

Recent Publications

Domestic Violence and International Law. By Bonita Meyersfeld. Portland, OR: Hart Publishing, 2010. Pp. vii, 332. Price: \$90.00 (Hardcover). Reviewed by Todd Baker.

In *Domestic Violence and International Law*, Bonita Meyersfeld undertakes three ambitious tasks: (1) depicting, in detail, the way in which international law treats domestic violence, (2) chronicling the events that have brought the issue to where it is today, and (3) suggesting how scholars and policymakers ought to think about domestic violence in the future. Each of these projects is distinct and considerable in its own right and their simultaneous undertaking makes for a challenging project. There is a particular tension between the first two largely descriptive enterprises and the third, which is essentially normative. As a result, the book's beginning disorients, and there are still a few noticeable gaps left in the reasoning even after it settles into its presentation. In spite of these shortcomings, Meyersfeld presents a thorough examination of the current status of domestic violence in international law, as well as a detailed history of the topic, replete with striking stories of women struggling against terrifying obstacles in search of justice. Her model of how to understand domestic violence is compelling, albeit incomplete. Although the book does not supply the comprehensive analysis and argument its inside cover advertises, any reader seeking a greater understanding of the subject would do well to read *Domestic Violence and International Law*.

Meyersfeld describes the steady increase in international recognition of the fundamental right of women, and others, to be free from domestic violence. Through U.N. documents, case law, scholarship, anecdotal accounts, and empirical analyses, Meyersfeld clarifies for the reader the global status quo of violence between partners. She discusses the historical trajectory of the capacity for international law to protect actual and potential victims of this violence (pp. 24-77). She also covers the major developments that have occurred in this area and provides documentary evidence of the effect these changes have had on women in various parts of the world.

Throughout her discussion of the evolving international understanding of domestic violence, Meyersfeld addresses expansive issues including the link between sex discrimination and domestic violence, the proper scope of an individual's right to privacy, the justification for international authority over sovereign states, and the powers and inadequacies of international law generally. Meyersfeld urges the reader to recognize domestic violence as a vicious and widespread issue and argues that it is and should be an object of international law. In her investigation of the extent to which international law already prohibits domestic violence, Meyersfeld observes that no international treaty explicitly does so (p. 2) and therefore looks to customary international law. She contrasts a "traditional" view of customary international law—that

balances custom with *opinio juris*—with “contemporary” approaches to it (pp. 10-15). The contemporary approaches recognize rules, principles, and norms derived from U.N. reports and bodies (pp. 11-12). Implicitly endorsing the “contemporary” approaches, Meyersfeld offers a model for international law on domestic violence wherein a state is to be held accountable for domestic violence that is sufficiently severe and pervasive, even if the perpetrators are private persons. In Meyersfeld’s model, domestic violence that is “systemic”—that is, sufficiently severe, continuous, gendered, and perpetrated against categorically vulnerable victims—amounts to a human rights violation that international law ought to recognize wherever a state’s actions or omissions result in an inadequate national remedy (p. 111).

The most notable weakness of Meyersfeld’s thesis does not lie with the arguments it makes, but rather the argument it cannot entirely deny—that international law, viewed in a traditional sense, does not prohibit domestic violence. After making the important distinction between “traditional” and “contemporary” views of customary international law, Meyersfeld does not expressly side with either one. She does, however, display her favor for the contemporary theories on several occasions. For one, she argues that the more traditional approaches are “arguably inappropriate, particularly in the context of violence against women” (p. 14). Where state behavior may and frequently does contradict people’s rights and needs, state practice and *opinio juris* alone should not determine customary international law (p. 14). In contrast, the contemporary approaches are “quite sensible” because they recognize principles that emerge from the United Nations’s “interaction with the international community” (p. 12). Meyersfeld, here, must take a side because, as she repeatedly concedes, the “traditional” approach will not corroborate the conclusions she reaches (pp. 1, 14, 62, 143). Only the elements of a contemporary theory of international law provide strong evidence of an international legal principle holding states accountable for domestic violence. Though Meyersfeld demonstrates that the elements the contemporary view of customary international law takes into account can and do *influence* sovereign states in a noncoercive manner (pp. 255-65), the limits the traditional approach to customary international law presents undermine the viability of much of her argument. Meyersfeld would be on firmer ground could she champion the contemporary approach and rebuff the traditional view’s limits on the impact of her conclusions.

There is also an unfortunate indecisiveness that begins with the host of sweeping questions Meyersfeld introduces early in the book. What is international law? (p. 3). What can be inferred from the behavior of states? (p. 8). Her discussion of customary international law raises serious challenges to any model of law derived only from the actions and representations of states, (p. 13), for states frequently act undemocratically and often espouse radically different values. The questions Meyersfeld poses are theoretical in nature, and they demand carefully structured reasoning if they are to be addressed fairly. Nonetheless, after a section-closing paragraph that readies the reader for a discussion of these deep issues (p. 16), Meyersfeld begins an informative but

unanticipated historical overview. One- or two-sentence samples of arguments appear throughout this extended presentation of facts (pp. 51, 75-76), but none of the early questions are addressed directly within the book's first major section.

Meyersfeld's arguments are compelling but scattered. They are frequently embedded within long, descriptive passages. For example, Meyersfeld confronts the proposition that an individual's right to be free from government interference in his or her home precludes or limits the state's ability to protect victims of domestic violence from their partners. Meyersfeld asserts that the right to privacy is not purely a negative right to be free from state interference, but also involves a positive right to individual autonomy. She adds that an abuser's right to privacy will generally not outweigh a victim's right to life and to physical and mental integrity. Rather than clearly articulating her position, however, her idea emerges in brief mentions across several passages (pp. 101, 127, 232, 243). The "due diligence standard," which sets a fairly high bar for states to meet in preventing violations of their citizens' rights, is important for Meyersfeld's purposes but receives a similarly dispersed discussion (pp. 83, 151, 210, 229). Meyerfeld's arguments lose some of their force as a result of this piecemeal treatment.

Certain key concepts do not receive adequate attention, evincing Meyersfeld's reticence to stake her case on theoretical grounds. Meyersfeld introduces a potential opposing argument based on the principle of cultural relativism, a topic with a significant literature in its own right,¹ and then rejects the view in two pages (pp. 103-05). She makes occasional reference to a demand for "substantive," rather than "formal" equality, by which she presumably means that policies should tend to diminish material (gender) inequality rather than merely being nondiscriminatory on their face. This distinction is widely discussed in other scholarship,² but is described sporadically and briefly in this book (pp. 105, 124-26). Meyersfeld twice hints at what could be a powerful economic argument for the international prohibition of domestic violence: the costs of domestic violence—manifested in medical bills, reduced productivity, social instability, etc.—may be higher than the cost of reducing or eradicating the problem (pp. 75-76, 148). Nevertheless, Meyersfeld does not spend more than a paragraph on this line of reasoning at any one point. By refraining from addressing cultural relativism, substantive and formal equality, and economic arguments at a greater length, the theory of the relationship between domestic violence and international law remains in places unfinished and unsatisfactory.

In spite of these shortcomings, Meyersfeld does offer a more comprehensive critique of other subjects. For example, she characterizes certain kinds of intimate violence as systemic, and therefore warranting international intervention. Meyersfeld outlines the factors that determine

1. See, e.g., BRET L. BILLET, *CULTURAL RELATIVISM IN THE FACE OF THE WEST: THE PLIGHT OF WOMEN AND FEMALE CHILDREN* (2007).

2. See, e.g., Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 *CAMBRIDGE L.J.* 562 (2000).

whether particular instances of domestic violence can be understood as “systemic”—severity, continuity, sex discrimination, vulnerability of the victims, and inadequacy of the state in responding to such violence—and addresses each directly (pp. 111-42). For example, with respect to severity, Meyersfeld explains that “[n]ot all acts of domestic violence fulfill the requirement of severity A one-off incident of violence, which leaves no lasting physical or emotional damage and does not create a climate of fear, may not require state intervention” (p. 112). Meyersfeld also discusses the issue of state responsibility at length, and, to a lesser extent, the noncoercive influence of international law on domestic violence. She articulates her view on a state’s obligation to protect its citizens from systemic domestic violence and addresses the individual considerations that form the larger issue (pp. 142-76, 193-251). If this approach had been adopted throughout the book, it would have resulted in a robust analysis of the topic of domestic violence and international law.

Despite these critiques, the book’s data and anecdotes make *Domestic Violence and International Law* an illuminating introduction to the issue. Meyersfeld presents evidence that domestic violence is of a pervasive and harsh nature warranting international attention. She demonstrates that entities like the United Nations, nongovernmental organizations, and various forms of media can influence the moral and legal norms of a community in ways that improve the lives of members who are vulnerable to domestic violence. Towards the end of the book, Meyersfeld returns to a factual discussion of crimes against women, such as female genital cutting and mass rape, which have been rationalized as encouraging “proper” female behavior in the former case and as a legitimate act of war in the latter. This discussion is followed by some detailed examples of how international law has successfully aided those at risk of domestic violence. Because Meyersfeld’s most substantive arguments precede this section, the reader can apply the models that Meyersfeld has proposed to the data she presents. By the end of the book, the reader can readily understand the analogy between the shocking practices of mass rape and female genital cutting, acts that have been carried out or condoned by the state, and domestic violence, a putatively private crime. Meyersfeld convincingly argues that states’ failures with respect to domestic violence have enabled this crime to exist in a “systemic” fashion, such that it is akin to female circumcision or mass rape. Through her presentation of informative and engaging facts, Meyersfeld successfully communicates her message even when her analysis falls short. On balance, Meyersfeld’s application of anecdotes and empirical information to her model compensates for the scattered nature of her other arguments.

Domestic Violence and International Law addresses captivating questions with serious implications for victims of domestic violence. Yet, rather than methodically untangling the relevant queries, Meyersfeld dances back and forth between description and argument. Although the reasoning underlying Meyersfeld’s position is compelling, it is at times incomplete. Nevertheless, because the book successfully offers several key analytic points and a comprehensive background of the topic, a reader looking for a better understanding of how national and international organizations can combat

domestic violence would be well served to start with *Domestic Violence and International Law*.

International Authority and the Responsibility to Protect. By Anne Orford.
New York, NY: Cambridge University Press, 2011. Pp. v, 235. Price:
\$40.00 (Paperback). Reviewed by Adam Goldenberg.

Most accounts of the Responsibility to Protect (R2P) doctrine examine its force and effect, or lack thereof: who has actually intervened in the name of protection? Were they inspired by R2P, or did they merely misappropriate its rhetoric? How do we distinguish humanitarian purpose from humanitarian pretext? If the latter achieves the former, does it even matter? Does regime change fall within the scope of the Responsibility to Protect? Should it?

