
Book Reviews

Alston, Philip (ed.). *Peoples' Rights: The State of the Art*. Collected Courses of the Academy of European Law. Oxford: Oxford University Press. 2001. Pp. 293. Hardback £45.00, Paperback £16.99; McCorquodale, Robert (ed.). *Self-Determination in International Law*. The Library of Essays in International Law. Aldershot: Dartmouth Publishing Company, Ltd. 2000. Pp. 616. \$245.00, £128.00.

'Is the human rights era ending?'¹ Michael Ignatieff asked in the *New York Times* in early 2002. As a post-September 11 syndrome spreads, deprioritizing civil liberties concerns, and as the international community grapples with the ever-expanding war on terrorism, it is easy to understand why he might have raised this question. Hence, the current climate provides a particularly challenging backdrop for an evaluation of the contemporary relevance of the so-called third generation human rights. The legitimacy of these collective rights has always been shakier in the West than that of civil and political rights, or even of economic, social and cultural rights when framed as individual rights. In a season when even previously uncontroversial (at least in theory) human rights norms on torture and arbitrary detention are coming under sustained attack, what hope is there for the right to peace or the right to solidarity? Faced with the challenges of 2003, can concepts of peoples' rights help us leap the myriad human rights hurdles of the early twenty-first century? Or are they merely an embarrassing holdover from the 1970s?

The books under review offer much raw

material for considering such questions. Alston's *Peoples' Rights*, a collection of essays from the Academy of European Law of the European University Institute, provides an overview of the entire terrain, covering everything from the most historically entrenched of group rights, self-determination, to the political battleground that is the right to development, to the emerging right to environment. An excellent bibliography on related topics is appended, demonstrating the breadth of scholarship available. McCorquodale's compendium picks up where Alston's leaves off, bringing together a wide range of twentieth century works specifically focusing on the most mainstream group right, self-determination. It offers 616 pages of elaboration, which are both helpful and brilliant in places, though inevitably repetitive and somewhat confusing as a whole. What becomes clear from reading both works is that the future of group rights is not looking bright, that their past includes some victories (especially for self-determination) among the many failures, that their meanings are highly contested and not just politically, and most of all, that in addressing the difficulties with such concepts we should be very careful not to lose sight of the important impulses which inspired them.

Toward the end of *Peoples' Rights*' nearly 300 dense pages, one may be forgiven one's frustration on discovering that their editor, Philip Alston, is convinced that the topic of those same 300 pages, namely peoples' rights *qua* peoples' rights, 'will continue to diminish in importance'² in the future. Despite this gloomy prognosis, the book provides an excellent introduction to the subject. Incisive opening and closing essays by the editor are helpful in putting the subject in historical perspective.

¹ Ignatieff, 'Is the Human Rights Era Ending?', *NY Times*, 5 February 2002, AT A29.

² Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed.), *Peoples' Rights* (2001) 292.

In Alston's view, group rights have evolved through four phases. In the 1940s, during the drafting of the UN Charter, crafted in the name of 'We the peoples of the United Nations', the notion of peoples was floated in a variety of contexts, but repeatedly 'neutralized'.³ The period of 1950–1971 represents what he calls 'the heyday of self-determination',⁴ leading to the third phase, from 1972–1989, the zenith of peoples' rights. Propelled by the works of scholars like Karel Vasak and Richard Falk and promoted by UNESCO and some NGOs, peoples' rights were enumerated during this period, *inter alia*, in the 1976 Algiers Declaration of the Rights of Peoples, in the General Assembly's declarations on the Right of Peoples to Peace (1984) and on the Right to Development (1986), and in treaty form in the African Charter on Human and Peoples' Rights (1981).

Yet, all this was followed, in Alston's most recent phase (since 1990), by the waning of peoples' rights in the face of political opposition engendered by their success, and due to a convergence of factors. These include the transformation of most liberation movements into governments, the end of the Cold War and globalization. He sees the post-1990 era as one in which such rights have 'greatly diminished significance', partly due to 'their failure to live up to any of the more ambitious expectations that their proponents harboured in the preceding phase'.⁵ Today, rights which seemed to offer much promise have been denuded. As Alston wryly comments, 'a search of "right to peace" sites on the World Wide Web yields almost nothing which sheds any light on the issue but instead reveals a great number devoted to the right to peace and quiet!'⁶ Alston's explanation for this is multi-faceted. In part, it inevitably resulted from the end of many socialist regimes, given that group rights were often officially championed by such governments and were therefore destined to be viewed with scepticism in

our neo-liberal era. But Alston goes further than this accepted wisdom, to explain that:

[m]uch of the fault lies with the way in which the proponents of these rights sought to dispense with any phase of progressive development of the relevant body of law and instead tried to vault over the *acquis* and establish a new paradigm which was, at best, poorly rooted in what had gone before.⁷

This is a reminder to well-meaning human rights lawyers that we had better do our homework. Human rights law is *law*, not a wish list or catalogue of dreams, and if we wish it to be accepted as such, it must be methodologically and conceptually sound.

Alston's volume offers a comprehensive overview of the state of international environmental law by Dinah Shelton; a useful schema of the variety of legal bases offered for rights of indigenous peoples by Benedict Kingsbury, and a glimpse of challenges in the area of minority rights by Peter Leuprecht. Outstanding articles include James Crawford's beautifully written 'The Right of Self-Determination in International Law: Its Development and Future', and Anne Orford's practically-minded 'Globalization and the Right to Development'.

