-Lax, Jacqueline Mowbray, Harriet Moynihan, Roger O'Keefe, Nilufer Oral, Josef Ostránský, Fulvio Palombino, Ole Pedersen, Celest Salung Petersen, Jason Pobjoy, Vernon Rive, Darryl Robinson, Cecily Rose, Tom Ruys, Cedric M.J. Ryngaert,

Mavluda Sattorova, Matthew Saul, William Schabas, Valentin Schatz, Martin Scheinin, David Schneiderman, Joanne Scott, Wei Shen, Sivan Shlomo-Agon, Paulina Starski, Armin Steinbach, Paul Stephan, Tim Stephens, Sofia Stolk, Immi Tallgren, Alan Khee Jin Tan, Dire Tladi, Nicholas Tsagourias, Harro van Asselt, Isabelle Van Damme, Larissa Van den Herik, Dimitri Van Den Meerssche, Harmen van der Wilt, Sergio Verdugo, Erik Voeten, Jochen von Bernstorff, Michael Waibel, Guiguo Wang, Shaina Western, Margaretha Wewerinke-Singh, Deborah Whitehall, Eric Witmer, Marcos Zunino.

*SMHN and JHHW*

## 2021 EJIL Peer Reviewer Prize

The EJIL Peer Review Prize 2021 is awarded to Dr Leena Grover, Associate Professor of International Law at Tilburg Law School. Given her broad range of interests, Dr Grover seemed an ideal potential peer reviewer for several manuscripts we received during the year. And indeed, we asked her to review several articles. At times, she might have thought ‘there is EJIL again, requesting a review’, but her reviews did not show any fatigue. Even when reviewing an article for the second time, her analysis was constructive, thorough and detailed. Dr Grover is the third EJIL Peer Review Prize winner since 2019 when the Prize was instituted. She joins Professor Dr Tilmann Altwicker and Dr Megan Donaldson, the 2019 and 2020 prize winners.

*SMHN and JHHW*

## Changes in the Masthead

In order to maintain a sense of freshness, vigour and intellectual dynamism in our Journal and its editorial policy-making, we regularly refresh our Editorial and Scientific Advisory Boards. This enables us to involve a broad range of scholars in the work of the Journal and in deliberations over the directions that EJIL should take.

After many years of service, the following Editorial and Scientific Advisory Board members are stepping down: Jean d’Aspremont, Luis Hinajosa, André Nollkaemper and Anne van Aaken. We sincerely thank them for their many contributions to the development, directions and functioning of the Journal.

Four members of our Scientific Advisory Board will move to the Editorial Board: Diane Desierto, Devika Hovell, Nico Krisch and Christian Tams. We are grateful for their ongoing valuable work for the Journal.

We welcome the following new members to our Scientific Advisory Board: Eva Brems, Leena Grover, Mamadou Hebie, Dino Kritsiotis and Margarethe Wewerinke-Singh.

We also welcome Wanshu Cong, a Global Academic Fellow in the Department of Law at Hong Kong University, to our editorial team. Dr Cong joins Michal Saliternik and Orfeas Chasapis-Tassinis as EJIL Associate Editor.

*SMHN and JHHW*

## Germany v Italy: Jurisdictional Immunities – Redux (and Redux and Redux)

Will we ever see closure to this saga at the centre of which one finds the somewhat controversial decision of the International Court of Justice of 2012 and the very controversial decision of the Italian Constitutional Court of 2014 which rebuffed that decision?

There is no need to recap fully the endless '*puntatas*' in this story, which have been followed assiduously like a successful series on Netflix, not least on EJIL: Talk!<sup>1</sup> I will just mention, since this is germane to my argument, that Italy and Germany had reached a settlement in the 1950s and 1960s, through treaties, on agreed compensation for all German crimes during World War II, which would preclude any further claims by Italy. Far from a King's ransom, but the Italians accepted it. Germany duly paid what was agreed. Italy 'unduly' spent the money on post-war reconstruction rather than compensating individual victims. Plaintiffs tried unsuccessfully to obtain relief in the German courts for a variety of legitimate legal obstacles.

In the wake of the ICJ decision, the Italian government and parliament, acting (entirely correctly) in exemplary good faith, introduced legislation that gave full effect to said decision. One thought at the time that this was the end of the series. A happy ending for the Rule of Law (though not so happy for the hapless victims of the German atrocities, sympathy for whom should not be forgotten).

Yet, to the surprise of most spectators, the '*regia*' thought otherwise and a new season was announced, featuring an application to the Italian Constitutional Court which struck down that legislation as violative of fundamental principles of the Italian Constitution and restored the right of the victims to bring civil actions for damages in the Italian courts.

As autumn follows summer, such actions were brought; as winter follows autumn, Germany (entirely correctly) refused to appear in such proceedings. And as spring follows winter, default judgments for damages were entered and German assets in Italy were attached.

Now it appears, as summer follows spring, that the Germans are losing their patience and word is that they are contemplating bringing the matter (the non-compliance of Italy with a decision of the ICJ) before the Security Council and/or starting new proceedings before the ICJ.