It has been ten years since the International Commission on Intervention and State Sovereignty (ICISS) published its report,³ and six years since the United Nations General Assembly formally endorsed R2P, at the 2005 World Summit.⁴ The U.N. Security Council has since established, authorized, or extended the mandate of multilateral actions in Iraq,⁵ Afghanistan,⁶ Darfur,⁷ Somalia,⁸ Libya,⁹ and elsewhere. In each case, and to varying degrees, old questions of legitimacy and authority have emerged alongside humanitarian objectives, bolstered or buffeted by the ebb and flow of political will.

Some critics of the Responsibility to Protect argue that the doctrine can be abused—or selectively applied—to suit the military objectives of powerful states.¹⁰ Others question the commitment of would-be interveners to enforce it.¹¹ But Anne Orford is not preoccupied by R2P’s “success” or “failure,”

3. INT’L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

4. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-40, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

5. S.C. Res. 1723, ¶ 1, U.N. Doc. S/RES/1723 (Nov. 28, 2006).

6. S.C. Res. 1974, ¶ 3, U.N. Doc. S/RES/1974 (Mar. 22, 2011); S.C. Res. 1943, ¶¶ 1-2, U.N. Doc. S/RES/1943 (Oct. 13, 2010); S.C. Res. 1776, ¶¶ 1-2, U.N. Doc. S/RES/1776 (Sept. 19, 2007); S.C. Res. 1707, ¶¶ 1-2, U.N. Doc. S/RES/1707 (Sept. 12, 2006).

7. S.C. Res. 1935, ¶ 1, U.N. Doc. S/RES/1935 (July 30, 2010); S.C. Res. 1769, ¶ 1, U.N. Doc. S/RES/1769 (July 31, 2007).

8. S.C. Res. 1910, ¶ 1, U.N. Doc. S/RES/1910 (Jan. 28, 2010); S.C. Res. 1744, ¶ 4, U.N. Doc. S/RES/1744 (Feb. 21, 2007).

9. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

10. See, e.g., *General Assembly agrees to hold more talks on responsibility to protect*, UN NEWS CENTRE (Sept. 14, 2009), <http://www.un.org/apps/news/story.asp?NewsID=32047> (“[O]utgoing [General] Assembly President Miguel D’Escoto . . . told the Assembly that the legacy of colonialism gave ‘developing countries strong reasons to fear that laudable motives can end up being misused, once more, to justify arbitrary and selective interventions against the weakest States.’”); see also Noam Chomsky, Statement to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect (July 23, 2009), available at <http://www.un.org/ga/president/63/interactive/protect/noam.pdf> (“The expansive rights accorded by the [ICISS] are in practice restricted to NATO alone . . . opening the door for resort to R2P as a weapon of imperial intervention at will.”).

11. See, e.g., Michael Ignatieff, *The Duty to Rescue*, NEW REPUBLIC (Sept. 24, 2008), <http://www.tnr.com/article/books/the-duty-rescue> (“The demand for humanitarian intervention is high, but the supply has dried up. The need to do something remains, but the moral conviction, together with the political will and the material resources to do it, has dwindled or disappeared.”).

however defined; rather, in *International Authority and the Responsibility to Protect*, she examines the impulse to intervene itself. R2P's origins, as she sees them, are anything but liberal.

In Orford's telling, the rhetoric of "protection" has a checkered past: the idea that national leaders might be usurped as the protectors of their people predates not only the U.N. Charter, but also the Westphalian state. To Orford, today's humanitarians are the unexpected heirs of medieval popes. History sometimes makes strange bedfellows, but comparisons can only be stretched so far. Here, Orford falls short. Her account makes a meal of superficial similarities, and her credibility suffers for it.

Even if she is right that the Responsibility to Protect is not a duty to be fulfilled, but rather the authority to act (p. 26), and even if R2P "represents a significant shift in thinking about the lawfulness of authority in the modern world," (p. 41) the doctrine still resides far from the imperial papacy. Is NATO's backing of Libyan revolutionaries, with Security Council approval, really in the same category as "the praise and approbation the Pope gave to the murder of King Henry III of France" in 1589 (p. 155)?

"[T]he Pope had jurisdiction to declare that a ruler was unlawful and should be deposed or resisted," Orford writes. "Successive popes had not only claimed the authority to depose rulers, but had regularly practiced that authority." (p. 139). As in the Responsibility to Protect, the universal jurisdiction of medieval popes hinged on the proposition that some kind of international executive may, under certain circumstances, trump a ruler's prerogative in the name of a higher ideal. But that comparison is thin, at best. Heresy is not a crime against humanity. The Sixteenth-Century papacy is not the Twenty-First-Century Security Council. The former enforced dogma. The latter arrests atrocity—or is, at least, empowered to do so. Orford is correct that, in both cases, the most extreme violation of sovereignty is condoned by an external power. But do the similarities really extend any further?

Orford argues that they do. She describes decisions by U.N. officials to override sovereignty, or even self-determination, based on their evaluation of those under their authority. In Bosnia-Herzegovina, for instance, U.N. executives sought to impose political and economic reforms that had been rejected by democratically-elected Bosnian legislators. Orford quotes a local media interview with a former High Representative, who declared that, "[t]he laws concerning economic reform and development are essential, and they simply have to be passed. In case this does not happen, you can be sure that I will not hesitate to exercise my powers" (pp. 98-99).

Another example: in 1961, amid civil strife in the Republic of Congo, President Joseph Kasavubu dismissed the elected prime minister, Patrice Lumumba. U.N. Secretary-General Dag Hammarskjöld and his representative, Andrew Cordier, professed their neutrality, but their actions—closing the airports and radio stations in Leopoldville—favoured Kasavubu. Orford describes how "Cordier made clear that his choices were based on his opposition to Lumumba," even though Lumumba had been democratically elected and enjoyed the confidence of Parliament (p. 84). Hammarskjöld, for

his part, saw Lumumba and his government as “clumsy” and “inadequate” (p. 86). Still, the Secretary-General espoused the ideal of self-determination: “the United Nations has had to be guided in its operation solely by the interest of the Congolese people and by their right to decide freely for themselves, without any outside influences” (quoted at p. 85). Orford seems to regard this as mere lip service, contradicted by the actual exercise of international executive authority: “[Hammarskjöld] chose efficiency and order over parliamentary support or self-determination,” she writes (p. 85).

Conflicts between rhetoric and reality, between purpose and pretence, have always been part and parcel of colonial paternalism. Centuries of examples exist. Orford cites Britain’s claim, during the Suez Crisis of 1956, that its boots on Egyptian soil were “impartial” (p. 62). She also describes Belgium’s “humanitarian intervention” into its newly independent former colony, the Congo, in 1960 (p. 72). But similarities in rhetoric mask differences in conduct, and Orford focuses too much on the former. After all, even Adolf Hitler used the rhetoric of protection to justify German influence in Czechoslovakia on the eve of the Second World War. Is the Responsibility to Protect tainted by the Nazis, too?

Perhaps, says Orford. Citing *Leviathan*, she highlights Thomas Hobbes’ claim that “the creation of a political order depended upon the establishment of a common power with the capacity to protect its subjects” (p. 110). This is where the Nazis come in; namely, the Nazi philosopher Carl Schmitt, who used Hobbes’ connection between protection and authority to justify totalitarianism: “the totality of this kind of state power always accords with the total responsibility for protecting and securing the safety of citizens” (quoted at p. 127). Orford connects the dots: “The deprivations of liberty in the absolutist states of early modern Europe, the police actions of colonial powers and the terror inflicted by the security forces of fascist Germany were all explained as exercises in institutionalizing protection” (p. 134).

It is far from clear, however, that we can draw meaningful conclusions about the Responsibility to Protect from the rhetorical similarities that Orford identifies. At last fall’s General Assembly session, for instance, Zimbabwean President Robert Mugabe invoked R2P even as he denounced the NATO mission in Libya, and Syrian Foreign Minister Walid Al-Moualem proudly described his government’s “responsibility to protect its citizens.”¹² R2P’s rhetorical force makes it prone to misuse, and yet it does not seem reasonable to judge the doctrine by those who hide behind or abuse it. Words are malleable. Deeds are less so. Surely we should judge the former by the latter, and not the other way around.

Yet, Orford sees dangerous precedent in the rhetoric of R2P: “the

12. See Walid Al-Moualem, Minister for For. Affairs and Expatriates of the Syrian Arab Rep., Address at the General Debate of the Sixty-Sixth Session of the United Nations General Assembly (Sept. 26, 2011), available at http://gadebate.un.org/sites/default/files/gastatements/66/SY_en.pdf; Robert G. Mugabe, President of Zim., Address at the Sixty-Sixth United Nations General Assembly (Sept. 22, 2011), available at <http://www.newzimbabwe.com/opinion-6117-Full+text+Mugabes+speech+to+66th+UNGA/opinion.aspx>.

responsibility to protect concept implicitly asserts . . . that [the international community's] authority to govern is, at least in situations of civil war and repression, superior to that of the state" (p. 120). For Orford, the problem is subjectivity: "Who decides what protection means and which claimant to authority can guarantee it? Who decides whether a particular government is in fact capable of protecting its population and bringing peace to its territory? Who has the authority to judge the legitimacy of rulers?" (p. 139).

It would be one thing if the Responsibility to Protect entailed rich, powerful countries sitting in judgment over poor, weak ones. But that is neither its purpose nor its effect. Indeed, the doctrine can only be acted upon with the approval of the Security Council, whose current membership includes Togo, Morocco, Guatemala, and Azerbaijan. True, R2P requires the support – or, at the very least, acquiescence – of the five permanent members of the Security Council, each of which may veto its enforcement. And, in the most extreme cases, the Responsibility to Protect will be rendered toothless unless powerful countries are prepared to intervene militarily in cases of "internal war, insurgency, repression or state failure . . ." ¹³ There is no denying that the most likely candidates for such intervention will be poor, weak, non-Western former colonies. But when people are being butchered, and when their rulers refuse to protect them, where else can the Responsibility to Protect shift but to the international community?

Orford is correct when she describes R2P as neither neutral nor impartial. It does not pretend to be. Instead, it embodies a turn taken in the 1990s, when, as Orford writes, "[m]any UN officials and other humanitarian actors responded to the perceived need to become more political and less impartial through the turn to human rights . . ." (p. 102). To endorse the Responsibility to Protect is to endorse the view that "[i]nternational intervention necessarily recognises some claimants to authority rather than others" (p. 195). But is this problematic? When medieval popes are plotting regicide, perhaps, but not when the international community is preventing genocide.