Orford sketches the contentious history of the right to development, reveals the contours of the right, then looks at how, if at all, this right has impacted the policies of international financial institutions. In a dimension too often missing in contemporary human rights law writing, she inquires whether the concept is *actually* useful in today's globalized world. Though aware of the right's potential dangers (governmental misuse as justification for violations of civil and political rights, site of wasteful political struggle between North and South in international fora), she concludes that the right to development, in light of its emphasis on participatory decision-making and ability to implicate both national and transnational policy-making and practice, can ultimately be harnessed to 'effect change in the current agendas of states, international

³ *Ibid.*, at 260.

⁴ *Ibid.*, at 262.

⁵ *Ibid.*, at 269.

⁶ *Ibid.*, at 281.

⁷ *Ibid.*, at 291.

economic institutions and foreign investors'.⁸ Such potential should make it more, rather than less, compelling in our times of national bankruptcies, market fundamentalism and claims of a unipolar world order. Yet, these frameworks, like notions of peoples' rights in general, are bedevilled by vagueness in requirements and methodologies.

For example, Crawford grapples with self-determination's 'radical indetermina[cy]'⁹ reminding us that we cannot make sense of it unless we come to understand both who is the 'self' (if a group of persons, which group? if not, the state?) and what exactly that entity is to determine (reform? democracy? autonomy? secession?) and how (by referendum? by force?). He paraphrases Ivor Jennings to the effect that 'to let the people decide is ridiculous because first someone must decide who is the people',¹⁰ neatly catching a paradox that runs throughout concepts of peoples' rights. Ultimately, self-determination in the (largely) post-colonial era offers more questions than answers. In Crawford's words:

An ethnic group, a group with a historical continuity and a consciousness, a group evidently entitled to respect, asserts: 'we are a people.' It seems to be so. And all peoples have the right of self-determination. The conclusion is obvious. But what is to be done with it?¹¹

Yet, reminiscent of Alston, while he is somewhat sceptical about the concept overall, he suggests that much of its spirit should be maintained: 'despite the difficulties and uncertainties . . . , the continuing vitality and potential for expansion of the principle of self-determination, at least as a directive principle, should not be underestimated'.¹²

This brings us to a consideration of *Self-Determination in International Law*. With 616 pages, McCorquodale's volume is a helpful

reference but a gruelling read. A number of standouts should not, however, be missed, including Nathaniel Berman's 1988 'Sovereignty in Abeyance: Self-Determination and International Law', Christine Chinkin and Shelley Wright's stunning feminist riff, 'The Hunger Trap: Women, Food and Self-Determination', Hannum's clear-thinking 'Rethinking Self-Determination', and Koskeniemi's wonderful 'National Self-Determination Today: Problems of Legal Theory and Practice'.

The book is part of the series: Library of Essays in International Law, of which McCorquodale is the general editor. In the series preface he writes that part of the purpose is, in the face of proliferating literature, to bring together many of the central articles on particular subjects, thereby easing the difficulties of staying on top of such material. However, a majority of the articles in this volume come from US law journals and are originally Anglophone, thus representing only a part of the global literature on the subject. To fulfil the series' mission, a great addition would be to make foreign language articles, which are much more difficult to obtain, available to the English reader in translation. Including more perspectives from Asia, the Arab World and Latin America (McCorquodale does include two articles by African scholars) would be a welcome addition to both this and Alston's volume. In addition, a conclusion with some attempt to summarize where we are in light of all of the literature's claims and counter-claims, and a subject index, could add to the McCorquodale book's usefulness, particularly for students.

Ultimately, the essential question posed by these two works is, 'do we need group rights?' Is there some need which these concepts synthesize that is not covered by other rights concepts? Carl Wellman, though not a proponent of solidarity rights overall, wrote that '[t]he introduction of this third generation of human rights has typically been justified as necessary for the realization of the first and second-generation human rights in a world of

⁸ Orford, 'Globalization and the Right to Development', in Alston, *supra* note 3, at 184.

⁹ Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in Alston, *supra* note 3, at 18.

¹⁰ Alston, 'Introduction', in Alston, *supra* note 2, at 18.

¹¹ Crawford, *supra* note 10, at 39.

¹² *Ibid.*, at 65.

global interdependence'.¹³ However, many have asked why, if group rights are but an aggregate of individual rights and hence can conversely be broken down into the individual right of each member of the group, a third-generation concept is necessary at all. Perhaps the most useful aspect of group rights is the questions which they provoke about the obstacles to enjoyment of civil, political, economic, social and cultural rights, and the platform they provide for making human rights claims against not only national but transnational actors.

Another question is whether, strategically, at this juncture when we may have moved from the era of human rights to the era of security, it is worth fighting to keep notions of peoples' rights within our human rights framework. A chain is only as strong as its weakest link. Ignatieff, in his recent *Human Rights as Politics and Idolatry*, argues that in the face of daunting challenges to human rights concepts, it is best to concentrate on a minimalist human rights agenda, a "thin" theory of what is right, a definition of the minimum conditions for any kind of life at all'.¹⁴ He underscores 'negative liberty', a framework that suggests emphasis on the individual civil and political rights which are currently thought to constitute *jus cogens* norms. While this has allure, it is perhaps in this most difficult of moments that the human rights movement must be most creative. Faced with widespread economic crisis and the attendant questioning of the 'Washington consensus', is this the time to retreat to the defence of a narrow individual rights paradigm? Confronted by terrorism and its symbiotic partner, counter-terrorism, should human rights law remain on the sidelines, limited to attempts to file off the roughest edges of each? Or can a group rights approach contribute to human rights law's continuing relevance in the face of such phenomena by emphasizing the resolution of outstanding

peoples' rights issues — ending colonial domination, confronting the unfairness of the global economy and challenging militarism?