This series is beginning to be boring. When one reaches my age, one often has the feeling, in the face of the never-ending vicissitudes of international law and life, of 'been there, seen that'. And from that vantage point, my unsolicited advice to the

<sup>1</sup> See D. Akande, [www.ejiltalk.org/et-more-on-immunity-germany-brings-case-against-italy-before-the-icj/](http://www.ejiltalk.org/et-more-on-immunity-germany-brings-case-against-italy-before-the-icj/); M. Milanovic, [www.ejiltalk.org/germany-v-italy-germany-wins/](http://www.ejiltalk.org/germany-v-italy-germany-wins/); C. Keitner, [www.ejiltalk.org/germany-v-italy-a-view-from-the-united-states/](http://www.ejiltalk.org/germany-v-italy-a-view-from-the-united-states/); A. Bianchi, [www.ejiltalk.org/on-certainty/](http://www.ejiltalk.org/on-certainty/); T. Schilling, [www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/](http://www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/); Pavoni, 'Simoncioni v. Germany', 109 *American Journal of International Law* (2015) 400; Jervis, 'Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law', 30 *European Journal of International Law* (2019) 105.

various German legal advisors is to chill out and cool it! Not least because, as the adage goes, ‘people in glass houses should not throw stones’.

To begin with, Germany, more than others, should have empathy and even sympathy for the predicament of the Italian government. Think for just one moment *Weiss*. Germany, an exemplary member of the European Union, a faithful icon of the rule of (European) law, suddenly finds itself in the face of a decision of its own much hallowed (and rightly so) Constitutional Court, which rebuffs (in a manner more rudely than the Italian Constitutional Court) the European Court of Justice and rides roughshod over the principle of the supremacy of EU law as enunciated by the ECJ. Anguished weeks and months follow: How does one affirm one’s respect for the rule of European law and, at the same time, one’s respect for German rule of law at the apex of which one finds, of course, one’s own Constitutional Court?

Eventually a way (of sorts) was found, though whether the Commission should pursue infringement proceedings against Germany for the decision of the German Constitutional Court is still not a question that allows easy answers, not least in the face of the inevitable copycats in other jurisdictions.

This is precisely the predicament of the current Italian government, the good faith of which cannot be called into question. Thus, instead of confrontation, the Germans would be wise to help their Italian brethren find a solution to a situation with which they are familiar, a solution which would not oblige the Italians to disrespect their own Constitutional Court by affirming their loyalty to one legal system of which they are part (the international legal order) at the expense of their domestic constitutional legal order.

The solution of ‘change your Constitution!’ is laughable. Quite apart from the question whether on the substance the ICJ got it right (I predict that sooner or later sovereign immunity will no longer provide a shield to grave violations of human rights/*jus cogens* and the Italian decision could be an important element in shifting customary law in that direction), it is unlikely that an attempt of this kind would garner the sufficient majorities necessary for such an amendment. And even if it did, this could well become a landmark decision of the much discussed ‘unconstitutional’ constitutional amendments. And then what?

It is slightly disturbing to see Germany, the author of the most unspeakable crimes in the 20th Century (with Stalin and Mao vying for a place on the podium), strongly arguing for customary law immunity in such cases. But I have sympathy for their position. One can just imagine the Pandora box of cases, red meat for avaricious lawyers, coming from far and near. For a conflict 80 years old, any meritorious cases should be dealt with intergovernmentally. I have somewhat less sympathy for the German scholarly community, which could and should significantly tone down the howls of horror and outrage at the decision of the Italian Constitutional Court. Defying an international tribunal? *Quelle horreur!*

For in reaching that decision, the Italian judges had the comfort of the shade given by that leafy tree, the German Constitutional Court and the German legal order. You remember of course the *Solange* saga launched in the 1970s? So long as .... beneath all the verbiage – make no mistake, a constructive decision – is the affirmation that

when push comes to shove, *in extremis*, the German Constitutional Court could not, at that time, compromise the most fundamental principles of the German constitutional order. Just imagine, even today, a European law that compromised in the eyes of the German Court the inviolability of human dignity (the so-called eternal clause). Does anyone have any doubt at the outcome of such a case? The proof of the pudding is always in the eating – and that meal was provided by the *Melloni* decision of the German Court.

As regards international law, the European Court of Justice also provides some shade. Think *Kadi*.<sup>2</sup> Would the outcome have been different had the violative Security Council regime been sanctioned in The Hague by the ICJ? There is a hint to such in the Opinion of the Advocate General, but not in the decision of the CJEU itself. At best, the answer to this question is not clear.

One can of course doubt, as many Italian commentators have pointed out, whether the Italian Court correctly interpreted the Italian Constitution. But if they reached the conclusion that following the ICJ would compromise fundamental principles of their Constitution touching on basic human rights, the jurisprudential and moral issues are far from simple and, at a minimum, the shock and horror are misplaced. To my eyes, they were faced with a veritable tragic choice in the strict sense of the word. And in the face of tragedy, even of this nature, one can only feel a measure of sympathy.

So what now? Here is at least one possible direction for a solution that can as far as possible honour all the conflicting legitimate legal interests involved in this situation and avoid yet another season in this never-ending series.

Plaintiffs should be allowed to proceed with their civil actions – thereby respecting what the Italian Constitutional Court regards as an unbridgeable fundamental right in these circumstances. Germany should refuse to appear, vindicating their right of sovereign immunity as affirmed by the ICJ. And the Italian state should indemnify Germany for any damages awarded, vindicating its obligations both under the relevant treaties signed by the two states as well as under the general law of state responsibility in the face of a violation.

The precise modalities are to be worked out and they are not simple. For example, the perception should not be created that Italy is paying for German war crimes; hence, it should be made clear that Germany has already made a lump sum compensation. Additionally, Italy should not be expected to offer a blank cheque. Thus, the Italians could by legislation limit the *quantum* of damages – it is doubtful if this would be held to be unconstitutional.

But the underlying principles embedded in this approach seem to me at least one solution to a saga the continuation of which seems as unnecessary as it is distracting to much bigger challenges facing Europe and the international legal order.

JHHW

<sup>2</sup> See J.H.H. Weiler, [www.ejiltalk.org/letters-to-the-editor-respond-to-ejil-editorials-vol-195/](http://www.ejiltalk.org/letters-to-the-editor-respond-to-ejil-editorials-vol-195/).