Orford raises a red flag over the rhetoric of protection, which the Responsibility to Protect shares with the very behavior it seeks to stop. Either we can be alarmed by these superficial similarities, or else we can celebrate the fact that, after centuries of abuse, the Responsibility to Protect has finally reclaimed the rhetoric of protection for humanitarian ends. Still, all of this will come to nothing if the countries that endorse the Responsibility to Protect refuse to act on it—a challenge that has nothing to do with rhetoric, and everything to do with politics. If the world intends to protect human beings from catastrophic harm, deeds matter more than words.

State Responsibility for International Terrorism. By Kimberley N. Trapp. New York, NY: Oxford University Press, 2011. Pp. vii, 295. Price: \$140.00 (Hardcover). Reviewed by Matthew Letten.

13. INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 3, at xi.

On September 29, 2011, Manssor Arbabsiar was arrested at John F. Kennedy International Airport in New York and accused of orchestrating a plot to assassinate the Saudi Arabian ambassador to the United States.¹⁴ Arbabsiar was said to be working on behalf of the Iranian government when he met with a paid Drug Enforcement Administration informant and discussed bombing a Washington, D.C. area restaurant where the Saudi ambassador was purportedly a frequent diner.¹⁵ Arbabsiar was allegedly connected with Iran's Qods Force, a unit of the Islamic Revolutionary Guard Corps.¹⁶ The Qods Force was reportedly ready to spend \$1.5 million to fund the attack.¹⁷ Officials from both the United States and Saudi Arabia said that Iran would be held accountable over the planned attack. The U.S. Treasury Department placed sanctions on five individuals, including four senior Qods Force officers connected to the alleged plot.¹⁸ The Saudi Embassy issued a statement denouncing the plot as a "despicable violation of international norms, standards and conventions."¹⁹

The accusation that elements of the Iranian government were involved in the planning of a terrorist attack raises important questions for international law. What does it mean for a state to be responsible for a terrorist act? How can one state attribute an act of terrorism to another state? What responsive measures might an injured state utilize? The oft-invoked rhetorical label of "state sponsors of terror" does little to capture the international legal framework that might be used to hold one state responsible for an act of terrorism in another state. Kimberley Trapp offers a thorough account of this international legal framework in the timely book—written before Arbabsiar's arrest—*State Responsibility for International Terrorism*. Trapp addresses the legal obligations of states not to engage in terrorism, to prevent terrorist acts, and to punish terrorist actors. Trapp also identifies the relevant international rules and norms that bear on the identification of a guilty state after a suspected instance of state terrorism, the standard of proof for attributing an act of terrorism to that state, and the responsive measures that an injured state can take.

Trapp argues that the legal obligations and rules of state responsibility she identifies have been underutilized in the context of international terrorism. Instead, most states respond to terrorism with some combination of a criminal law enforcement paradigm, where individual actors are held criminally responsible, and a security paradigm that utilizes defensive military force sanctioned by the U.N. Security Council against offending states (pp. 1-2). These responses, however, do not "fully address the systemic consequences of

14. Evan Perez, *U.S. Accuses Iran in Plot*, WALL ST. J. (Oct. 12, 2011), <http://online.wsj.com/article/SB10001424052970203633104576625163343308154.html>.

15. *Id.*

16. Sealed Amended Complaint, *United States v. Arbabsiar*, No. 11-MAG-2617 (S.D.N.Y. Oct. 11, 2011), available at <http://online.wsj.com/public/resources/documents/assassinationcomplaint1011.pdf>.

17. Perez, *supra* note 14.

18. *Id.*

19. Statement, Royal Embassy of Saudi Arabia, Statement on Plot to Assassinate Ambassador (Oct. 11, 2011), available at <http://www.saudiembassy.net/announcement/announcement10111101.aspx>.

un-remedied breaches of international law” (p. 2). Holding guilty states responsible under the international legal framework that Trapp identifies would “play an important role in maintaining respect for international law, ‘confirm the validity of fundamental international norms’ relating to terrorism, and . . . prevent the escalation of threats to international security by promoting the reconciliation of the relevant states and restoring ‘confidence in a continuing relationship’” (p. 2). Throughout the book, Trapp identifies the legal obligations of states to prevent terrorist attacks, to punish terrorist actors, and not to engage in terrorism themselves. Although Trapp falls short of an entirely persuasive account, *State Responsibility for International Terrorism* makes the significant contribution of an authoritative summary of the relevant international law and, more importantly, of an alternative paradigm for responding to state terrorism.

Trapp begins her narrative of state responsibility with the prohibition on state terrorism that exists under both customary and treaty law. Under customary law, Trapp identifies three primary frameworks within which a specific act of state terrorism might fit: the prohibition on aggression as specified in the U.N. Definition of Aggression, the prohibition on the use of force as set out in Article 2(4) of the U.N. Charter and the U.N. Declaration on Friendly Relations, and the principle of nonintervention as outlined in the U.N. Declaration on Friendly Relations (p. 33). Trapp also analyzes the various treaty regimes that prohibit state support of international terrorism. Trapp discusses thirteen Terrorism Suppression Conventions (TSCs) that require states to, among other things, criminalize terrorism under domestic law and assist in the law enforcement process (p. 9).

After outlining the primary rules of international law obligating states to refrain from engaging in state terrorism, Trapp examines the secondary rules of state responsibility bearing on attribution and breach of primary rules (p. 34). In the clearest case of attribution, states are responsible for the organs of the state acting in their official capacity (p. 34). Most instances of state terrorism, however, will involve groups who somehow act on behalf of the state while remaining outside the state’s formal structure. Trapp focuses her analysis on the International Law Commission’s Articles on State Responsibility, which hold states responsible for the actions of groups or individuals acting under the state’s control. The International Court of Justice (ICJ) has interpreted control as “effective control” in its decision in the *Nicaragua* case, where the United States was accused of arming the Contras rebel group.²⁰ Though the United States may have had general control over the Contras, the ICJ held that the United States did not have the effective control of directing the attacks that violated humanitarian law (p. 40). Trapp finds this standard too demanding and argues for an “overall control” test where the state need have only general control over a terrorist group’s operation. The source of the overall control test is the International Criminal Tribunal for the Former Yugoslavia (ICTY),

20. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14 (June 27).

where the Appeals Chamber held in *Tadić*²¹ that the government of Yugoslavia had exercised overall control over Bosnian Serb forces and could be held accountable for their violations of humanitarian law (pp. 40-41).

In her discussion of the standards of attribution, Trapp encounters the first significant hurdle for adoption of her suggested approach to state responsibility for terrorism. The ICJ rejected the overall control test and reprimanded the ICTY in its decision in the *Bosnia Genocide Case*²² (p. 42). The effective control test suffers from significant epistemic and evidentiary problems in proving a necessary level of operational control over terrorist activities. Conversely, the overall control test seems appropriately flexible in its more contextual approach. The weight of international law and state practice, however, favors the effective control test. Given the challenge of adequately proving state control over a terrorist group, states will be reluctant to leave the current security paradigm and avail themselves of the international legal framework concerning state responsibility.

Besides the obligations of states not to commit or assist in acts of terrorism, international law establishes obligations relating to a state's prevention and punishment of terrorists (p. 63). Again, Trapp draws on a range of sources in customary and treaty law in articulating these obligations. Concerning prevention, states are under a longstanding obligation not to allow their territory to be used for acts contrary to the rights of other states. The Internationally Protected Persons Convention, for instance, obligates states to take all practicable measures to prevent their territory from being used to prepare or execute an attack on a person protected under the convention (p. 64). The obligation, however, is subject to the limitations that a state must have knowledge of the terrorist's general operations and the capacity to engage in prevention (p. 65). Trapp is particularly concerned about a heightened standard of due diligence being applied to states after the attacks of September 11, 2001. New TSCs, according to Trapp, impose heightened responsibilities on states without sufficient regard for the territorial or resource capacity of those states (pp. 75-79). These TSCs, however, provide states with increased access to intelligence networks and financial resources (pp. 77-79). Trapp's concern about the imposed costs of a heightened obligation to prevent attacks therefore seems outweighed by the practical benefits of enhanced, coordinated terrorism prevention among states.

Following a terrorist attack, states encounter obligations to punish responsible terrorist actors within their jurisdiction. States are under a conditional obligation of *aut dedere aut judicare* to extradite accused terrorists on the request of an injured state or submit the accused for prosecution in their state (p. 84). Absent extradition to the injured state, however, the standards of effective prosecution are subject to broad state discretion. The obligation to prosecute is subject to a "good faith test of effective compliance" (p. 88). The

21. Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment on Appeal, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 1999).

22. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

prosecuting state may decline to prosecute on the basis of insufficient evidence or some form of claimed immunity. Suspicion that the prosecuting state was involved in the terrorist attack further complicates any application of the effective compliance test (p. 128).

After an offending state is identified, the injured state can respond directly to the attack through countermeasures or it can submit the case to an international judicial body for a determination of attribution and possible reparations (pp. 131, 183). Trapp prefers ICJ determinations of state responsibility over countermeasures because countermeasures are taken without an independent finding of responsibility. The jurisdiction of the ICJ, however, requires the consent of both parties. Securing the consent of both parties to a state terrorism case is unlikely given the probable reluctance of an offending state to be dragged before the court (p. 132). Given this difficulty, Trapp presents an interesting argument for an expanded ICJ jurisdiction based on the ICJ's *Bosnian Genocide* decision (pp. 135-44). Under this theory, states that have signed the TSCs and agreed to prevent terrorism could be brought before the ICJ for violating this obligation by engaging in state terrorism. There is, however, little state practice to support expansive ICJ jurisdiction over questions of state responsibility. The only case submitted to the ICJ on this issue, the *Tehran Hostages* case, was settled by the United States and Iran before the decision phase of the proceedings (p. 181). In the absence of judicial settlement, states have overwhelmingly relied on self-help measures to respond to state acts of terrorism. Injured states acting in self-help do so without the benefit of an independent determination of attribution, often relying on the extrajudicial approval of the U.N. Security Council to justify their response.

Overall, Trapp's account is judicious in defining the limits of the international legal framework for state responsibility in the terrorism context. Injured states hoping to invoke the substantive international legal obligations of the offending state face significant evidentiary and jurisdictional problems in proving attribution before an international judicial body. Though the rules of the game are clear in the area of state terrorism, it is hard to tell when states are obeying them. The security and law enforcement paradigms, therefore, will probably continue to shape state policies. Despite this, the international legal framework for state terrorism has a number of advantages for addressing cases like that of Arbabsiar. While the security paradigm offers a disproportionately large stick—the threat of military force—for dealing with these accusations, the international legal framework concerning state terrorism offers more measured responses, such as reparations or the extradition of responsible government officials. Additionally, the criminal conviction of Arbabsiar, the most likely outcome of this case, would not address Iran's breach of its legal obligations concerning noninterference and the use of force. Given the advantages of Trapp's framework, it deserves a place in policy discussions and represents an important contribution to the international community's understanding of how it should confront similar cases.