Alston himself concludes that 'a conception of human rights which has banished all dimensions of group and peoples' rights will be a greatly impoverished one and one which is ill-equipped to deal with some of the major challenges that are certain to confront it in the years ahead'.¹⁵ He admonishes Western governments to reconsider their obligations vis-à-vis the ever-growing inequities associated with globalization and not to see the diminishing of peoples' rights concepts as a licence to consign such concerns to the wastebasket of history. While peoples' rights, including self-determination, suffer from vagueness and are fraught with some perils, the concerns which underlie them remain as relevant now as in the 1970s, if not more so. Perhaps it is no accident that culturally the 1970s are much in fashion at the moment.

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Meijknecht, Anna. *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Antwerpen, Groningen, Oxford: Intersentia, 2001. Pp. 271. ISBN 90-5095-166-X.

Like a phoenix re-emerging from the ashes time and again in legal and diplomatic history, the protection of minority and indigenous groups is increasingly proving to be one of the most problematic post-Cold War issues facing state and non-state actors, including the human rights movement at large.¹⁶

¹³ Wellman, 'Solidarity, the Individual, and Human Rights', 22 *HR Quarterly* (2000) 650.

¹⁴ M. Ignatieff, *Human Rights as Politics and Idolatry* (2001) 56–57.

¹⁵ Alston, *supra* note 2, at 292.

¹⁶ For comprehensive surveys, see e.g. G. Pentasuglia, *Minorities in International Law: An Introductory Study* (2002); S. J. Anaya, *Indigenous Peoples in International Law* (1996).

Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law, a revised version of a doctoral dissertation defended at Tilburg University, captures the corresponding renewal in legal scholarship by examining the international legal status of minorities and indigenous peoples. As framed by the author, the fundamental issue is 'whether, and to what extent minorities and indigenous peoples themselves are able to defend their rights on the international level', which, in turn, 'evokes the question of whether their position under international law enables them to do so' (at 21). This 'bottom-up' approach, prompted by the asserted insufficient role of states in enforcing human rights norms, seems to indicate a fundamentally procedural concern, in spite of a whole range of broader substantive considerations offered throughout the book.

Central to the author's interpretative framework is the development of the notion of international personality formulated by the International Court of Justice (ICJ) in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*.¹⁷ Meijknecht suggests that 'personality' remains *au fond* 'an empty notion' (at 31) which needs to be filled in by three interrelated, but distinct, elements, i.e., international legal capacity, international legal subjectivity and international *ius standi*. In essence, the author construes international legal capacity as the 'internal' capacity of an entity to bear rights and duties. Such a capacity would indeed reflect the complex of factual qualities of the entity, most notably its degree of autonomy and its will to exist as a separate entity, which manifests itself, in the case of composite entities, with a degree of organization and representation instrumental in establishing relations with other entities. International legal subjectivity, to be enjoyed only by entities possessing legal capacity, would instead indicate the 'external' perspective of the international legal order, namely the act of attributing rights and duties to an

entity. Meijknecht importantly argues that possessing legal capacity and being a subject of law, particularly in relation to non-state entities such as individuals, do not secure the actual protection of rights. Hence, the role of international *ius standi* as one of the constitutive elements of international personality, broadly construed as the right to bring a claim before not only strictly judicial bodies but also quasi-judicial and non-judicial or political bodies, at least in the general sense, as regards the latter bodies, of being entitled to make one's case for improving protection. Here again the author seems to acknowledge the crucial 'value added' of this procedural dimension in relation to the purpose of her study. However, this essentially pragmatic or practical concern is framed in theoretical terms in an attempt to combine Lauterpacht's view, that *ius standi* is not a prerequisite for the legal subjectivity of individuals (and other non-state entities), and Kelsen's view, that makes such subjectivity dependent on a faculty of independent action conferred upon them to enforce their rights. She indeed argues that while an entity can be a subject of international law without having *ius standi*, this right would be necessary to achieve the 'higher status' of international person.

By conceptualizing international personality as the function of these three elements taken together, while at the same time upholding each of them separately, a 'scale' is developed on the basis of which the author attempts to determine the international legal status of minorities and indigenous peoples. The line of reasoning as to legal capacity appears, though, unpersuasive at least in three respects. First, although Meijknecht refers to the notion of international legal capacity as deriving from 'internal', factual qualities of the entity in question, the acquisition of such a capacity by minority and indigenous groups is made dependent on an 'external' element, i.e., recognition of the representatives of the group as such, most notably by international institutions. Second, she characterizes this external element of recognition as 'political' (at 120), suggesting its purely declaratory effects in respect of the

¹⁷ Advisory Opinion, ICJ Reports (1949).

existence (as opposed to the *exercise*) of legal capacity, while at the same time attaching essentially constitutive legal consequences to it regarding the capacity of the groups concerned as exercised through their representatives. Of course, there is a significant political backdrop against which the emergence of minorities and indigenous peoples (and especially the latter) on the international stage has to be measured. And yet, the developments affecting indigenous peoples mentioned by the author to substantiate 'external' recognition are not in themselves merely political or factual, but, as implied by Meijknecht's analysis itself, also reflect a legal process internal to the relevant bodies like the UN Working Group on Indigenous Populations (WGIP) (derogating from Article 71 of the UN Charter on the participation of NGOs in the meetings of the ECOSOC and its subsidiary bodies). This has resulted in the conferral of specific procedural capacities upon indigenous representatives acting on behalf of their groups, including participation in the drafting process of the UN Draft Declaration on the Rights of Indigenous Peoples, adopted by the WGIP in 1993. Third, recognition of such specific capacities seems to suggest that the question here is not so much whether or not the relevant groups have international legal capacity in general, but rather what kind of capacities, if any, they have been conferred. In other words, speaking of 'legal capacity' (at 120 and 223) may appear to imply capacities which in fact do not exist, and therefore does not avoid the task of distinguishing between the various capacities and between the entities which enjoy them. A different matter is whether specific capacities might have to be related to the wider framework generated by the attribution of substantive rights to an entity which is emerging as a 'subject of international law'.

