Recent Publications

International Human Rights Law: Returning to Universal Principles. By Mark Gibney. Lanham: Rowman & Littlefield Publishers, Inc., 2008. Pp. xi, 149. Price: $24.95 (Paperback). Reviewed by Tasha Manoranjan.

In *International Human Rights Law: Returning to Universal Principles*, Mark Gibney attempts to provide a new framework for actualizing human rights around the globe. Gibney describes an "easy" four-step process that he claims would substantially enhance global protection of human rights: responsibility, territory, accountability, and remedy (p. 13). This process is meant to establish degrees of responsibility for human rights violations, transform the notion of territory to hold states accountable for their human rights obligations within and beyond their own borders, and provide a remedy for victims when states violate human rights.

Gibney argues that states are currently able to hide behind the principle of sovereignty, and the immunity it provides, to avoid responsibility for human rights violations within their borders and, indirectly, through arming and enabling rogue regimes. He argues that his four-step process will revolutionize thinking and acting on behalf of human rights, by introducing accountability into the international system. Gibney attempts to reconcile sovereign immunity with existing legal obligations states have agreed to uphold, by arguing that states have willingly ceded some sovereignty in becoming parties to international treaties. This enables other states to enforce treaties against violating states.

Gibney's objective is noble, and sorely needed. His book adds worthwhile support to the debate surrounding impunity for human rights violations and identifies valuable mechanisms for bridging the alarming disconnect between international law and international practice. Gibney's writing style is also highly palatable. The book is accessible and efficient: he wastes no time with flowery language and succinctly conveys his points. His straightforward approach to human rights protection would have been greatly furthered, however, by a more pragmatic framework for enforcing human rights around the world.

Gibney identifies the end we want to achieve—an international norm of accountability for human rights violations—but does not provide a roadmap to actualize this ideal. The book is often backward-looking and theoretical. Gibney focuses his examination on legal precedent that has diminished human rights protection and allowed states to violate international law. The crux of the book explains the problem of enforcing human rights around the world: the ability of states to hide behind sovereign immunity.

Unfortunately, readers looking for solutions to the shortcomings of the current status quo will likely be disappointed. Only in the last thirty pages does Gibney attempt to offer concrete mechanisms for improving human rights protections around the globe. His book hastily addresses what is arguably the most important aspect of international human rights: enforcement.

Gibney emphasizes the current legal obligations that states possess through treaties, conventions, and jus cogens (p. 130). He argues that current legal obligations are adequate on paper, but that states' actions often fail to reflect this: "As empirical data has shown, being a party to [the Torture Convention] (or any other) international human rights treaty has essentially no bearing on actual state practice" (p. 101). Gibney identifies and constructs several new proposals for holding states accountable for human rights violations, which he argues will end the cycle of impunity and thereby prevent or strictly circumscribe future violations.

Gibney first proposes the creation of an International Civil Court, which would enable individuals to bring evidence and charges against states for human rights violations. He argues that the International Criminal Court does not empower individuals to bring charges against their abusers. The prosecutorial office has discretion in taking cases, and the court's jurisdiction is limited to only four human rights areas: genocide, crimes against humanity, war crimes, and the crime of aggression (p. 121).

Gibney presents a second proposal from Manfred Nowak, the United Nations Special Rapporteur on Torture, for a World Court within the United Nations that would hold states accountable under international human rights treaties. However, Nowak's proposal is inadequate for Gibney's purposes. It allows states to choose which treaties would be binding under the World Court and focuses on states' direct human rights violations while ignoring indirect violations such as providing arms to regimes that abuse human rights.

Gibney's third proposal is potentially the most controversial and potent: to use domestic courts in third-party states to hold other states accountable for human rights violations. Legal vehicles do already exist in several countries for holding individual citizens of other countries accountable—for example, the Alien Tort Statute in the United States and provisions of the State Immunity Act in the United Kingdom—but these vehicles do not allow one state to find the other state itself guilty of these violations. He argues that the domestic courts of countries party to relevant international treaties should exercise jurisdiction over other states (p. 139).

Without historical or statutory precedent for such action, it can be difficult for a court to assert jurisdiction in this manner. Gibney rightfully points to the Alien Tort Statute, which allows human rights claims against individual abusers, as precedent for such action. He eloquently justifies extending the Alien Tort Statute to hold states equally accountable.

There are at least two objections to Gibney's third proposal. Allowing one state to be tried in the courts of another goes against basic principles of state sovereignty: the state being tried has not consented to the trial and thus should not be bound by the result. Moreover, some states perceive concerns over human rights as merely promoting the neo-imperialist agenda of the West. Holding states accountable in the domestic courts of other states would engender further concern along these lines, unless and until Western states were held equally accountable for human rights violations in other countries' courts.