Changes of State: Nature and the Limits of the City in Early Modern Natural Law. By Annabel S. Brett. Princeton, N.J.: Princeton University Press, 2011. Pp. ix, 242. Price: \$35.00 (Hardcover). Reviewed by David Louk.

Over the last several decades, moral and political theorists have devoted considerable attention to problems in global ethics. In particular, they have focused on problems that stem from the disconnect between ethical theories derived from universal principles and a contemporary world in which such normative commitments are mostly actualized through juridical and political institutions that stop at the national border. Scholars have contended with whether and how universal ethical obligations may transcend borders;²³ what duties exist, if any, to assist those in need regardless of nationality;²⁴ and whether closed borders and unequal immigration and citizenship policies are morally arbitrary and unjustifiable.²⁵ At the same time, many continue to question whether we have comparable ethical obligations to animals and the earth at large as we do to each other.²⁶

While today's interconnected world heightens the sense that national laws and closed borders seem at times morally arbitrary, this tension is not unique to the present day. As Annabel Brett's latest book, *Changes of State* demonstrates, such sentiments existed long before the dawn of Westphalian sovereignty. Indeed, jurists wrestled extensively with similar ethical issues in the decades before the Peace of Westphalia in 1648, the date commonly thought to mark the birth of the sovereign nation-state system.

In *Changes of State*, Brett expertly traces the theoretical development and contestation of political and juridical boundaries in the early modern period of natural law jurisprudence. In this period, natural law jurists wrestled extensively with the relationship between conceptions of nature, morality, and the law, as well as the relationship between natural law (universal law knowable by man through examination by reason) and the law of nations (principles of law shared by all nations, but not necessarily natural). Brett highlights many of the leading jurists and theologians of the period, including Thomist Dominicans (such as Francisco de Vitoria and Domingo de Soto), Jesuits (such as Gabriel Vázquez, Juan de Salas, Francisco Suárez, Luis de Molina, and Rodrigo de Arriaga), and Protestant and humanist natural law

23. See, e.g., SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* (2005); SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* (2002); KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* (2004).

24. See, e.g., THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* (2002); Peter Singer, *Famine, Affluence, and Morality*, 1 *PHIL. & PUB. AFF.* 229 (1972).

25. See, e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

26. See, e.g., RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989); PETER SINGER, *ANIMAL LIBERATION: THE DEFINITIVE CLASSIC OF THE ANIMAL MOVEMENT* (2009); *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

thinkers (broadly construed to include, among others, Hugo Grotius, Thomas Hobbes, and Alberico Gentili). In so doing, she traces the tensions in arguments surrounding the foundation of “the city” as both a clearly demarcated juridical space and also a metaphysical space, the space of the civil commonwealth separated from nature.

Brett focuses in particular on the conflicted relationship that natural law conceptions of “the sphere of the city” have with conceptions of nature, what she calls a “fraught intersection” of the political and the natural world (p. 3). Her introduction specifies this problem: on the one hand, the city must distinguish itself from the natural world in forming itself as an independent juridical space governed by civil law; on the other hand, during natural law theory’s early modern period, the city and its laws were themselves necessarily grounded in conceptions of nature and the natural, insofar as they drew their authority from the ideas of natural law. This problem animates Brett’s chapters of careful exegesis and generates several related difficulties for natural law conceptions of the “sphere of the city.”²⁷

Two such complexities raised early in the book have continued relevance for contemporary readers: first, what distinguishes subjects of the law of nations from natural law; and second, the seemingly paradoxical fact that the law of nations relies on an underlying conception of the natural in order to distinguish itself from natural law.

In addressing the first problem, Brett begins by noting the influence of the Roman jurist Ulpian’s distinction between the natural law, which applies to *all* beings (including animals), and the law of nations, which applies only to human beings (p. 21). This common conception was one which many early modern natural law jurists responded to in understanding the difference between natural law and the law of nations. If the city is defined as a space that must be governed by the law of nations in addition to natural law, then it must be made clear what distinguishes the former from the latter.

Early into *Changes of State*, Brett expertly outlines the importance of the concepts of free will and agency in this division, and the way they complicate Ulpian’s definition. One common way to understand subjects under the law of the city was to understand legal subjects as those who possess the free agency to follow or disobey the law. If so, then what makes an agent “free” will have a profound impact in delimiting what, precisely, is “the sphere of the city.” Most early modern natural law jurists simply denied that animals had the free agency upon which to own their actions in reaction to law. They may have the capacity to pursue self-preservation, but this is done by necessity in the absence of a free will that chooses to act or not act.

Yet considering the theological underpinnings of all natural law thinkers of this period, the idea of free will as freedom from internal compulsion

27. Brett notes that while she uses the term “city,” the idea of the city encapsulates not only the city but also the state, as both rely on boundaries as separating the city or state from nature. This is evocative of Hannah Arendt’s observation that the etymology of the words for city or town in Greek, Latin, and German all stem from words meaning to wall off, encircle, or fence off. See HANNAH ARENDT, *THE HUMAN CONDITION* 64 n.64 (2d ed. 1998).

introduces its own difficulties. Early modern Calvinists, for example, had to confront the essential place of necessitation in the unavoidable desire to sin after the Fall. After all, if men are compelled to commit acts of sin outside of their control, then they do not truly possess free will. And if so, then what distinguishes men from animals, who themselves are not free from natural impulse? Through a careful reading of predominantly Jesuit critiques of early Calvinism, Brett demonstrates how Calvinists could be accused of demolishing the distinction between the natural law and the law of nations by turning men into animals, if human liberty depends on freedom from necessity (p. 56).

Protestants had several solutions to this problem, such as that of the French Calvinist Du Moulin, who, for example, distinguished spontaneous acts from voluntary ones, and argued that because some (and indeed *most*) human acts are voluntary, especially in the realm of civil actions, humans are distinguishable from animals, who may act only when spontaneously and impulsively inclined (pp. 53-55). A second solution, put forth by Hobbes, was to redefine liberty not as freedom from necessitation, but as freedom from the restriction of bodily movement (pp. 57-58). For Brett, Hobbes's important distinction in *De Cive* was not between humans and animals, but between "animates" and "inanimates," the latter of which cannot act in response to external stimuli, however impulsive or free the action may be (p. 58).

More problematic, however, was the notion among some early modern thinkers that agency underlies not only the law of nations but also natural law—indeed, that free will is the foundation of law itself. Under such a construction, if animals do not possess the free agency necessary to be subjects even of natural law, then the significance of Ulpian's distinction between natural law (which applies to humans and animals alike) and the law of nations (which applies only to humans) collapses, since animals could not properly be considered by early modern jurists as being subjects of the law in either sense (p. 75).

In the middle chapters of the book, Brett helpfully outlines a number of possible explanations provided by natural law jurists for the distinction between natural law and the law of nations. These include, among others, the conception that the law of nations is partly natural and partly positive, that the whole of the law of nations is positive law, and that the natural law has two meanings, one related to the demands of natural reason and the other related to the function of human utility (p. 77). Brett focuses on the last of these, whose proponents, among them the Protestants Hobbes²⁸ and Gentili, transform the law of nations into natural law applied to the city. Such a move provides a foundational homology for many contemporary international relations scholars, who identify anarchy in the state of nature among men and interpolate this condition into the international system of states, which comes to be seen as resembling this state of anarchy in nature.

Yet this leads to a second conceptual problem: On the one hand, if the

28. Brett recognizes the discomfort in referring to Hobbes as a Protestant, and she does so primarily in order to group him with most other Protestants whose views are broadly more similar to one another than they are to their Catholic Jesuit contemporaries.

law of nations is premised on natural law, this underlying law must be universal to all. Yet on the other hand, if it is universal, then its deployment through particular state apparatuses is, to some degree, ethically arbitrary. Hobbes is relatively unconcerned by this, for his justifications for the law of nations rest on utility, not any underlying moral truth. Nonetheless it is ironic that while freedom from necessity is what distinguishes human agency in natural law, the necessity of seeking freedom from coercion by our fellow men ultimately draws us out of this natural state and into the sphere of the city. Thus, Brett argues, beginning with Hobbes, political philosophy departs from the idea of the law of nations as a distinct juridical stage of human civilization and instead toward the necessity of the city as essential to the wellbeing of mankind (p. 117).

Nevertheless, this alone does not settle the extent of law's reach over individuals nor the extent of an individual's obligation to the civil law, questions which occupy the later chapters of *Changes of State*. Perhaps the most novel contribution of Brett's work is to highlight the intriguing yet easily overlooked similarities between the metaphysical and physical distinctions between the inside and outside of the city. While contemporary scholarship dwells extensively on the problems of inside/outside as bounded juridical and territorial space, Brett also emphasizes the ways in which this dichotomy rests on a notion of metaphysical interiority and exteriority in which the city is conceived in contradistinction to nature. For many early modern natural law scholars, Brett observes, the ideas of locality and unity served as essential presuppositions to the idea of sovereignty and the subjection of individuals under the civil law (p. 195).

This dual emphasis on both the physical and metaphysical in understanding the "sphere of the city" may help to explain, for example, how we may legitimately close morally arbitrary borders to strangers in circumstances of non-necessity—essential to the development of the sphere of the city and the civil body—but preserve the central right of the navigation of the seas or the right of extraction of resources in common spaces. Nevertheless, such a division cannot so easily explain the denial of a right to beg or provide the needy with basic material needs, a recurring and vexing problem confronted both by Sixteenth Century jurists and contemporary scholars alike. For advocates of expanded rights to economic migration and universal basic entitlements, then, Brett provides a fresh lens with which to view old arguments.

Yet this is precisely what is at times frustrating about the book. With the book's Tolstoy-sized cast of intellectual characters, readers not already familiar with the early modern period of natural law philosophy may have trouble appreciating the lengths to which Brett has gone to display the nuanced differences among individual positions. Because the book's narrative arc is thematic rather than historical or biographical, thinkers (and their propositions) appear and vanish repeatedly throughout the work. Lacking a broad familiarity or a capacious memory for precise differences of opinion, the reader is unlikely to follow these threads easily without returning repeatedly to earlier chapters.

This is not an insurmountable task in order to appreciate the tremendous ground the book covers—and Brett’s likely intended audience will already be very familiar with these thinkers. But it will probably be discouraging for readers seeking an initial encounter with this literature, an audience that *Changes of State* could benefit greatly in light of the contemporary discourse surrounding many of these issues. Likewise, while Brett briefly traces the problems of this era to their contemporary counterparts in the introduction, the lack of a dedicated conclusion that recapitulates these analogues to the present-day sells the reader short of the overall importance of the project.