Meijknecht identifies different ways in which the contemporary international legal order conceptualizes minorities and indigenous peoples. She observes, though, that 'the approach most frequently applied in international documents dealing with minorities and indigenous peoples is the indirect

approach' (at 174), meaning an approach characterized by the formulation of specific state duties and the substantial referral of the attribution of rights to domestic law. Since this approach, chosen by states for states, unsurprisingly leaves them in principle a large degree of discretion in implementing norms, a major issue, according to Meijknecht, arises as to whether minorities and indigenous peoples can have a 'voice' in the form of *ius standi* as a way of practically constraining such a discretion. Three points need to be made here. First, despite the fact that Meijknecht embraces the notion of 'subjects to a lesser extent' with regard to non-state entities, explained in relation to the book's theoretical framework (at 55–56), she then oddly refers to what she identifies as a predominantly indirect approach to minorities and indigenous groups (somewhat encompassed by her understanding of limited subjectivity of non-state entities) as indicating the 'object or beneficiary of obligations of the state' (at 168). Second, in terms of minorities and indigenous peoples 'as such', the review of international instruments does not lead to a major breakthrough. Minorities *qua* groups are virtually non-existent as bearers of substantive rights, while indigenous peoples are conceptualized as bearers of rights. However, this either tends to be diluted into the language of state duties (ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries) or poses several issues which remain unclear, such as precisely which group rights are recognized and what their relation is to individual rights (Draft Declaration). Third, Meijknecht offers the conclusion that in order to contain state discretion regarding the protection of minorities and indigenous peoples a need arises for adequate supervisory mechanisms to be actionable by the groups themselves. This appears to shift the focus from the general (and in itself rather vague) perspective on legal subjectivity to the more pragmatic question whether these groups have the specific legal capacity to bring an international claim to defend the relevant rights or interests. To put it differently, the subjectivity approach, as a seemingly viable

one at present in relation to indigenous peoples, does not help provide answers to the concern of the author as to whether, and to what extent, the substantive rights supposedly attributed to them, or otherwise the norms protecting them, can be invoked by themselves to effectively defend their position.

This procedural dimension is discussed in Chapter V. Meijknecht mainly explores the role of quasi-judicial bodies, particularly the UN Human Rights Committee under the Optional Protocol complaints mechanism and the Inter-American Commission on Human Rights (IACHR) in the context of its petition procedure. In so doing, she addresses the specific aspect of the victim requirement as an impediment to a more independent procedural role of groups 'as such', like minority and indigenous groups as well as interested NGOs. Meijknecht observes that the Optional Protocol mechanism, although allowing for communications from a group of 'similarly affected' individuals as stated in *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*,¹⁸ considers inadmissible not only complaints from allegedly directly affected collective entities but also complaints in the form of an *actio popularis*. However, she stresses that whereas such mechanism does not accept communications submitted by a third-party on behalf of individual victims, the IACHR petition procedure does allow at least this form of petitioning mostly on behalf of indigenous communities. Indeed, petitions have been filed with the IACHR by NGOs, indigenous groups and their representatives with or without the victims' knowledge or consent. By building on the IACHR practice, the author interestingly argues that a disconnection between the person of the victim and the person of the claimant is not only possible, considering the difference — emphasized by Lauterpacht — between being the holder of a right and having the capacity to enforce it, but is also highly desirable in practical terms, given the frequent lack of information or skills

on the part of the victims or the difficulty of identifying all individual victims resulting from large-scale violations. However, the conclusions Meijknecht draws from this important aspect of the question appear to go far beyond what is warranted. She contends that 'in such cases, organisations representing the minority group or indigenous people "as such" should be able to speak and act before judicial or semi-judicial organs on behalf of the group', which, in turn, 'would enable minorities and indigenous peoples to participate in international fora as subjects of international law, thus as bearers of international rights and obligations' (at 222). How can a minority or indigenous organization, or even a third-party NGO, 'speak and act' on behalf of the group when, in the context of the supervisory procedures at issue, the substantive rights whose violation is claimed are *not* allocated to the group 'as such', but to its members? How can the distinction between the rights protected and the procedural capacity to defend them in a judicial-like body, following Lauterpacht's approach itself, justify the description of the simple extension of indirect enforcement possibilities for individual victims in terms of the direct emergence of new 'subjects of international law' understood as procedural creations designed to vindicate *others'*, not *their own*, rights? With regard to indigenous peoples, as long as collective rights are recognized and made available to them for judicial-like proceedings, as for instance suggested by the recent judgment of the Inter-American Court of Human Rights in the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,¹⁹ then one might argue that the respective indigenous group petitions would constitute more than a merely procedural phenomenon, perhaps fitting into Kelsen's paradigm linking the holding of a right to the capacity of the holder to enforce it as a requirement for international subjectivity. But absent such a link, speaking of subjectivity on a purely procedural basis goes in fact

¹⁸ Communication No. 167/1984, Views of 26 March 1990, (1990) Annual Report II, 1.

¹⁹ Case 11.555, Ser. C, No. 79 (31 Aug. 2001), www.corteidh.or.cr/seriecing/Mayagna_79_ing.html.

too far. The noteworthy issue of petitioning by groups or organizations other than the victims can and should be usefully viewed from the limited and practical perspective of achieving more flexible and functional procedural requirements, without having to link it to — rather questionable — wider repercussions.

As for non-judicial mechanisms, the author's thoughts somehow echo those of the chapter on legal capacity: while minorities are increasingly gaining access to the relevant bodies, it is indigenous peoples that stand out for 'making their voice heard' on the international level as true collective participants in a multilateral dialogue, as is crucially confirmed by their role within the newly established UN Permanent Forum for Indigenous Peoples.