## 10 Good Reads

It has not been an easy task to compose this year's list – not because of a dearth of good reads, but quite the opposite – *embarras de richesses*. And two of the books actually go back to 2020 but given that I read them late in the year, it was too late to include them in last year's crop. I will however sneak in two honourable mentions, with only brief commentary – but they were very close.

I want to remind the reader that these are not 'book reviews', which also explains the paucity of law books or books about the law. Many excellent ones have come my way in 2021, as in previous years, but an excellent law book is not always, in fact rather rarely, a 'good read' in the sense intended here: curl up on the sofa and enjoy a very good read, maybe even as a respite from an excellent law book? I should also point out that some of the 'good reads' are not necessarily literary masterpieces – and yet, still, very good reads.

The 'Freud cluster'. By pure happenstance, four of my best reads this year are linked more or less directly to Freud, in one or two cases rather tenuously and indirectly. And there is truly no evident connection among the four, except for the 'Freud connection'.

### **Robert Seethaler, *The Tobacconist* (Transl. Charlotte Collins. Picador, 2017) (*Der Trafikant* (Kein & Aber, 2012))**

Of all the recommendations this year, *The Tobacconist* is something of a literary masterpiece. It is slim, in the best tradition of the Mitteleuropa Novella. I have seen it referred to as a 'coming of age' novel. It is really much more than that in that it is not just or only the coming of age of a young Austrian bumpkin moving to Vienna, discovering love, sex and mostly himself, but also a coming of an Age – the dark transitions of the 1930s and all that. The story unfolds in 1937. It is simply superb in both these aspects, written with huge sensitivity, humour and a light touch, which conceals real depth into the human and the social. Freud is one of the clients of the tobacco shop where Franz Huchel works and a certain delicate relationship is established, not central to the main 'plot' for what it is, but revealing in many ways. I read the book in one gulp in late 2020 and then savoured it slowly again this year. Upon reflection I decided this would be my number one recommendation, and I want to believe that anyone who picks it up will not only see its great literary virtues but have the feeling of having encountered a splendid piece of art.

### **Irwin D. Yalom, *When Nietzsche Wept* (Basic Books, 1992)**

This was an international bestseller translated into many languages and yet it is precisely an example of a very good read which is far from a Kafka, a Zweig or a Joseph Roth. But, it is an interesting and engrossing story – a bit like a TV series that is far from great but is bingeable. This is a bingeable book. In some ways, the author (whose sophistication and culture and professionalism as a psychiatrist and psychology

scholar are beyond question) admits such. It is an introduction to the origins of psychoanalysis through a captivating tale involving principally Nietzsche as a patient, Josef Breuer as his therapist, the enigmatic Lou Salomé with whom everybody seems to be in love and even Richard Wagner; and others make an appearance – including Freud who is still Breuer's young apprentice and is still learning. (At times one has the impression that some of the ideas that lay persons like me associate with Freud really originated with Breuer.) The tale involves, too, the marriage travails of Breuer as well as the complications of male therapist–female patient relationships. These are described with sensitivity, though mostly male sensitivity. This might be a bias of the times, but also of the author. Do not be put off by any of this. Once started, it is hard to put it down, and I do not expect many will feel that they wasted their time. It really is a very good holiday read.

### **Hans Küng, *Freud and the Problem of God* (Transl. Edward Quinn. Yale University Press, 1990)**

Now we get to the 'serious' Freud stuff. The celebrated liberal Catholic theologian Hans Küng, *bête noire* of the Vatican (primarily, but not only, because of his attack on the doctrine of Papal Infallibility), passed away in 2021. I recalled being impressed when I read him 45 years or so ago. I decided to reread some Küng. I was somewhat less impressed when re-diving (or rather delving) into some of his most famous, and very verbose, major works, including some I had not read. He is one of those authors who manages to be a hugely prolific writer of, yes, mostly verbose books. (How do they do it?) He has written extensively on religions other than Christianity, so I read his book on Judaism, which was far too fawning to be any good. Hence I did not bother with his treatment of other religions. I expected the same. So I set aside the tomes and looked for some shorter stuff, and came across two little jewels. One is *Mozart, Traces of Transcendence*. Worth a read, a fairly good read, even in disagreement. The other, which I am recommending, is *Freud and the Problem of God* – his Yale Terry Lectures, which is an indication of his prominence. It is an engagement with Freud's major works on the theme, principally his early 1927 essay, *The Future of an Illusion*, which sent shock waves that are difficult to appreciate in our very different, very secular world of today, *Civilization and Its Discontents* (1939, where religion is but one theme) and his rather tortured but profound *Moses and Monotheism* (1939). I say tortured because it is, at least between the lines, the most serious engagement with his own Judaism or rather Jewishness. If you have not read all or any of the above, it is still worth reading Küng, who engages empathetically, at times sympathetically, with this dimension of Freud's work and gives the reader a fair account of them. Where he agrees with Freud, his very own *bête noire* is, of course, Christianity. The Lecture origin of the book (120 pages) facilitates a fluent reading. It is a clever book. He Freudizes (excuse this horrible neologism) Freud, exposing his assumptions and particularly the claim that Freud does not draw his atheist conclusion from his psychoanalytical exploration, but comes with his atheism as a premise with inevitable psychological conclusions (illusion/delusion, an invention responding to human needs, etc). He is particularly sharp in his

critique of the potentially harmful therapeutic consequences of such. Pick your side in the debate, but whichever it may be, this is a rewarding read.