This leaves readers with the task of determining whether, and how, Sixteenth and Seventeenth Century natural law jurisprudence may continue to be relevant to contemporary debates about economic migration, duties of assistance, and cooperation among nations, among other things. Nonetheless, there is much to recommend about this book, not least the enormous contribution it makes in systematically drawing together such a tremendous range of thinkers within the early modern natural law canon. Readers looking for a comprehensive treatment of this formative period of jurisprudence will find no better guide than Brett.

Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance. By C. Raj Kumar. New Delhi: Oxford University Press, 2011. Pp. xiii, 234. Price: \$50.00 (Hardcover).
Reviewed by Aleksandar Marsavelski.

In August 2011, prominent social activist Anna Hazare went on a hunger strike while leading a series of anti-corruption demonstrations in India.²⁹ One of the protestors’ demands was the establishment of an ombudsman body, called Lokpal, to combat the widespread corruption hindering the country’s economic development.³⁰ C. Raj Kumar’s book, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance*, was published just in time to provide concrete suggestions to Indian lawmakers as they confront this issue. In the book, Kumar adopts a relatively new perspective on corruption—that it is a human rights violation³¹—and applies that framework to India.

In *Corruption and Human Rights in India*, the author argues that the mere recognition of corruption as a human rights violation is itself a substantial step in combating the problem. Noting that some of the rights on which corruption

29. See Jim Yardley, *Victorious Hunger Striker Shakes a Political Status Quo*, N.Y. TIMES (Aug. 28, 2011), <http://www.nytimes.com/2011/08/29/world/asia/29india.html>.

30. *Id.*

31. This idea evolved within the discourse about corruption and human rights in Africa, where corruption has been recognized as an “abuse to all internationally acknowledged human rights.” Livingstone Sewanyana, *Corruption and Its Effects on Human Rights*, in CORRUPTION, DEMOCRACY AND HUMAN RIGHTS IN EAST AND CENTRAL AFRICA 101, 107 (Ayodele Aderinwale ed., 1994). Later the discussion became more global while at the same time recognizing corruption as a violation of human rights per se. See Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT’L L. 495, 500 (1999).

impinges—such as the right to nondiscrimination, the right to access to justice, and the right to development—are already internationally recognized as human rights, Kumar presents the right to a corruption-free government as a human right, as well. Under Kumar’s paradigm, both victims of corruption and the judicial branch should play important roles in holding officials accountable. These strategies are promising for India. As Kumar shows, “judicial governance”—a term used to emphasize judicial activism—has already posed critical challenges to parliamentary and executive powers in that country. For instance, India’s Supreme Court has creatively interpreted the right to information through the constitutional right to freedom of the press (p. 164). The author also suggests that the human rights approach is particularly relevant to India given the country’s high levels of poverty: if public administration works properly only when government officials receive bribes, the poor will suffer discrimination due to their economic status (pp. 11, 36, 42).

One of Kumar’s principal arguments is that India focuses too heavily on the instruments of criminal justice in combating corruption. Kumar contends that India should instead emphasize transparency and accountability. The main reason for this proposal is the inefficiency of the Indian criminal justice system. For example, Kumar cites a problematic provision in the Code of Criminal Procedure that gives procedural immunity to public servants (p. 19). The only argument for keeping this provision in the Code—a relic from India’s colonial past—is to avoid “vexatious prosecution” against public servants, an unacceptable reason, in the author’s view. Such statutory provisions support the status quo in which corruption is a “low-risk, high-profit activity” (p. 26). Thus, Kumar argues that a human rights approach is preferable to the criminal justice strategy, because it does not depend on the inefficient state apparatus. Instead, a human rights approach empowers victims—with the help of whistleblower laws—to attack corruption by seeking justice through judicial remedies (pp. 9-10).

Kumar’s treatment of the criminal law approach in India is, however, incomplete. For one thing, he does not acknowledge that the criminal law approach to combating corruption had been undermined in India largely as a result of a lack of political will. But this situation need not be permanent. In fact, India has witnessed a recent increase in political will to fight corruption, prominently evidenced through the trial of a former government minister, among other officials, in a sale-rigging scandal that began in November 2011.³² Kumar also does not consider a number of arguments in favor of the criminal justice approach in general. After all, a criminal justice system can work well when there is proper cooperation between the police and the public prosecutor and when the legal framework provides tools for combating corruption (e.g., special investigative techniques). Moreover, victims cannot fight corruption without the involvement of police and public prosecutors, as they are in charge of collecting the relevant evidence and bringing corrupt public officials to

32. See Romit Guha & R. Jai Krishna, *Trial Begins in India’s Telecom Scam*, WALL ST. J. (Nov. 11, 2011), <http://online.wsj.com/article/SB10001424052970204358004577031302722062344.html>.

justice. In the end, an effective combination of both the human rights and criminal law approaches is likely the key to success in combating corruption.

The scope of Kumar's book extends well beyond a criticism of the criminal justice approach to combating corruption. Perhaps one of his most compelling insights relates to the treatment of corruption vis-à-vis cultural values. The author confronts an argument encountered in part of the literature (p. 85 n.95)—that Asian countries have different cultural values that make importing human rights concepts from the West inappropriate—by arguing that there is no evidence to suggest that culture has anything to do with social tolerance or intolerance for corruption. He discusses forms of networking known in Southeast Asia as *quan-xi* as examples of culturally-rooted tolerance for corruption, but rejects the possibility of using culture as an excuse for not fighting corruption. Nevertheless, he allows that “the cultural underpinnings of corruption in a given society must be considered when attempting to formulate effective measures against such acts” (p. 88).

Having rejected a cultural justification for corruption, he focuses on India's domestic anti-corruption legal framework—both as it is and as it should be. To find the appropriate legislative solutions for India, Kumar looks to international law, especially the United Nations Convention against Corruption,³³ as well as to a number of countries' domestic systems. Perhaps the most valuable study of this book is the comparison of anti-corruption systems across Asia (Hong Kong, China, Mongolia, Thailand, the Philippines, and Singapore). Kumar argues that anti-corruption laws in Hong Kong and Singapore, which both introduce an independent agency to fight corruption, have proven to be most efficient in combating corruption (pp. 72-73).

Inspired by Hong Kong's institutional approach, Kumar suggests that India establish an Independent Commission Against Corruption (ICAC) with constitutional status and the power necessary to investigate and prosecute cases of corruption (pp. 176, 192). Kumar would give the ICAC the following basic institutional requirements: a commitment to independence, a commitment to guaranteed operational capacity, and a commitment to wide jurisdiction (pp. 177-78). Given that corruption cases have not been investigated or prosecuted impartially and that Indian police and law enforcement agencies are perceived to be corrupt, Kumar also argues that it is important to separate anti-corruption initiatives from other police functions (p. 179). Furthermore, he adds that the ICAC should have a communications office for providing relevant information, such as the procedure for receiving complaints, to the media (pp. 194-95). Finally, among other activities necessary for a structured anti-corruption strategy, the author proposes a number of lifelong learning projects targeting parliamentarians, legal officers, and judges. This training should facilitate communication between the ICAC and the legislative, executive, and judicial bodies, which is certainly critical to the effectiveness of the fight against corruption.

Kumar's recommendations have immediate relevance—especially given

33. U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

protestors' recent demands for the establishment of an ombudsman body similar to the ICAC. Referring to these new developments in the book's postscript, the author gives support to Hazare's campaign and estimates that "[t]here is no doubt about the fact that the institutional design of Lokpal as an independent, impartial, and effective mechanism will be the sole factor for its success" (p. 215). The author has every reason to be optimistic about the Lokpal Bill as it establishes a single institution for combating corruption similar to the one proposed in his book.

Kumar's treatment of recent events goes beyond merely acknowledging their connection to his project. At the end of the postscript, the author outlines several proposals regarding the draft of the Lokpal Bill. First, he stresses that the Lokpal should include members of civil society in addition to politicians, bureaucrats, and judges—the typical members of commissions in India—to ensure the legitimacy and credibility of Lokpal. Second, Kumar's last proposal emphasizes the importance of the accountability of Lokpal itself, which is essential to retaining the trust and faith of the citizens in this institution. Finally, to send a clear message that government leaders are not above the law, Kumar demands that the prime minister of India be subject to Lokpal's jurisdiction. Perhaps surprisingly, however, Kumar asserts that Lokpal is not suitable for investigating allegations of corruption against the judiciary, arguing that its constitutional powers would weaken Lokpal's efforts to seek transparency and accountability in governance. But this rationale does not seem very convincing. Many European countries have special bodies for combating corruption that are able to exercise jurisdiction over judges without witnessing a diminishment of their role and powers.³⁴ Furthermore, the ideal models of Kumar's book—Hong Kong's ICAC and Singapore's Corrupt Practices Investigation Bureau—both have jurisdiction over acts of corruption committed by members of the judiciary. The principle that no one—including members of the judiciary—is above the law would likely provide even more legitimacy to such specialized institutions.

Furthermore, despite these concrete proposals, Kumar's arguments lack historical perspective. Indeed, the author does not even mention the many previous attempts to establish an independent ombudsman in India. In fact, the first legislative proposal for establishing Lokpal dates back to 1966.³⁵ Of course, Kumar might justify this omission by positing that the earlier drafts of the Lokpal Bill were substantially different from his conception of the ICAC, but this assumption is only partially true. An examination of one of the first drafts regulating Lokpal³⁶ reveals several similarities that the author fails to address. For example, according to Article 7(1) of the Lokpal and Lokayuktas

34. The French *Service central de prévention de la corruption* (Central Service for the Prevention of Corruption), the Belgian *Office Central pour la Répression de la Corruption* (Central Office for the Repression of Corruption), and the Croatian *Ured za suzbijanje korupcije i organiziranog kriminaliteta* (*Office for the Prevention and Suppression of Corruption and Organised Crime*) function in this manner.

35. See M.P. JAIN, *LOKPAL: OMBUDSMAN IN INDIA* 218-27 (L. M. Singhvi ed., 1970).

36. See S.K. AGRAWALA, *THE PROPOSED INDIAN OMBUDSMEN: A COMPARATIVE STUDY OF THE LOKPAL AND LOKAYUKTAS BILL, 1968*, at 55-76 (1971).