Measured against the suggested 'scale' of international personality, the author concludes that minorities are caught in the individualistic, 'persons belonging to' model, which makes the 'development of minorities "as such" into entities with legal capacity and, subsequently, into subjects of international law, problematic, and to some extent, even improbable' (at 219). The story is quite different, Meijknecht maintains, with regard to indigenous peoples: they have legal capacity, they are a subject of international rights and duties, and they can even collectively represent their interests and protect their rights before non-judicial or political bodies. In other words, by meeting the first two constitutive elements of international personality, according to the author's construction, indigenous peoples seem to be on the road to becoming international legal persons. Meijknecht admits the lack of an indigenous group *judicial ius standi*, going beyond the individual-centred pattern of judicial-like procedures, but she notes that the current standing of indigenous peoples before non-judicial forums such as the UN Permanent Forum suggests either possible parallel future developments within a judicial-like context, or the emergence of an international person of a special kind, based on the previously explained broad understanding of *ius standi*. The usefulness of developing a legally stretched 'higher status',

i.e., that of an international person, in connection with the 'valued added' of a broadly construed *ius standi* is somewhat puzzling. In fact, the doctrine by which Meijknecht is creatively inspired did not imply this distinction. If the focus is on *ius standi*, then does not the matter become more simply one of determining the existence of a special legal capacity, whose (possible) establishment should therefore be seen as either reinforcing the substance of legal subjectivity (if any) or reflecting an autonomous perspective to be appreciated on its own terms? The point here is that the author, by reinterpreting the *Reparation* decision in a way that considers legal capacity as a general prerequisite for a narrowly defined legal subjectivity, rather than a continuing legal parameter functionally designed to determine the content of subjectivity (if any) in the traditional sense of personality,²⁰ addresses the procedural dimension through a separate discourse, leading up to a rather artificial qualitative distinction between precisely 'subjectivity' and 'personality'. In other words, if one adheres to the subject approach to indigenous peoples in international law, the recognition of greater or lesser degrees of *ius standi* to them at the international level might usefully be viewed as amounting to nothing more than the conferral of special procedural capacities as the practical (as opposed to a largely theoretical) complementing content in which that individual subjectivity has resulted. If one does not adhere to the subject approach in this context, then the procedural dimension is to be valued simply for its autonomous, yet crucial, functional purpose of allowing the groups concerned to defend the relevant rights or interests before international bodies. After all, this is the fundamental concern motivating the author's inquiry, as further suggested by the pragmatic perspective chosen in Chapter V. Indeed, although Meijknecht in this chapter still looks for avenues to reinforce the

²⁰ See e.g. P. Sands and P. Klein, *Bowett's Law of International Institutions* (2001), at 472–473; Lyssitzin, 'Territorial Entities Other than States in the Law of Treaties', 125 *RdC* (1986) 9–15.

position of minorities and indigenous peoples *qua* groups, she nevertheless (quite unsurprisingly in regard to minorities) investigates how best to protect them through, among others, typical individual rights-based complaints mechanisms. The suggested disconnection between the person of the victim and the person of the claimant might be one important way of achieving this objective. The suggestion adds to the more general call for an effective 'division of labour' between judicial-like responses, focused on individual victims within a (reinforced) collective dimension, and non-judicial or political responses, geared towards supervising those aspects that affect whole groups and facilitating participation of the people concerned, especially indigenous peoples.²¹

Speaking of the position of individuals in international law, Brownlie notes that it is 'unhelpful' to characterize them as 'subjects of law' as the term remains somewhat empty-handed, or with little substance, when it comes to determining the actual legal capacities attached to it in this case, compared with those of other types of subjects.²² Meijknecht is well aware of the, at best, limited legal status of non-state entities such as individuals, but, in the final analysis, it appears doubtful whether the 'scale' of international personality she develops proves, or may prove, realistically more effective to strengthen the international legal position of minorities and indigenous peoples. Although the range of international legal entities is not rigid and immutable, but is capable of changes and developments, with regard to minorities as such, the three-step personality discourse is at present (and perhaps over the longer term as well) largely, if not entirely, unpractical. It may apply to some extent to indigenous

peoples, yet its ramifications, sometimes explained by Meijknecht in a rather tentative manner, tend to obfuscate the pragmatic overarching theme of what special procedural capacities these peoples actually have, be they entitlements to take part as equal partners with states in pertinent meetings or rights to bring international claims, as the truly functional substance of their presumed, 'qualified' (actual or emerging) legal personality.

On balance, *Towards International Personality* ends up usefully deconstructing the minority and indigenous rights discourse as it developed in the 20th century, thereby offering images of central questions such as the formulation of norms and the state duties attached to them and the possible expansion of enforcement possibilities for the benefit of minority and indigenous members as well as the respective groups as a whole. But precisely because of that, it leaves the reader with the impression, or even the conviction, that effective responses to the international legal advancement of minorities and indigenous peoples, particularly from the 'bottom-up' — as opposed to the 'statist' — perspective central to the author's line of reasoning, are more likely to be found in those more limited and functional aspects than in the language of international personality.

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Scott, Craig (ed.). *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Oxford: Hart Publishing, 2001. Pp. 731. \$95.

The importance of tort law in international law has greatly increased over recent years. This development was prompted in particular by the so-called forced-labour cases against German and Austrian global enterprises such

²¹ For a general analytical framework of the role of minority rights supervisory models, see Pentassuglia, 'On the Models of Minority Rights Supervision in Europe and How They Affect a Changing Concept of Sovereignty', 1 *European Yearbook of Minority Issues* (2001/2002) 29.