### **Yosef Hayim Yerushalmi, *Freud's Moses* (Yale University Press, 1993)**

Maybe you have had enough of Freud or religion or both by now. This is another fluent read based on lectures given, and offers a full engagement with the theme of Freud's tortured Jewish identity. Not more of that, you might be thinking. Give it a try. It is a truly wonderful read, almost like a *Krimi*, with correspondence, photos and artefacts, which 'expose' Freud's phobia (my word) that, God forbid (I could not resist this), psychoanalysis will be dubbed a Jewish science. It is a tale which is told sympathetically, almost lovingly unmasking the Great Unmasker in a way that does not in any serious manner destabilize Freud's huge scientific and cultural contributions. In many respects, it delicately humanizes him in unexpected ways.

Of the 'Freud cluster', *The Tobacconist* is a must, any of the other three will do.

### **Dorothy Parker, *The Portable Dorothy Parker* (Penguin Classics Deluxe Edition, second revision, 2006)**

I confess to my ignorance. I had never read Dorothy Parker before this year. How could I have not? How could you have not? The book is a selection of her short stories, poems, literary and theatre critique and letters. It is a work of a very special genius from a remarkable person, who in many ways was, in her human and feminist sensibility, way ahead of her times. (Her heyday I would say was from the 1920s to the 1950s – she died in 1967.) She belonged to that Hemingway, Scott Fitzgerald et al. crowd, and the only explanation why she is not quite in that pantheon (if pantheon it is) is because – her own explanation – she did not complete a full novel. But her short stories are timeless (try *The Lovely Leave* for starters). The poems are priceless (*Unfortunate Coincidence*: 'By the time you swear you're his, Shivering and sighing, And he vows his passion is Infinite undying – Lady, make a note of this: One of you is lying'). The book and play reviews (of those I had read or seen) always made me see things I had not noted before, and the correspondence will not make you cringe. In a bout of enthusiasm, I managed to procure a First Edition of the 1944 slim original. But you are advised to buy the Penguin deluxe edition of 2006, which contains the full shebang. It is a book one could, I suppose, read in one big gulp, but to get the full pleasure of it small portions are advised, thus prolonging and renewing the pleasure.

### **Andrew Clapham, *War* (Oxford University Press, 2021)**

Here is an oeuvre which is at one and the same time a law book (you could teach a course out of it) and a book about the law (it does so much more than simply outline

the law of armed conflict both *jus ad* and *jus in*). It contextualizes it, historicizes it, makes it human in its inhumanity (wonderful chapter on victims). It is a book of very serious scholarship. But it is included in my selection for this year (after all, there are quite a few excellent books covering the subject) because of the manner in which it is written. Almost conversational – without compromising nuance and detail. A book on the law of armed conflict? Typically, when they land on one's desk, one tends to flip through them, maybe read the intro and conclusion, perhaps a select chapter. Sounds familiar? In this case, I started just thus, expecting that it would demand 45 minutes of my time, and was then completely drawn into it. If you are new to the subject (hard to imagine among readers of EJIL...), you could not find a better introduction. If you are an old hand, you will both profit and enjoy, maybe with a tinge of jealousy.

### **Charlotte Allen, *The Human Christ – The Search for the Historical Jesus* (The Free Press, 1998)**

Please do not skip to the next selection. This was a contender for my number one recommendation for the year. It is practically a page-turner interspersed with continuous chuckles. The subject is the so-called Historical Jesus as distinct from the Christ of Faith: a survey of centuries of historical research as to what Jesus *really* said and what Jesus *really* did and who Jesus *really* was. Put differently, the scholarship that debunks the simplistic versions of 'Gospel Truth'. Given the centrality (and in some ways even enduring importance) of Christianity to western civilization, it is an important story. The original historicists were of course branded as heretics. But at least in the last 200 years there has been no serious theology that does not integrate, one way or another, the historical Jesus perspective. It is a discipline that was dominated by German Protestants in the 19th century and the first half of the 20th. However, since Vatican Council II, Catholics have entered the field (with a vengeance and extraordinary excellence), and in the last half century they have dominated American theological discourse. Now, given the subject matter, you can imagine that even more contentious than the battles between the Christ of Faith crowd and the Historians are the battles among the various historical schools. As Allen comments wryly, though all professing to use more or less the same historical scientific toolkit, if the author is a liberal German Protestant, *mirabile dictu* the *real* Christ will be, you guessed, in the image of a liberal German Protestant. The book has been on my shelf for years, but I kept setting it aside. Charlotte Allen is a journalist. There is enough rubbish written on the subject by supposedly serious scholars, so why bother with a journalistic account? (Wondering about rubbish? Try John Allegro, a member of the original team deciphering the Dead Sea Scrolls. Original he was! In Allen's description, he is the author of '*...The Sacred Mushroom and the Cross*, a true collector's item for aficionados of the search for the historical Jesus. Allegro contended that Jesus was not a human being but rather a mushroom'. So incongruous was this that I bought his book and read it. It's for real.)

So now I crawl to Canossa. Journalist or not, Allen's book is erudite, quite comprehensive, an excellent primer on the subject. My shelves are groaning under the weight of Historical Jesus scholarship, which I would never dream of inflicting on others. But this is different. It is written with verve and wit – as compelling an intellectual history as you will ever find. Of course, many in the field hated it, but this is because of her acerbic tongue. Sample this (*a propos* Hans Küng):

The most enthusiastic Catholic Johnny-come-lately [to historical Jesus scholarship] was Hans Küng .... In 1974, when he was 48, Küng published a 600 page book, *On Being a Christian*, whose ramblings bore all the earmarks of a middle-aged man's sudden (and slightly behind the curve) discovery of sixties youth culture: quotations from *Hair*, allusions to *Jesus Christ Superstar* and the Beatles, and fawning adulation of everyone under the age of 30.