Bill of 1968, Lokpal would have had the competence to investigate allegations that a public servant committed a corrupt act.³⁷ Furthermore, Lokpal would have had the same status as the Chief Justice of India, thus providing it the independence necessary to investigate corruption.³⁸

Despite its limitations, Kumar's book ultimately succeeds in developing practical ideas relevant to a current, and important, controversy.³⁹ Beyond providing interesting solutions to some of the dilemmas faced by Indian legislators today, Kumar's book speaks to the expectations of a broader audience interested in new approaches to fighting corruption or in new perspectives on the contemporary framework of human rights in general.

The Constitution's Gift: A Constitutional Theory for a Democratic European Union. By John Erik Fossum and Augustín José Menéndez. Plymouth: Rowman & Littlefield Publishers, 2011. Pp. ix, 303. Price: \$75.00 (Hardcover). Reviewed by Alisa Shekhtman.

In 2005, French and Dutch voters summarily refused to ratify the treaty resulting from the Laeken reform process, which aimed to establish a constitution for Europe. This unexpected result appeared to reflect a "skeptical public attitude" that shifted the development of European constitutionalism from "ambiguity" to outright "rejection" (p. 7). Four years later, the ratification of the Lisbon Treaty—a document essentially identical in content to the constitution rejected in 2005—appeared to confirm fears regarding the European Union's democratic legitimacy, especially considering that the failed referendum was European voters' first opportunity to participate directly in European political and legal integration. In the wake of this crisis of faith, John Erik Fossum and Augustín José Menéndez's *The Constitution's Gift* attempts to answer the questions at the heart of European integration studies by presenting a new theoretical framework for analyzing European constitutionalism. *The Constitution's Gift* uses its newly-coined theory of "constitutional synthesis" to develop the vocabulary of European constitutionalism, locate its development within the field of constitutional theory, and suggest that the theory could be transferred to other political contexts.

Rather than the more traditional routes of "revolutionary" or "evolutionary" constitution-making, the authors argue that the European Union followed a path that synthesized the constitutions of individual member states, relying in particular upon the six national constitutions of the founding member states of the European Community (p. 208). The text describes the initial impetus for this process as the subordination of national constitutions to the

37. *Id.* at 61. Such acts involve "abuse of position, with a view to gain or harm a person (including gain to himself), personal interest or improper or corrupt motives, or corruption or lack of integrity." *Id.* at 16.

38. JAIN, *supra* note 35, at 128.

39. The parliamentary discussion about the Lokpal Bill is scheduled for the winter session of India's Congress, which began November 22, 2011. Vibhuti Agarwal, *Congress on the Hot Seat in Parliament's Winter Session*, WALL ST. J. (Nov. 1, 2011), <http://blogs.wsj.com/indiarealtime/2011/11/01/congress-on-the-hot-seat-in-parliaments-winter-session/>.

role of the common constitutional law, which requires fewer political resources than a revolution, but also creates a limited set of constitutional norms. Constitutional synthesis combines legal norms and consolidates institutions, as the European legal order develops alongside its corresponding supranational institutional structure (p. 209). The dynamics of synthetic integration are thus crystallized in a synthetic constitutional moment followed by a combination of transformative and simple constitutionalization.

Before developing this theory, however, the authors clarify the analytical distinctions between different types of constitutions and constitutional dynamics, pointing out that much of the debate surrounding European constitutionalism studies has been clouded by the inadequate separation of these concepts. The authors distinguish between constitutions that are formal (a single set of legal norms, contained in a written, socially recognized constitution), material (common action norms that are considered fundamental, based on actual patterns of political behavior), and normative (those norms that “meet with the highest standards of democratic legitimacy, due to the fact that they were forged through specially demanding processes of deliberation and decision making, should be defined as the higher law of the land”) (p. 25). The text argues that the European Union does not have a formal or a normative constitution, but that the founding treaties “contain the key elements of the material constitution of the European Union, which can be further reconstructed by reference to national constitutions, key decisions by Community legislature, and courts” (p. 23).

The authors further delineate a set of three constitutional dynamics, which they argue can be “combined so as to create the democratic legitimacy of constitutional norms” (p. 42). The first of these dynamics is “constitutional transformation,” the type of deliberation and decision-making seen during “constitutional moment[s].” This type of “revolutionary” constitutional development seems to draw on the American experience, but the authors explain that it can work in tandem with the other two processes. The authors distinguish this process from “transformative constitutionalization” in which “social and judicial practice interprets the fundamental norms in the structuring of institutions and in the organization of social relationships in a constitutional key, but *without* making any formal changes,” and from the third process, “simple constitutionalization,” which they describe as the “fleshing out of the normative implications of constitutional norms when they are applied to specific circumstances” (pp. 32-33). In addition to providing a helpful foundation for the authors’ reasoning, these analytical distinctions go a long way toward clarifying the “false controversy” (p. 42) of “*whether* the European Union has a constitution, and if so, *what* its contents are and *how* it should be constructed and applied” (p. 20). Having laid this groundwork, Fossum and Menéndez are in a better position to describe the theory of constitutional synthesis in more detail.

To prove successfully how this new approach uses elements of previous analysis to examine the development of European constitutionalism in a more holistic light, the authors lay out the five theories that have most influenced

constitutional synthesis. The new model combines the fusion theory's concern with institutional dynamics with the idea that the European legal system always had a constitutional character—a concept first presented in Ingolf Pernice's theory of multilevel constitutionalism (p. 70). It combines positive aspects of other scholars' approaches, including Pernice's theory, Andrew Moravcsik's intergovernmentalist approach, Joseph Weiler's theory of constitutional tolerance and Christian Joerges's theory of conflicts, but disposes of elements of those theories that the authors consider weak or inadequate (pp. 70-76).

Fossum and Menéndez also demonstrate how constitutional synthesis ties into the narrative of the first thirty years of European integration through an analysis of recent developments in the European Union. Since the failure of the Constitutional Treaty and the subsequent ratification of the Lisbon Treaty, the question for legal scholars has been whether European leaders left constitutionalism by the roadside, fearing that another politicized “no” vote would come as an outright affront to the European Union's democratic legitimacy. Interestingly, Fossum and Menéndez point out that the 2005 rejection of the original Constitutional Treaty by French and Dutch voters can be seen as a confirmation “in the negative” of European constitutional principles (p. 159), since voters acted “in their capacity as holders of negative constitutional power” to reject the proposal (p. 161). They explain that “the main impulse behind [the] Laeken [Convention],” which produced the Constitutional Treaty, “was to transcend synthesis by opting for democratic constitution making,” whereas the later Lisbon Treaty was inspired by an “overarching vision of reforming synthesis to render the European political order stable” (pp. 212-13).

Fossum and Menéndez caution, however, that the processes were more similar than they may first appear; much of the Lisbon Treaty's substantive elements were contained in the earlier proposal, and both relied on intergovernmental processes (p. 162). The authors sum up the theory of constitutional synthesis by labeling it a “collective outgrowth” of national constitutional laws (p. 176), whose unclarified nature “goes a long way to account for what [would] otherwise seem[] a radical shift” between Laeken and Lisbon (p. 158). This fresh interpretation of the Lisbon Treaty's ratification is one of the more intriguing contributions of the theory, and also illustrates how smoothly it fits with the reality of European constitutional development.

It is difficult, however, to discuss European constitutionalism without addressing the salience of national identity and its effect on treaty ratification processes. The book would benefit from a discussion of these extralegal factors. Its overview of the ratification process makes clear that different constituencies responded to the proposed Lisbon Treaty within the context of their national constitutional traditions. For instance, while German voters had a relatively passive approach to the referendum, French voters chose to bring the issue to a public debate based on a national constitutional process that required such a measure to be supported by a majority of the population (pp. 36-37). The wide range of responses to the referendum implies that norms of political participation had significant and varied effects across the member states.

Although this sociological approach is not directly relevant to the legal literature, it is nonetheless important to keep in mind when examining the development of European integration. To leave it out of the discussion is to ignore one of the most significant barriers to enhancing the European Union's democratic legitimacy.

The strengths and weaknesses of the constitutional synthesis model are most clearly seen where the authors compare the development of European constitutional law with that of Canada (pp. 177-205). Fossum and Menéndez describe both constitutional arrangements as “derivative, incomplete, and reli[ant] on transferred legitimacy” (p. 182). They draw a parallel between the Canadian Constitution, which finds its roots in the British North America Act of 1867, and European constitutional law, which similarly stems from the combined set of constitutional norms of individual member states. They go on to say that both systems are “intentionally pluralistic,” draw heavily on intergovernmental mechanisms, and limit explicit constitution making (p. 215). The authors argue that, as a result of the similarities in their constitutional development, these polities face similar challenges, such as a high sensitivity to external economic and political shocks. These broad similarities do indicate a certain extent of parallelism between the European and Canadian experience. In particular, the idea that such systems are highly sensitive to external economic shocks is readily corroborated by current events.

While the similarities in constitutional development between the European Union and Canada are intriguing, this comparison nevertheless highlights the weaknesses of discussing constitutional theory in a sociological vacuum. For instance, Fossum and Menéndez examine the case of Quebec, mentioning that its vociferous dissent to the development of Canadian constitutionalism stemmed from its separate linguistic and cultural identity (p. 184). But the authors fail to note that such a roadblock to constitutionalization would likely be considerably stronger in a polity of twenty-seven states that each have their own distinct linguistic, cultural, and political identities that have developed over the course of centuries and are often defined in relation to the identities of their neighbors.

The nebulous sociological concept of “identity” may not naturally integrate itself into a legal analysis, but it is valuable in the context of supranational constitution-building. In a situation that involves the amalgamation of different legal norms and traditions, it may be helpful to consider the historical and political conditions from which those constitutional norms arose, in order to better chart out what the constitutional synthesis model would suggest for the future of Europe. While the authors argue convincingly that over-reliance on this approach is a “retreat[.]” from engaging with constitutional practice (p. 9), there are potentially significant consequences to removing it from the analysis entirely.

The theory of constitutional synthesis was developed to “make sense of the European experience,” which it does with resounding success (p. 210). Although this has made the theory well-equipped to explain the development of European constitutionalism, it means that it may not translate easily to other

regions and legal phenomena. This new theoretical framework provides a plausible and clear illustration of the legal evolution of the European Union, clearing away many of the “false controvers[ies]” that surround European integration (p. 42). But when the text expands its analysis to compare European constitutionalism to that of Canada, the extent to which the theory has been tailored to the European experience becomes apparent. Thus, the book might benefit from recognizing these limits and allowing itself to focus on the peculiarities unique to the European Union. This might include a discussion of how the added weight of member states’ individual political cultures and traditions could impede the integration process. Nonetheless, the novel theoretical approach delineated in *The Constitution’s Gift*—along with its clear and persuasive reasoning—will doubtless be heralded as a gift to the field of European integration studies by legal and political scholars alike.