²² I. Brownlie, *Principles of Public International Law* (1998), at 66.

as Siemens and Degussa.²³ For the first time in legal history, almost the entire industrial sector of one state was brought before the courts of another state claiming intentional and massive abuse of human rights before and during the Second World War.²⁴ Companies such as Volkswagen and other global players certainly knew of the dangers of the US system of civil procedure involving class actions, punitive damages and the idea of rigid and intrusive pre-trial discovery. These companies have dealt with those phenomena mostly in the context of product liability.²⁵ But being sued for human rights violations was something new. The idea of human rights litigation, i.e. suing a private person for human rights abuses, was born in the US with the case of *Filartiga v. Peña-Irala*.²⁶ In the forced-labour cases, these two strands (human rights litigation and the powerful weapon of a civil action) were combined.

Europe deals with human rights abuses differently from the US. The classical way of dealing with human rights abuses is by prosecution in criminal proceedings. The downside of this approach is that one needs to find one or more individuals to be held responsible for the violations that have either been caused by or resulted in benefits to a company. An alternative method in Europe of dealing with human rights abuses is to communicate the violation to the European Court of Human Rights (ECHR). However, this latter system of regional human rights protection has the major flaw that it only applies to infringements linked to a state.²⁷

²³ See e.g. the judgment of the District Court of New Jersey, 57 F Supp 2d 248 (1999); US Dist Lexis 13864; see also Safferling, 'Zwangsarbeit vor US-amerikanischen Gerichten', 53 *Neue Juristische Wochenschrift* (2000) 1922.

²⁴ For the historic and legal background to the forced-labour cases, see P. Zumbansen (ed.), *NS-Forced Labor: Remembrance and Responsibility* (2002).

²⁵ See e.g. *Volkswagen AG v. Schlunk*, 486 US 694 (1988).

²⁶ 630 F 2d 876 (2nd Cir. 1980).

²⁷ Cf. *Loizidou v. Turkey* (Preliminary Objections), ECHR (1996) Series A, No. 310.

The human rights litigation pioneered in the US could therefore serve as a promising way out of this dead end. Continental civil procedure does not, however, provide for such weaponry as the US system does (e.g. pre-trial discovery). Therefore, lawyers for the victims of human rights infringements will seek a forum that suits their and their clients' interests best, that is, they try to bring the case before a US court.

The legal problems in this regard are manifold, and academic writing on the subject is sparse. All the more laudable therefore is the effort of Craig Scott of York University, Toronto, to address these issues and to bring together the writings of some 30 academics into one voluminous publication to discuss different aspects of the idea of human rights litigation. The title, *Torture as Tort*, is certainly an easily remembered and perfectly fashionable alliteration, but does not mirror the entire content of the book. The subtitle therefore rightly broadens the picture when it describes the book as a *Comparative Perspective on the Development of Transnational Human Rights Litigation*. This subtitle sets a standard the individual contributions do not always live up to.

The book is divided into six parts. Part I, entitled 'Frames and Foundations', starts with a superb introduction by the editor himself which may serve as an introduction to human rights litigation in general. There follows a second chapter, also by the editor, on the problem of bringing together human rights law and tort law. Chapter 3 (Michael Swan) and Chapter 4 (John Terry) introduce US tort law, in particular the *Filartiga* case. Setting the baseline of human rights litigation, these chapters contain little that is new for lawyers who have already come across this form of action. Nevertheless, the two chapters are useful reading for those who are new to this subject. Part I concludes with a final chapter (Malcolm Evans and Rod Morgan) discussing the different ways of fighting torture (i.e. prevention and punishment) and how they relate to each other.

Part II discusses two central problems of litigating in a third state: jurisdiction and

immunity. After an introduction to Canadian law on this topic (Anne McConville), the defence of *forum non conveniens*, which is accepted by judges all over the world in far too many cases, is discussed (Upendra Baxi).²⁸ Ironically, human rights often take second place behind state sovereignty in any consideration of *forum non conveniens*. A question which unfortunately is not discussed is how international power, state sovereignty and immunity interrelate. To sue a Paraguayan police officer seems easy and less problematic with regard to *forum non conveniens* than to bring an action against powerful German banks. The two final chapters in Part II (Wendy Adams, and Peter Burns and Sean McBurney) discuss state immunity and *jus cogens* in transnational litigation. Adams holds a rather positivistic view,²⁹ while Burns and McBurney take a more public international law approach in which civil redress seems to be the necessary bottom-line for the protection of human rights, i.e. a way to force a state to act in accordance with its international obligations.

Part III is entitled 'Characterisation, Choice of Law and Causes of Action'. After an analysis of the substantive law used in *Filartiga* (Jennifer Orange), several possibilities for defining the legal nature of torture are presented: either to establish a claim *sui generis* for human rights redress (Graham Virgo); or to develop national (here, Canadian) law under the influence of public international law into transnational law (Sandra Raponi);

or to develop a (common law) tort of torture in Canada (Ted Hyland).

Part IV deals with the applicability of human rights to non-state actors. The first chapter in this part assesses civil liability (Valerie Oosterveld and Alejandra Flah), beginning with command responsibility of subordinates for acts of torture as developed in international criminal law (see Article 28 of the Statute of the ICC)³⁰ and as applied in US human rights litigation. Secondly, the maxim of *respondeat superior*, a concept of enterprise liability (strict liability), is discussed. Introducing this principle into tort law would result in an effective system of strict liability for high-ranking superiors. Responsibility for human rights violations in UN field operations (Chana Wickremasinghe and Guglielmo Verdirame)³¹ and state responsibility for human rights abuses by global enterprises are considered next (Muthucumaraswamy Sornarajah). The following chapter is by Andrew Clapham, one of Europe's leading scholars on the effects of human rights in the private sphere. His development of a 'right to a civil redress' for human rights violations is based on human rights law, namely, the ECHR and its Court. One could also regard the necessity for civil redress as a problem arising from Article 14 of the Convention Against Torture (Andrew Byrnes). This norm, although containing no *obligation* for states to establish universal jurisdiction, nevertheless gives at least a *permission* for doing so.