The book is copiously annotated and has an extensive bibliography – talking about belief, it defies belief how a book of such erudition can be so readable (for the record, she is a serious Christian). Terrific read.

### **Alicja Sikora, *Constitutionalisation of Environmental Protection in EU Law* (Europa Law Publishing, 2020)**

Typically, when I see 'Constitutionalization' I run for cover. Almost as fast as when I see 'Proportionality'. This is a book that has the hallmarks of a legal practitioner (and serious scholar), whose work covers not just or principally litigation, which is what comes to mind when we see the word Practitioner, but the law-making process itself. I have a weakness for law books that adopt an evolutionary approach, a movie rather than a snapshot of The Law as It Stands. And if you think how, as recently as, say, 20 years ago, we tended to talk of consumer protection law and environmental protection law as kind of twins of third-generation rights, we see that all this has changed with environmentalism entering the value DNA of the Union, and it can no longer be thought of in sectoral terms. Just think of the ubiquity of the word 'sustainability' in so many diverse areas of law and policy. The study is not fawning, though it is normatively positive about this evolution, and interspersed are critical comments at different levels which come just at the right places. And, of course, it passes the Good Read test, which is not obvious for this subject matter and this genre of book.

### **Doreen Lustig, *Veiled Power, International Law and the Private Corporation 1886–1981* (Oxford University Press, 2020)**

In many ways this book can serve as a model for countless doctoral students grappling with how to turn their dissertation into a successful book. One lesson is: take your time! Allow for maturation of thought and writing. Historical theses are typically of humongous size, cholesterol-laden with every possible detail and source and oftentimes of interest to no one outside the narrow field of the historical subject matter. Lustig's volume is slim, very slim for a historical study – what an achievement, what

a virtue. It is written engagingly, not quite in the conversational style of Clapham but with utmost clarity, and above all a story, a real story, unfolds from chapter to chapter. It has wonderful momentum. And, importantly, it is not only the historical narrative that is of true interest, but it is abundantly relevant to any contemporary discourse of corporations and international law.

[Full disclosure: once before, in recommending Guy Sinclair's prize-winning book, I faced the dilemma that he, as is Lustig, was a friend and young colleague. I disclosed this, as I am doing now. I would recuse myself from writing a proper book review in such a case, but why, I reasoned then and I reason now, should I exclude from my list of Good Reads a book that was one of my best reads this year, and would be such whether I knew the author or not?]

### **Adam Zagajewski, *Mysticism for Beginners (Poems)* (Transl. Clare Cavanagh. Farrar Straus & Girou, 1997)**

That great poet from that nation of poets (and, it appears, still poetry lovers), Poland, died earlier this year. Take the word 'Mysticism' in the title in a very, very holistic way. One way to understand it would be to think of the non-material dimension of our lives, of the human condition. Consider this: 'Vermeer's Little Girl'.

Vermeer's little girl; now famous,  
watches me. A pearl watches me  
The lips of Vermeer's little girl  
are red, moist and shining.  
Oh Vermeer's little girl, oh pearl,  
blue turban: you are all light  
and I am made of shadow.  
Light looks down on shadow  
with forbearance, perhaps pity.

I chose this one, of many, partly because it corresponds so beautifully with Szyborska's Vermeer poem alluded to in an earlier Good Reads. I would be remiss if I did not mention his superb translator, Clare Cavanagh. If you have not read poetry for a long time (since high school?), I cannot think of a better re-starting point than this wonderful slim volume.

## **Honourable Mentions**

### **Wolfgang Borchert, *The Man Outside (A Play)* (New Directions, revised edition 1982)**

Borchert's play is the work of an awfully young soldier returning from the war. It was a hit back in 1947 but was then the subject of all manner of criticism. It is a remarkable document and a very good read.

## Joachim Fest, *Not I – Memoirs of a German Childhood* (Transl. Martin Chalmers, Other Press, 2012)

Joachim Fest is a controversial person. It is worth rereading the chapter about him in Reich-Ranicki's *The Author on Himself* ('Nine Good Reads and One Viewing', 29 *EJIL* (2018)). But this memoir, written in old age, is captivating and beautifully written.

## Previous Good Reads

### (2014)

Moshe Halbertal, *Maimonides: Life and Thought* (Princeton: Princeton University Press, 2013); Robert Howse, *Leo Strauss, Man of Peace* (Cambridge: Cambridge University Press, 2014); Norman Davies and Roger Moorhouse, *Microcosm. A Portrait of a Central European City* (London: Pimlico, new edition, 2003); Gregor Thum, *Uprooted: How Breslau Became Wrocław during the Century of Expulsions* (Princeton: Princeton University Press, 2011); Klemen Jaklic, *Constitutional Pluralism in the EU* (Oxford: Oxford University Press, 2014); Nick Barber, *The Constitutional State* (Oxford: Oxford University Press, 2012); Wistawa Szymborska, *Here* (Boston: Mariner Books, 2012); Wistawa Szymborska, *Poems New and Collected* (Boston: Mariner Books, 2000 (or any other collection of her poems)); Michael S. Pardo and Dennis Patterson, *Mind, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (New York: Oxford University Press, 2013); Maria Aristodemou, *Law & Literature: Journeys from Her to Eternity* (Oxford: Oxford University Press, 2000); Thomas D. Seeley, *Honeybee Democracy* (Princeton: Princeton University Press, 2010); Jürgen Tautz, *The Buzz about the Bees: Biology of a Superorganism* (Heidelberg et al.: Springer Verlag, 2008).