Justice in International Law: Further Selected Writings. By Stephen M. Schwebel. New York, NY: Cambridge University Press, 2011. Pp. vii, 373 Price: \$125.00 (Hardcover). Reviewed by Zoilo Velasco.

Critics of international law typically focus on its lack of “legislative machineries, compulsory adjudication and enforcement procedures”⁴⁰—three mechanisms that make a legal system effective. These deficits affect whether justice can be sought or achieved in international law.

Stephen M. Schwebel does not openly address or defend against this type of criticism in his book, *Justice in International Law: Further Selected Writings*. Drawing from his experience as a former Judge and President of the International Court of Justice and as a renowned international arbitrator, he delves instead into the expansive and, at times, confusing issues that abound in international law and examines how existing international institutions, actors, and decision-making processes contend with and strive to achieve “justice in international law.”

The book, a sequel to a 1994 tome,⁴¹ is a compilation of essays written over time and under various circumstances. Owing to this character, the book at times lacks fluidity and coherence. It also leaves to the reader the task of determining how the essays fit into the general theme of “justice in international law.” In fact, nowhere does Judge Schwebel offer a clear definition of “justice” in international law. What can be culled from his essays are the substantive, procedural, and structural schema that contribute to it.

One such scheme concerns the impartiality of judges and adjudicators. It is said that international law is infinitely flexible, its character a manipulable facade for power politics.⁴² Judge Schwebel recognizes this criticism, allowing that “[t]he judicial process should, ideally, be unaffected by political considerations Nevertheless in practice this estimable ideal is not easily

40. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 9 (1990).

41. STEPHEN M. SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS* (1994).

42. Koskenniemi, *supra* note 40, at 9.

realized” (p. 21). He further admits that a judge is a prisoner of his own experience (pp. 21, 33, 42). However, Judge Schwebel believes that the objectivity of judges can still be maintained, even for national and ad hoc judges thought to remain loyal to their states. By citing instances in which national judges voted in ICJ cases against the position of their own country—or, in the case of ad hoc judges, against the position of the country that appointed them—Judge Schwebel makes a compelling point.

Perhaps too compelling, as the book comes down strongly in favor of the ICJ. While suggesting that any student of the Court can readily identify “four or five cases in which it was questionable . . . whether the Court’s judgment was correct on the law, the facts, or both” (p. 31), Judge Schwebel identifies no such case, with the possible exception of *Nicaragua*⁴³ (pp. 18-19, 31). In fact, one does not find in his essays any serious criticism of the ICJ, nor of international tribunals generally.

Judge Schwebel still highly regards the Court, on which he served for many years, and he “is necessarily constrained, above all by the confidentiality of deliberations, but also by respect for the ICJ as an institution” (p. 43). He also remains optimistic about the future of international adjudication and arbitration more broadly, and points to the ICJ’s remarkable docket in recent years as proof of the international community’s continued confidence in the system. In the end, though, Judge Schwebel succeeds in defending the contributions of international tribunals to the settlement of international disputes, noting that their “[r]esultant judgments are predominantly persuasive; in the large, international justice is done and is seen to be done” (p. 24).

Procedure, especially as regards the enforcement of awards, is another important element of justice identified by Judge Schwebel. He presents the problem of domestic enforcement of foreign arbitral awards where the arbitration proceedings are attacked as contrary to domestic conceptions of procedural due process. He argues that national courts could observe procedures only in their most basic requirements, and could dismiss any procedural “irregularity” committed by the international tribunal, while still giving effect to commercial arbitral awards. Judge Schwebel provides cogent support from a survey of cases that show how national courts honor arbitral awards despite certain procedural lapses—such as the Mexican courts that held that “compliance with specific Mexican service requirements was unnecessary for enforcement of a foreign arbitral award, as long as actual notice was received” (p. 235). He concludes that “domestic due process, it seems, [is] in the process of being reformulated into an ‘international public policy’ that will foster the free flow of goods and services and enhance arbitration and the arbitral process” (p. 245). This conclusion, however, appears to be a general observation rather than expression of the decisions of the national courts. It is not clear whether the cases did in fact rely on considerations of fostering international commerce to uphold arbitral awards.

43. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27).

Also on the validity of arbitral awards, Judge Schwebel examines the authority of a truncated tribunal to render an award where one of the party-appointed arbitrators withdraws unjustly or without the consent of the other arbitrators. The withdrawal usually occurs late in the arbitration proceedings as a means to delay or preempt an unfavorable judgment. Judge Schwebel argues for the authority of the truncated tribunal, a position he has maintained at least since 1987.⁴⁴ He bolsters his case by pointing to new rules adopted by different bodies, such as the Permanent Court of Arbitration and the International Chamber of Commerce, and to recent decisions of international tribunals, all of which uphold the authority of the truncated tribunal to render an award. He demonstrates how procedural rules can be used to ensure that justice is done and that parties fulfill their obligation to arbitrate in good faith.

As to the question of structure, Judge Schwebel acknowledges that adjudication in international law does not have the structural hierarchy one finds in national courts. This is evidenced by the proliferation of many international tribunals that decide cases independently of each other. Judge Schwebel welcomes the proliferation of international tribunals. There seems to be some creative interaction between the International Court of Justice and the different international tribunals as they have, on several occasions, cited each other's rulings in their respective cases. He cites illuminating examples, such as the ICJ's "decision in the case concerning the *Gabčíkovo-Naymaros Project*, in which the Court relied *inter alia* on a decision of the arbitral tribunal in the *Air Services Agreement* case," and "the decision of the arbitral tribunal in the *Eritrea/Yemen* dispute, which drew upon the Court's jurisprudence in the *Anglo-Norwegian Fisheries* case" (p. 105).

Judge Schwebel also recognizes the potential for these tribunals to act at variance with each other. He suggests that the ICJ could serve as "a judicial mechanism that would promote or ensure the uniform interpretation of international law," though he acknowledges that the political will needed to establish such a mechanism is currently lacking (p. 106). He additionally supports a limited approach to structural change in international adjudication that would involve the ICJ delivering advisory opinions to international tribunals on legal issues that require the interpretation of general rules of international law (p. 107).

Judge Schwebel likewise advocates for structural change with regards to international arbitration. As it stands today, there is no international court with effective jurisdiction over disputes concerning the recognition or enforcement of foreign arbitral awards. Hence, he suggests, "UNCITRAL should set about drafting an international convention which would provide for the creation and establishment of an International Court of Arbitral Awards, whose jurisdiction would be limited to deciding upon challenges to the validity of international commercial arbitral awards" (p. 247).

In all these proposals for structural change, which aim to deliver justice in

44. STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 144-296 (1987).

international law, Judge Schwebel's tone is rather idealistic. Indeed, a unified system in international law adjudication is a laudable goal, but the absence of political will among international elites undermines this aspiration. As Judge Schwebel himself admits, no such apparent political will exists. Beyond their normative value and logical cogency, his proposals are not convincing, as they are simply not practicable.

Justice in International Law: Further Selected Writings, while not offering an explicit definition of "justice," offers insightful discussions of different issues that bear upon how we ought to understand or seek justice in international law. Although it does not directly engage critics of international law, the book is in every way an exposition of the fact that justice does exist, and that it is capable of being realized in international adjudication. For students and scholars of the subject, the book is an invaluable resource.

Diplomacy: A Singapore Experience. By S Jayakumar. Singapore: Straits Times Press, 2011. Pp. 6, 288. Price: \$26.00 (Hardcover). Reviewed by Daniel Weisfield.

Singapore has punched above its weight since achieving independence in 1965. Ranked 184th in the world for geographic size,⁴⁵ the country ranks twelfth in the world for GDP per capita⁴⁶ and fourteenth for exports, surpassing Mexico and Saudi Arabia.⁴⁷ Singapore currently ranks first in the World Bank's Ease of Doing Business Index.⁴⁸

The standard account attributes Singapore's economic success to its strategic location, Confucian work ethic, and the linguistic and legal legacy of British imperial rule. This formulation minimizes the significance of Singapore's government strategists. Singapore's success has been hard-won, and a principal tool in this campaign has been diplomacy.

S Jayakumar, who penned *Diplomacy: A Singapore Experience*, was part of the post-independence generation that built Singapore into a tiny tiger. Between 1971 and 2011, he served as Singapore's Deputy Prime Minister, Minister of Foreign Affairs, Minister of Law, Home Minister, Permanent Representative to the United Nations, and the Dean of the National University of Singapore's Faculty of Law. His generation led Singapore into the exclusive club of metropolises—including Dubai and Hong Kong—that entice foreign capital by offering fair rules and clean government. Jayakumar states that the alternative for Singapore was irrelevance: a dreaded future as a "little red dot" on the Asian map, unblessed by oil, land, or abundant population (p. 29).

45. Data: Land Area (sq. km), WORLD BANK, <http://data.worldbank.org/indicator/AG.LND.TOTL.K2?display=default> (last visited Dec. 1, 2011).

46. Data: GDP Per Capita, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD/countries/1W?display=default> (last visited Dec. 1, 2011).

47. WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2011, at 24, available at http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf (last visited Dec. 1, 2011).

48. WORLD BANK & INT'L FIN. CORP., DOING BUSINESS 2011: MAKING A DIFFERENCE FOR ENTREPRENEURS 3 (2010).

In *Diplomacy*, Jayakumar's anecdotes span decades, and his tone is matter-of-fact. The book seeks to memorialize Singapore's recent history for the benefit of its future foreign service officers, and in so doing, explain how Singapore built up the "norms, principles and experiences that form the bedrock of our foreign policy" (p. 17). Part I of this book counsels creative, proactive diplomacy. Part II deals with safeguarding Singapore's national interests. Part III explains Singapore's relationships with regional powers. In each section, Jayakumar expounds his diplomatic philosophy through anecdotes and object lessons. Although many of these lessons are narrowly tailored for Singaporean diplomats, some lessons translate to small states generally and others might be applied usefully by big powers.

Jayakumar's first lesson for small states is simple enough: Be excellent. "The moment we become merely mediocre, we will be marginalized and ignored" (p. 40). Singapore's ability to command the attention of big powers is predicated on its economic dynamism and efficient governance. Handicapped by size, Singapore must compensate with superior performance.

His second lesson can be summed up equally succinctly: Never act like you've arrived. Singapore's founding Prime Minister, Lee Kuan Yew, was fond of repeating this maxim to his cabinet (p. 66). An arriviste attitude will quickly earn the enmity of the bigger, poorer neighbors. To this end, Singapore let the Thais host Asia's first summit with EU heads of state, even though Singapore bore the grunt work. "Singapore should not appear to want to hog the limelight" (p. 26).