Part V addresses human rights and cultural relativism. In the first contribution (Jan Klabbers), human rights are — in contrast to

²⁸ In the forced-labour case against Degussa and Siemens (see *supra* note 23), Judge Debevoise declared the claim inadmissible for reasons of *forum non conveniens* and the political question doctrine.

²⁹ Even the International Court of Justice, in the judgment in *Democratic Republic of Congo v. Belgium*, 14 February 2002, reprinted in 41 ILM (2002) 536, seemed more open towards accepting exceptions of state immunity; cf. 'Symposium: The Congo v. Belgium Case Before the ICJ', 13 *EJIL* (2002) 853, in particular the articles by Cassese, Wirth and Spinedi.

³⁰ See Fenrick in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Article 28; see also K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 673–706.

³¹ Responsibility in UN operations certainly needs further exploration; for a discussion of humanitarian law and UN military operations, see Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *Yearbook of International Humanitarian Law* (1998) 3.

modern legal theory³² — presented as strictly political rights which do not, by themselves, generate legal claims. Consequently, there is no place for human rights litigation. The interrelation of the self-determination of societies and foreign tort claims are considered next (Jennifer Llewellyn): assessing the legality of amnesties in a foreign court can seriously damage the re-democratization process in a society which has suffered from an oppressive system. The last two contributions in this part discuss two interesting cases. The first (Belinda Wells and Michael Burnett) discusses the case of an Australian citizen who was asked under Saudi Arabian Islamic law to decide whether or not he wanted the convicted murderer of his sister to be executed. The convicted murderer sought an injunction in an Australian court to save her life. The case, which was eventually settled out of court, starkly highlights the problem of cultural differences in transnational litigation. The final chapter of this part (Amnon Reichman and Tsvi Kahana) discusses a judgment of the Israeli Supreme Court which declared the use of physical force in the course of police questioning illegal.

Finally, Part VI brings legal theory (in particular, tort theory) into the book. First, there is an argument in favour of a more globalized approach for judges to adopt (Mayo Moran). The notion of the exclusivity of national and international law should be overcome. The final chapter of the book (Oliver Gerstenberg) deals with the very German notion of *Drittwirkung* (third party effect) of constitutional rights.

Obviously, a brief review cannot comprehensively comment on a book of some 700 pages. I will therefore limit myself to two critical comments. The first is a substantive one, concerning the very essence of human rights law in civil courts; the second is a more structural criticism concerning the manner of dealing with comparative law.

Human rights litigation attempts to give a

procedural answer to situations in which a human rights violation has been committed by private individuals. The circumstances of the violation may be either a situation where a state or a state-like entity encourages or even orders the abuse (for instance, in the *Filartiga* case) or a situation in which a global company abuses human rights, with or without a state backing the oppressive policy (this was the case of German insurance firms or banks seizing Jewish assets, or other German companies using forced labourers in their plants). In this context, I find it misleading when Sornarajah tries to link human rights abuses committed by corporate nationals abroad to state responsibility.³³ He is of the opinion that multinational corporations are not recognized as subjects of international law; the responsibility of those companies has not been discussed in international law; any redress therefore needs to be linked to state responsibility. But what else are the forced-labour or South Africa cases all about? It is certainly true that those global players are not vested with personality in public international law. But, of course, they enjoy subjectivity in private international law and they cannot be deprived of this position simply by the fact that they have violated a public international (i.e. a human rights) norm.³⁴ Another reason why Sornarajah meditates on state responsibility in this context is that he presumes that national states can control these global enterprises.³⁵ With respect, this presumption is naïve. Global companies will simply leave a state that tries to exert too much control over them, as has happened for lesser reasons.

³³ Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 491.

³⁴ Wolf has elaborated on this question in his affidavit in the forced-labour case against Degussa and Siemens; see the references at *supra* note 23.

³⁵ Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 496.

³² See e.g. J. Habermas, *Die postnationale Konstellation* (1998) 170–194.

And, what would we win if we could find a home state responsible for the human rights abuses of a multinational company? Such state responsibility would be almost impossible to enforce.³⁶ Sornarajah is, however, right in his second point: national states are responsible for providing effective redress in their courts for any human rights violation. The reason for this, however, does not lie in the fact that corporate nationals could be seen as agents of national states,³⁷ but rather in human rights protection. The right to life, as laid down, for example, in Article 2(1) of the ECHR, contains the obligation for a national state to establish a legal system in which compensation may be paid.³⁸

A separate issue is the question of sources. There seem to be some inconsistencies on the nature of torture as tort. Virgo³⁹ rightly addresses the question of stigmatization: does it matter whether the perpetrator is sued for an ordinary tort or for torture as an international tort? *De lege ferenda*, Moran argues in favour of an international common law as the meeting point of national and international

law.⁴⁰ That would in a sense remedy the problem with sources, but will — at least in the near future — remain a dream.

What is missing in the discussion on sources of law, in my view, is a proper differentiation between the separate issues under discussion.⁴¹ The first issue concerns the question of whether the act in question constitutes an act of torture. This issue is to be answered by international law itself, mainly the Convention Against Torture.