### (2015)

Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press, 2015); Vittoria Barsotti, Paolo Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press, 2015); Sabino Cassese, *Dentro La Corte. Diario di un Giudice Costituzionale* (Il Mulino, 2015); Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press, 2015); Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016); Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press, 2015); W.G. Sebald, *On the Natural History of Destruction* (Modern Library, 1999); Pio Baroja, *El Arbol de la Ciencia* (first published 1911); Patti Smith, *M Train* (Alfred A. Knopf, 2015); Miguel de Unamuno, *San Manuel Bueno, mártir* (first published 1930).

### (2016)

Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (Knopf, 2016); Mario Vargas Llosa, *Travesuras de la niña mala* (Alfaguara, 2006); Patrick

Pasture, *Imagining European Unity Since 1000 AD* (Palgrave Macmillan, 2015); Ricardo de Ángel Yágüez, *¿Es Bello el Derecho?* (Civitas, 2016); Olivier Dupéré, *Constitution et droit international* (Institut Universitaire Varenne, 2016); David Bellos, *Georges Perec: A Life in Words: A Biography* (D.R. Godine, 1993); Monica Garcia-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press, 2014); Julio Ramón Ribeyro, *La palabra del mudo* (Seix Barral, 2010); Marise Cremona, David Kleimann, Joris Larik, Rena Lee and Pascal Vennesson, *ASEAN's External Agreements: Law, Practice and the Quest for Collective Action* (Cambridge University Press, 2015); Mary Oliver, *Felicity: Poems* (Penguin Press, 2015).

## (2017)

Robert Caro, *The Years of Lyndon Johnson, 4 Volumes* (Alfred A. Knopf, 1982–2012); Ludovic Hennebel and Hélène Tigroudja, *Traité de droit international des Droits de l'homme* (Editions Pedone, 2016); Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, 2015); Aldo Schiavone, *Ponzio Pilato: Un enigma tra storia e memoria* (Einaudi, 2016); Pontius Pilate: *Deciphering a Memory* (transl. Jeremy Carden, Liveright, 2017); Eduardo García de Enterría, *Fervor de Borges* (Editorial Trotta, 1999); Guy Fiti Sinclair, *To Reform the World—International Organizations and the Making of Modern States* (Oxford University Press, 2017); Matthew Saul, Andreas Follesdal and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press, 2017); Bernard E. Harcourt, *Exposed—Desire and Disobedience in the Digital Age* (Harvard University Press, 2015); María Elvira Roca Barea, *Imperiofobia y Leyenda Negra—Roma, Rusia, Estados Unidos y el Imperio español* (Siruela, 2016); Claudio Rodríguez, *Alianza y Condena* (Ediciones de la Revista de Occidente, 1965); *Alliance and Condemnation* (transl. Philip W. Silver, Swan Isle Press, 2014).

## (2018)

Marcel Reich-Ranicki, *The Author of Himself: The Life of Marcel Reich-Ranicki* (Princeton University Press, 2001); Louis Dumont, *German Ideology: Essays on Individualism: Modern Ideology in Anthropological Perspective* (University of Chicago Press, 1986); Louis Dumont, *German Ideology: From France to Germany and Back* (University of Chicago Press, 1994); Yishai Beer, *Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War* (Oxford University Press, 2018); Hilary Mantel, *Wolf Hall* (Fourth Estate, 2009); Hilary Mantel, *Bring Up the Bodies* (Fourth Estate, 2012); Dennis Marks, *Wandering Jew: The Search for Joseph Roth* (Notting Hill Editions, 2016); E. B. White, *Here Is New York* (The Little Bookroom, 1999; Harper, 1949 (1st ed.)); Charles Leben (ed.), *Droit international des investissements et de l'arbitrage transnational* (Editions A. Pedone, 2015); Benjamin D. Sommer, *Revelation and Authority: Sinai in Jewish Scripture and Tradition* (Yale University Press, 2015); Miguel Beltrán de Felipe and Daniel Sarmiento Ramírez-Esudero, *Un Tribunal para la Constitución* (Registradores de España, 2017); *It Stays With You* (Documentary film, produced and directed by Cahal McLaughlin and Siobhan Mills, 2017, available at <https://vimeo.com/222497700>).

**(2019)**

Anthony Julius, *Trials of the Diaspora—A History of Anti-Semitism in England* (Oxford University Press, 2010); Julio Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Oxford University Press, 2018); Julio Baquero Cruz, *El árbol Azul* (Cuadernos de Langre, 2018); Francisco J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017); Ilenia Ruggiu, *Culture and the Judiciary: The Anthropologist Judge* (Routledge, 2018); Karen J. Alter and Laurence R. Helfer, *Transplanting International Courts—The Law and Politics of the Andean Tribunal of Justice* (Oxford University Press, 2017); Javier Marias, *Corazon Tan Blanco (A Heart So White)* (Editorial Anagrama, 1992; transl. Margaret Jull Costa, Harvill Press, 1995); Magda Szabó, *The Door* (transl. Len Rix, Harvill Press, 2005); Richard Ford, *The Sportswriter* (followed by *Independence Day*, *The Lay of the Land*, *Let Me Be Frank with You*) (Vintage, 1995); Kalypso Nicolaidis, *Exodus, Reckoning, Sacrifice: Three Meanings of Brexit* (Unbound, 2019); Hanoch Levin, *The Labor of Life: Selected Plays* (Stanford University Press, 2003).