Third, Jayakumar advises small states to plan for the long run. In 1995, Singapore decided to pursue a nonpermanent seat on the U.N. Security Council—for the 2001-2002 term. Jayakumar states matter-of-factly that this would "give us a lead time of about six years to campaign and prepare for eventual membership" (p. 67). True to form, Singapore won the seat in 2000 with 168 out of 173 votes.⁴⁹ However, Jayakumar fails to acknowledge that such long-term planning is easier when a governing party does not lose elections. Singapore's People's Action Party (PAP) has won wide electoral majorities since 1966, making Singapore a de facto one-party state.

Fourth, a small state must stand its ground. In 2004, when Singapore's deputy prime minister planned a trip to Taiwan, China pressed Singapore to cancel the visit. Singapore refused to balk, recognizing that it would irreversibly lose credibility as a sovereign state if it capitulated to Chinese demands. Singapore's prime minister explained, "From time to time we are put to the test. As a small country, we cannot afford to flinch."⁵⁰ A half decade later, some wonder if Singapore has flinched. Singapore has launched several law enforcement actions against Falun Gong practitioners, which some see as a

49. Press Release, U.N. General Assembly, Colombia, Ireland, Mauritius, Norway and Singapore Elected to Security Council for 2001-2002, U.N. Press Release GA/9784 (Oct. 10, 2000), available at <http://www.un.org/News/Press/docs/2000/20001010.ga9784.doc.html>.

50. Lee Hsien Loong, Address at 2004 National Day Rally at the University Cultural Centre of the National University of Singapore (Aug. 22, 2004) transcript available at http://www.channelnewsasia.com/ndp2004/rally/external_relations.htm.

capitulation to Chinese pressure.⁵¹

Some of Jayakumar's admonitions apply equally well to big states. A general rule of strategy, for example, is to seek unlikely allies. At the United Nations, Singapore started the Forum of Small States (FOSS) in 1992 for countries with less than ten million inhabitants. Singapore led the FOSS into a nonideological bloc that now comprises 100 countries. Similarly, during the third U.N. Conference on the Law of the Sea (UNCLOS), Singapore started a group for Landlocked and Geographically Disadvantaged States, which it permanently co-chairs with Austria (p. 112).

Jayakumar also argues that a statesman must be a salesman. He advocates "a Singapore Inc. approach" and imagines "a platform to promote the Singapore brand in the Middle East" (p. 36). In our world of annual Country Brand Index rankings, countries that ignore branding assume their own risk.⁵²

Finally, he argues that diplomats must treat protocol as a tool, not a straitjacket. Jayakumar bucked protocol when, as Singapore's Permanent Representative to the United Nations, he asked a bright young Egyptian diplomat to lunch (p. 61). That young Egyptian was Amr Moussa, who later became the Arab League's Secretary General and a front-runner in Egypt's post-Mubarak presidential race.⁵³

Rule of law is *Diplomacy's* leitmotif. Jayakumar preaches a gospel of rules. Internationally, Singapore's survival depends on rule of law; under the "law of the jungle" that Singapore fears, a diminutive state would quickly be subsumed by more powerful neighbors (p. 76). Domestically, Singapore's economic vitality depends on its ability to attract international business, which depends in turn on Brand Singapore—i.e., the island's reputation for transparency and equal application of the law.

But rule of law, Singapore-style, can look suspiciously like tyranny. Singapore's economic success and social cohesion is purchased at the expense of individual liberty. The Singaporean government calls this "communitarianism," and openly acknowledges that this system emphasizes communal outcomes over individual rights. This is not tyranny, they say: it is a

51. In 2010, Singapore convicted five Chinese Falun Gong practitioners of vandalism for displaying unlicensed placards in a pedestrian underpass. Singapore rescinded their visas and work permits. Additionally, Singapore deported a Chinese Falun Gong practitioner for meditating in public without a permit. These law enforcement actions fall within the scope of Singapore's Vandalism Act and 2009 Public Order Act. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: SINGAPORE (Apr. 8, 2011), available at <http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154401.htm>; BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, 2010 INTERNATIONAL RELIGIOUS FREEDOM REPORT: SINGAPORE (Nov. 17, 2010), available at <http://www.state.gov/g/drl/rls/irf/2010/148893.htm>; see AUSTL. GOV'T REFUGEE REVIEW TRIB., COUNTRY ADVICE SINGAPORE: SINGAPORE-SGP36245-FALUN GONG-CHINESE-PUBLIC PRACTICE-ASYLUM SEEKERS (Mar. 5, 2010), available at www.mrt-rrt.gov.au/ArticleDocuments/197/SGP36245.pdf.aspx.

52. See, e.g., Press Release, GfK Group, America Remains the Most Admired Country Globally in the 2011 Anholt-GfK Roper Nation Brands Index (Oct. 12, 2011), available at http://www.gfk.com/group/press_information/press_releases/008789/index.en.html.

53. See, e.g., Khaled Dawoud, *Moussa on Top*, AL AHAM WEEKLY (Apr. 14-20, 2011), <http://weekly.ahram.org.eg/2011/1043/eg7.htm>; Larbi Sadiki, *Mubarak's Requiem: Who Will Emerge?* AL JAZEERA (Feb. 9, 2011), <http://www.aljazeera.com/indepth/opinion/2011/02/201128145954697300.html>.

fundamentally different social model.⁵⁴

Singapore is rated “Partly Free” by Freedom House.⁵⁵ In the last two years, it has ordered a politically sensitive film removed from the Internet, convicted a British writer of contempt of court for criticizing its justice system—in particular, the death penalty—and required the International Herald Tribune to apologize and pay fines after it published an article critical of the Prime Minister.⁵⁶ Penalties for petty crimes remain high and enforcement is strict.⁵⁷

Singapore’s zealous commitment to a strict application of the rule of law has been tested in headline cases involving foreign defendants. Should Singapore relax its iron standards when defendants hail from countries with more lenient norms? Jayakumar’s answer is unlikely to please Western liberals. In his view, Singapore’s infamous 1994 enforcement of a caning sentence against Michael Fay, an American teenager convicted of vandalism, was not a blind application of barbaric punishment. Singapore faced intense lobbying for clemency, including from then President Bill Clinton. But the city-state decided to proceed with four strokes of the cane—reduced from the original six—in order to prove that Singapore enforces its laws “without fear or favour” (p. 135). The same logic applied to the 1994 hanging of Johannes Van Damme, a Dutch national convicted of drug trafficking. “[T]he integrity of our legal system and the standing of our judiciary are among the hard-earned assets of the Singapore brand name. We do not jettison them for transient political convenience” (p. 153).

This ardent faith in law extends to international disputes. Singapore has adjudicated disputes with Malaysia in the International Court of Justice, the International Tribunal for the Law of the Sea, and the World Trade Organization. Jayakumar concedes that risky international litigation is an unattractive option for big countries that can assert their rights *de facto*, for instance by occupying a disputed island rather than suing for it. But he points out that international dispute resolution can serve several less-than-obvious purposes. International adjudication gives governments a face-saving option when they know they are wrong but can’t concede an issue due to nationalist pressure at home (p. 179). Additionally, the specter of international litigation can induce a government to change offensive behavior (p. 177). Finally, merely offering to seek international resolution of an issue can grant moral high ground to the offeror—if an opposing country refuses a neutral arbiter, it may implicitly help prove the plaintiff’s case (p. 188).

54. See, e.g., Lee Kuan Yew’s comments: “As it has turned out, more communitarian values and practices of East Asians—the Japanese, Koreans, Taiwanese, Hong Kongers and Singaporeans—have proven to be clear assets in the catching-up process. The values that East Asian culture upholds, such as the primacy of group interests over individual interests, support the total group effort necessary to develop rapidly.” *The East Asian Way—With Air Conditioning*, 26 *NEW PERSP. Q.* 112 (2009) (interview by Nathan Gardels with Lee Kuan Yew).

55. FREEDOM HOUSE, *FREEDOM IN THE WORLD 2011: SINGAPORE*, available at <http://www.freedomhouse.org/template.cfm?page=22&country=8130&year=2011>.

56. *Id.*

57. *Id.*

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Throughout this book, one wonders whether it is an independent account or a semi-official narrative. In the Acknowledgments, Jayakumar thanks Singaporean civil servants for their help with editing, and thanks the Prime Minister and President for “taking the trouble” to read his manuscript (p. 7). So long as Lee Kuan Yew lives, some think, memoirs by Singaporean officials will shirk controversy. The problem is not censorship, but self-censorship: every official imagines the octogenarian is looking over his shoulder.

Jayakumar never acknowledges the diplomatic advantages enjoyed by a ruling party that can operate without legitimate fear of losing the next election. When Singapore faced a diplomatic crisis with Australia in 1991 relating to the transit of a deported Cuban refugee, for example, it “amended the immigration regulations . . . as an interim measure” to prohibit the entry of such persons (p. 128). If only all governments could so easily change regulations to suit the circumstances.

This leads to the deepest critique of the book. Jayakumar implicitly frames his narrative as apolitical. He can do this because he takes one-party rule for granted. The PAP held power in 1971 when Jayakumar got his first political appointment—and still held power in 2011 when he retired as Senior Minister. In this sense *Diplomacy* is the consummate victor’s narrative. Jayakumar writes nothing about J. B. Jeyaretnam, the late firebrand of the Singaporean opposition, who was disbarred, fined, and jailed many times for his criticism of the PAP.⁵⁸ Nor do we hear about current Singaporean opposition leader Chee Soon Juan, arrested and jailed repeatedly for staging public demonstrations, making unpermitted speeches, and “defaming” Singapore’s sitting statesmen.⁵⁹ Singaporean judges may have enforced Singapore’s laws in these cases. But is this what rule of law aspires to?

The cover of *Diplomacy: A Singapore Experience* features a photo of a futuristic city. Glass skyscrapers soar beside a 500-foot Ferris wheel; buses ply uncongested boulevards. To a citizen of New York or Los Angeles, this image looks like a Disneyland, a fantastical imagining of what a city might be in some alternate universe where cities have deep pockets, visionary leaders, and cooperative citizens. The city in the photograph is, of course, Singapore. It is authoritarian, and is indisputably effective at generating wealth, safety, and social welfare for its citizens. Its success is built on the back of canny diplomacy. Jayakumar’s readable book explains this diplomacy, using tactical episodes to outline broad strategic imperatives.

58. See, e.g., *J.B. Jeyaretnam*, *ECONOMIST* (Oct. 9, 2008), <http://www.economist.com/node/12376738>.

59. See, e.g., *Jailed Again for Speaking in Public*, *BBC NEWS* (Feb. 24, 1999), <http://news.bbc.co.uk/2/hi/asia-pacific/285279.stm>.