The second issue is whether there exists individual liability for a concrete violation of the prohibition of torture. This may be taken from domestic law, if an equivalent norm exists. If not, one needs to determine whether the norm at the international level can be applied automatically, i.e. whether the international norm is self-executing.⁴² The individual chapters in this book give different answers to this question. Although the wording of the Convention Against Torture clearly pertains only to states, the prohibition of torture has become a standard norm in international law. It has been regarded as a human right by virtue in particular of Article 7 of the ICCPR and Article 3 of the ECHR.⁴³ The European Court of Human Rights has held in several cases that the prohibition of torture is an absolute right and therefore overrides national law.⁴⁴ The Court has thereby established an inalienable right for every individual in any situation. Also, the International Criminal Tribunal for the former Yugoslavia has ascribed self-executing effect to the prohibition of torture as far as the question of

³⁶ The ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, chapter IV.E.1, 34 *et seq.*, and the commentary by J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), set up an interesting framework, but, despite this, there is no enforceable system. See 'Symposium: State Responsibility', 10 *EJIL* (1999) 339–460.

³⁷ See Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 493 *et seq.*

³⁸ The European Court of Human Rights was clear on this point as regards criminal prosecution. See most recently *Pretty v. United Kingdom*, 29 April 2002, Application No. 2346/02, (2002) 35 EHRR 1, para. 38 or *Orphan v. Turkey*, 18 June 2002, Application No. 25656/94, paras 333–348. There is no reason why the obligation to entertain effective criminal prosecution should not extend to provide for effective remedies in civil courts; cf. also the contribution by Clapham in this volume, at 513.

³⁹ Virgo, 'Characterisation, Choice of Law and Human Rights', 325 at 334 *et seq.*

⁴⁰ Moran, 'An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law', at 661.

⁴¹ The same mistake was often made in the context of the applicability of international criminal law.

⁴² Cf. A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984), paras 864–866.

⁴³ Cf. S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd ed., 2001) 119 *et seq.*

⁴⁴ See e.g. *Chahal v. UK*, Application No. 22414/93, ECHR (1996) Series A, No. 22, paras 74 and 78–79; the leading case in this regard is *Soering v. UK*, ECHR (1989) Series A, No. 161.

criminal responsibility is concerned.⁴⁵ What is true for criminal law must also be true for civil liability, for the simple reason that private law is less intrusive in character and is not strictly bound by the maxim of *nullum crimen, nulla poena sine lege*.⁴⁶ Relying on these two pillars, namely, human rights law and international criminal law, the internationally established prohibition of torture must be accepted as offering a legal basis for civil redress. A transformation into domestic law may be desirable for reasons of certainty and clarity in the law, but this is not strictly necessary as the international prohibition is self-executing.

The final issue is the question of implementation: which national court is accessible? This question can be solved by private international law and the ordinary rule of jurisdiction.

The book under review refers in its subtitle to 'comparative law'. If the reader expects a truly comparative work, he will be disappointed. Of the 31 authors in this volume, only two have a continental European background. There are some 15 pages of cases quoted at the beginning of the book, but only four cases stem from civil law countries; 19 cases by the ECHR and two by the ECJ are included. The book focuses largely on US and Canadian law as seen (mostly) by Canadian authors. Sometimes it appears that, when describing 'the other' system, the authors rely more on rumours than on research.⁴⁷ Further, the reviewer is frankly at a loss to understand how Sornarajah could write about international human rights without referring even once to the ECHR system, which is probably

the best working system of human rights protection in the world.⁴⁸ Having said this, the book contains an excellent work on the European system by a true expert on the subject, Andrew Clapham. Furthermore, it is curious that a book on tort theory should include a chapter which discusses German constitutional law regarding the rights of soccer players after the ECJ's *Bosman* judgment.⁴⁹

Nevertheless, some of these criticisms can be made of any book that consists of a collection of essays by different authors. Even the most diligent editor — which I have no doubt Craig Scott is — cannot prevent different standards of quality and inconsistencies here and there. *Torture as Tort* is still a good book and, above all, a necessary book. I can only hope that academics are encouraged and inspired by reading it to do further research on human rights litigation. Such litigation is a powerful weapon, after all. The German forced-labour cases (unfortunately) did not lead to legal precedents in this regard; the cases were settled and a foundation was established and endowed with some US\$5 billion to compensate the victims.⁵⁰ Although the original concept of human rights litigation as a dispute between private parties was dropped as soon as the German Government stepped in and burdened the German taxpayer with 75 per cent of the settlement, the victims in the end did receive some financial compen-

⁴⁵ ICTY, *Prosecutor v. Furundzija*, Case No. IT-95–17/1-T, Judgment, 10 December 1998, paras 153–156. There, the Trial Chamber attributed *jus cogens* character to the prohibition of torture.

⁴⁶ Cf. Safferling and Zumbansen, 'Iura Novit Curia', *Juristische Rundschau* (2002) 6 at 10, concerning the forced-labour cases; reprinted in Zumbansen, *supra* note 24, at 233.

⁴⁷ See Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', at 505 *et seq.*

⁴⁸ This is even more surprising as the European Court of Human Rights has several times addressed the problem of state responsibility for human right violations by state agents; see *Matthews v. UK*, Application No. 24833/94, Reports 1999-I, paras 26–35.

⁴⁹ Gerstenberg, 'Private Law, Constitutionalism and the Limits of the Judicial Role', at 687.

⁵⁰ As to the forced-labour settlement, see Adler and Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the Foundation to Compensate Slave and Forced Laborers of the Third Reich', 39 *Harvard Journal on Legislation* (2002) 1–62, reprinted in Zumbansen, *supra* note 24, at 333; and Safferling, 'Zwangsarbeiterentschädigungsgesetz und Grundgesetz', 34 *Kritische Justiz* (2001) 208–221.

sation. This is a success — small as it is — which was only possible because of the class actions filed in the US. Human rights litigation has thereby proven itself to be a working tool for the protection of human rights through civil redress. In particular, in the field of

corporate crime, this tool is very much needed to fill the gaps in international criminal law — and it is to be hoped that it does not always take 55 years to accomplish.

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