**(2020)**

Olga Tokarczuk, *The Books of Jacob* (*Księgi Jakubowe albo Wielka podróż przez siedem granic, pięć języków i trzy duże religie, nie licząc tych małych*) [*The Books of Jacob, or a Great Journey Through Seven Borders, Five Languages and Three Major Religions, Not Counting the Small Ones*] (Wydawnictwo Literackie, 2014); Harry Mulisch, *The Discovery of Heaven* (transl. Paul Vincent, Penguin, 1997); Olivier Corten, *Le discours du droit international—Pour un positivisme critique* (Pedone, 2009); Janusz Korczak, *Bankructwo Małego Dżeka* (Krajowa Agencja Wydawnicza RSW “Prasa- Książka-Ruch”, 1979); Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press, 2015); Witold Gombrowicz, *Bacacay* (transl. Bill Johnston, Archipelago, 2006); William Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge University Press, 2019); Robert Massie, *Dreadnought—Britain, Germany and the Coming of the Great War* (Ballantine Books, 1992); Andoni Luis Aduriz y Daniel Innertarity, *Cocinar, Comer, Convivir—Recetas para pensar con los cinco sentidos* (Ediciones Destino, 2012); Josef Hen, *Nowolipie Street* (transl. Krystyna Boron, D1 Books Llc, 2012).

JHHW

## **Rabia Balkhi – The Legacy of a Medieval Poet in Afghanistan**

Readers of EJIL will be quite familiar with our regular rubrics – Roaming Charges and The Last Page. The photographs and poems we publish in these sections of the Journal aim to remind us, as academics and human beings, of the ultimate subject of our scholarly reflections, the world and the people who inhabit it.

We are especially pleased to publish in this issue a poem by Rabia Balkhi, a medieval female poet from Balkh (now northern Afghanistan), and a photograph representing the poet in present-day Kabul. The story behind this poem and the photograph is well worth recounting.

We came across some writings attributed to Rabia Balkhi during a search for a poem related to Afghanistan and the devastating situation there following the Taliban takeover of the country in late August this year. An illuminating article by Munazza Ebtikar, a PhD candidate at the University of Oxford and originally from Afghanistan, gave context to the history and legacy of Rabia Balkhi.<sup>3</sup>

Rabia, the daughter of an Emir in the Balkh court, most likely lived during the 9th or 10th century. Her family's noble status enabled her to receive an education and develop her poetry. As one of the earliest practitioners of New Persian, Rabia's poetic work lives on in the narrations of Sufi Persian poets through the centuries. The longest narration of Rabia's life is in one of the mystical stories of the *Elāhi-nāma* (Book of the Divine) by the 12th-century Sufi hagiographer and poet Farid al-Din 'Attār. We are publishing a poem from this story in this issue, beautifully translated by Munazza Ebtikar.

Rabia's fate was sealed when she fell in love with her brother's Turkish slave, Baktash. Her poetry lyrically speaks of longing for her unattainable love. Jealous and envious of her poetic mastery, Rabia's brother imprisoned her in the hamam and threw Baktash into a well. It was there, it is said, that her brother slit her wrists and Rabia wrote her last love poems with her own blood until her death.

Today Rabia Balkhi continues to be revered in Afghanistan, and depending on the person's perspective, she is seen as a passionate feminist who defied power and injustice, a saint or martyr who gave her life to divine love or a tragic victim of the patriarchy.

This brings us to present-day Afghanistan and the photograph in our Roaming Charges section of a poster of Rabia Balkhi on the protective wall of Afghanistan's Supreme Court. The Pashto text beneath the picture reads, 'Rabia Balkhi 4th hijri century poet'. The photograph was taken in early August 2021, but it is quite probable that the poster has been vandalized in the meantime as the Taliban have defaced images of women across the capital. The photograph was taken by a young Afghan woman from Panjshir, Farhat Chira, who left Kabul in September this year with her parents for the long and difficult journey to France where she is currently seeking asylum.

AB

## In This Issue

The last issue of 2021 opens with an article by *Fuad Zarbiyev*, who undertakes a critical examination of the privileged status that the judicial representation of international law enjoys in mainstream international legal discourse. Zarbiyev argues

<sup>3</sup> M. Ebtikar, 'The Story of Rabia Balkhi, Afghanistan's Most Famous Female Poet', Ajam Media Collective, available at <https://ajammc.com/2021/08/16/rabia-balkhi-afghanistan-poet/>.

that this status is neither obvious nor unobjectionable, and points to its main ramifications. In the next article, *Katie Johnston* explains how the nature and context of an alleged customary rule affect the manner in which the International Court of Justice applies the *opinio juris* and state practice tests to determine whether the alleged rule actually exists. Thereafter, *Jie (Jeanne) Huang* suggests ways to strike a balance between the international law-based requirement to increase transparency in investment arbitration and the domestic law-based requirement to protect personal data. As Huang notes, such balancing is likely to become particularly acute as international arbitration increasingly relies on virtual hearings. *Sherzod Shadikhodjaev* addresses another challenge associated with online economic activity: namely, ensuring that the regulation of digital trade abides by the principle of technological neutrality, which requires regulators to treat all technologies equally. Questions related to technological neutrality and data protection are also discussed by *Dafna Dror-Shpoliansky* and *Yuval Shany*, who problematize the dominant view according to which the same rights that people have offline should also be protected online. Asserting that the ‘normative equivalency’ paradigm does not ensure sufficient protection for human rights in cyberspace, the authors support the recognition of new digital human rights, such as the right to internet access and the right not to be subjected to automated decisions.

Our Roaming Charges image by a young Afghan woman, *Farhat Chiri*, complements the Last Page poem by a medieval female poet, *Rabia Balkhi*, from Balkhi (present-day Afghanistan). Together they invite reflection on the importance and influence of the poet in today’s Afghanistan. An earlier section of this Editorial tells the fascinating and tragic story of Rabia Balkhi.

The next section launches *EJIL*’s new Legal/Illegal series, which features short articles assessing the international legality of current events. The idea is to create a space for timely doctrinal deliberations, which are more in-depth than the *EJIL: Talk!* framework can cater for. Our first Legal/Illegal exchange addresses the question whether the use of force by Azerbaijan in the Second Nagorno-Karabakh War was lawful or, more generally, whether the use of force by a state to recover a territory that has been occupied for a long time can be lawful. *Tom Ruys* and *Felipe Rodríguez Silvestre* reply in the negative, reasoning that the use of force in such circumstances cannot be considered as self-defence because it does not satisfy the immediacy requirement. In contrast, *Dapo Akande* and *Antonios Tzanakopoulos* assert that where an occupation follows from an unlawful armed attack, it should be seen as a continuing armed attack, which accords to the attacked state an ongoing right to self-defence.

In Critical Review of Governance, *Jinyuan Su* examines the legality of establishing offshore air defence identification zones outside a state’s national airspace. Su finds that under customary international law, passive identification (for instance, through radar detention) is permissible, whereas voluntary identification (for instance, through the submission of flight plans) is at best tolerated.

*EJIL* has had a special relationship with the European Society of International Law since the planning stages of the Society’s creation. *ESIL*’s founding meeting was

convened in 2001 on the initiative of the Editors of the *European Journal of International Law* in conjunction with Professor Hanspeter Neuhold of the University of Vienna. Since then, there have been several valuable collaborations between the Society and the Journal. We aim to demonstrate that special relationship in the Journal by dedicating some pages to highlights of ESIL conferences, as selected by the ESIL Board. This issue therefore contains a section focused on the Society's 16th annual meeting on 'Changes in International Lawmaking: Actors, Processes, Impact', convened in Stockholm in September 2021, despite all the challenges of a pandemic. The section begins with the speech with which the Convenor of the Organizing Committee, *Pål Wrangé*, opened the conference. It continues with an edited version of the – online – keynote conversation between *Martti Koskenniemi* and *Sarah Nouwen* on 'The Politics of Global Lawmaking'. The section closes with two pieces reflecting on the conference, written by *Romain Le Boeuf* and *Sotirios-Ioannis Lekkas*.

The last section in this issue is a Transatlantic Symposium on *The Restatement (Fourth)*. Situated between articles and book reviews, the Symposium illustrates EJIL's commitment to taking books seriously. And the 2018 *Restatement on the Foreign Relations Law of the US* is a book that merits serious discussion. The Symposium is the written record of a literal – albeit online – discussion we organized in October 2020 between, on the one hand, US scholars intimately familiar with the *Restatement*, indeed many of its authors, and, on the other hand, Europe-based scholars who are intimately familiar with the issue areas covered by the *Restatement*: treaties, jurisdiction and immunities.

One of the aims of this Symposium was to reflect on the institution of the American *Restatement* – not exactly in the form of an 'everything you wanted to know and did not dare to ask' but, to the best of our abilities, an 'everything important you wanted to know' or at least 'some of the most important things you wanted to know' about the *Restatement*. In pursuing that objective in this transatlantic exercise, we were immensely helped by the participation of the actual reporters of the *Restatement (Fourth)*, who were open and receptive to answering some searching and delicate questions.

After an introduction to its key concepts and structure, the Symposium opens with a literal Q&A between the Symposium convenors and one of the project's two coordinating reporters, *Paul Stephan*. We discuss the selection of the reporters, the writing process, the *Restatement's* intended audience and its relationship with the *Restatement (Third)*. In the two following contributions, the phenomenon of the US *Restatement* is commented on and critiqued by *Hélène Ruiz-Fabri* and *Anne Peters*. *Paul Stephan* responds to these two articles. The Symposium then turns to a discussion of the substantive law as treated in the *Restatement (Fourth)*. *Alina Miron* and *Paolo Palchetti* argue that in the area of the law of treaties, the *Restatement (Fourth)* is more inward-looking than the *Restatement (Third)* was – a view that reporters *Curtis Bradley* and *Edward Swaine* dispute. *Cédric Ryngaert*, too, focuses on the differences between the *Restatement (Third)* and *(Fourth)*, finding the latter to have adopted a 'parochial' approach to the law of jurisdiction. In his response, *William Dodge* differentiates between 'parochial' and 'modest' approaches to the customary international law of jurisdiction, and defends the virtues of modesty. The Symposium concludes with a

substantive discussion between *Roger O'Keefe* and reporters *David Stewart* and *Ingrid Wuerth* on the *Restatement's* treatment of the law of immunities.

We are grateful to all the Symposium contributors: to commentators for engaging, seriously and respectfully, with a work of significance, and to the *Restatement* authors for their openness in discussing their work.

*MS, SMHN and JHHW*

## In This Issue – Reviews

In addition to our *Restatement* symposium, this issue features a review essay and three regular reviews.

In the review essay, 'When Should International Courts Intervene?', *Jan Petrov* engages with *Shai Dothan's* book of the same title and applies its framework to the particular challenge of populism.

The three regular reviews cover new scholarship on civil wars, supply chain governance and EU law in an end-of-year *potpourri*. *Mary Ellen O'Connell* reads *Chiara Redaelli's Intervention in Civil Wars* as 'a sophisticated account of the international law on intervention in civil war', but emphasizes the resilience of the prohibition against military force. *Ioannis Kampourakis* shares *Stefano Ponte's* criticism of 'green capitalism', set out in *Business, Power and Sustainability in a World of Global Value Chains*, and highlights how and why the book's central claim matters for international law(yers). Finally, *Justin Lindeboom* enjoyed reading *Pavlos Eleftheriadis's* 'original and provocative' attempt, in *A Union of Peoples*, to portray the EU as a 'construct of the law of nations' – even though the book's vision of international law puzzles him more than a bit. Lots of food for thought, then – happy reading!

*CJT*