The book offers a rousing call to action but is ultimately impractical. Gibney lacks a methodology for implementing the book's strategy. He correctly identifies jurisdiction as one obstacle to holding a state accountable in another country's domestic courts and addresses this by saying America should be able to enforce the treaties it is party to against other countries that violate them.

Here, Gibney's analysis is flawed: when legal structures and jurisprudence all promote human rights in theory, how do you muster the political will to enforce human rights in actuality? For example, Congress passed the Genocide Accountability Act in 2007,[1] which provides the statutory basis for holding Sri Lankan officials with U.S. citizenship or Green Cards responsible for killing tens of thousands of Tamil civilians in Sri Lanka. However, despite a meticulous model indictment of over eight hundred pages that was delivered to the Department of Justice in February 2009, the Department has yet to initiate an investigation. Readers will be disappointed to find that Gibney does not offer any solution to the crucial question of enforcement. Gibney fails to provide any insight into persuading the Justice Department or any court to press charges against foreign officials—the most crucial step in providing a real remedy to victims.

Gibney skillfully weaves his theory together with relevant legal precedent to poignantly demonstrate the flaws of the current human rights enforcement system. He draws from cases across international tribunals, regional human rights courts, and domestic courts to depict current and ideal protections for universal human rights principles. These examples are intriguing and constitute the core of the book. They demonstrate how courts have had the opportunity to adjudicate international human rights principles, but cowardly chose to hide behind the shield of sovereignty instead.

Gibney's book is hopeful for a system that respects human rights and holds states accountable for violations of international human rights law. Gibney argues that new mechanisms theoretically could improve enforcement of human rights violations, and thus his book is a worthy contribution to the field. However, it could have been richer had he included a more realistic strategy to bridge the divide between international principle and practice.

Just Trade. By Berta E. Hernández-Truyol & Stephen J. Powell. New York: NYU Press, 2009. Pp. 390. Price: $55.00 (Hardcover). Reviewed by Paul Slattery.

In *Just Trade*, Berta E. Hernández-Truyol and Stephen J. Powell argue that the General Agreement on Tariffs and Trade (GATT) and the U.N. Universal Declaration of Human Rights inaugurated a persistent divide between international trade law and international human rights law. At best, they claim, this divide ignores the unparalleled power of trade to advance human rights. At worst, it spawns preventable human rights crises. The authors call on the World Trade Organization (WTO) and its member states to

1. Genocide Accountability Act, 18 U.S.C. § 1091(d) (2006).

use trade policies to advance and enforce international human rights law. They argue that trade law and human rights law share synergies, and the book explores how extant trade frameworks recognize, ignore, or counteract these synergies.

Just Trade names two intended audiences: students in a trade and human rights course and professionals in all fields. As a textbook, it has much to offer. It provides an accessible introduction to international law, human rights law, and trade law. It also surveys pressing concerns with global trade and provides ample material for classroom discussion. For a professional audience, the book persuasively links evolving trade agreements, rules, and jurisprudence to the frustrations and potential outlets for human rights advocates. Its exploration of evolving WTO jurisprudence frames the issues with particular clarity.

The prescriptive project of *Just Trade* is less lucid. Terms like globalization, nation-state, and human rights all lack clear, consistent definitions. Some policy proposals are noncommittal and others have unaddressed and potentially daunting ramifications. In all, the book is thought-provoking and descriptively compelling, but its recommendations leave readers wondering.

The core of *Just Trade* is the authors' proposed relationship between human rights law and trade law. "[H]uman rights norms are indisputably the foundational, widely shared standards of justice and right conduct," are inextricably linked to trade policies, and "should prevail over trade norms" (p. 67). The WTO and member states are obligated to enforce these human rights norms through trade rules and agreements, and their obligations extend beyond each country's citizens and borders. Developed countries, in particular, have "perpetuat[ed] a global order whose foreseeable effects are widespread human rights harms" and "have a negative duty to ameliorate the human rights harm that their global institutional order has caused" (p. 288).

This proposed duty motivates the authors' straightforward though noncommittal, analysis of many human rights issues. For example, the authors describe the disparate impact of global trade on women. They recommend giving women more say in trade policy and consider the gendered impact of new trade agreements (p. 204). Similarly, the authors argue that global trade fosters trafficking in forced labor. They propose that lawmakers write policing practices, reporting mechanisms, and fair wage prescriptions into trade agreements (p. 188).

By avoiding advocacy for definite policies, *Just Trade* is not comprehensive. The general focus on the Americas leaves EU lessons unexplored. The indigenous rights chapter ignores the experiences of U.S. and Canadian indigenous peoples. The poverty chapter devotes one sentence to developing-country institutions. Concrete proposals would have illuminated practical concerns with integrating human rights and trade law; instead, the authors focus readers on their paradigm rather than policy minutiae.

The authors commit to only one legal strategy, which raises ultimately unanswered questions. GATT's default requirement is nondiscriminatory trade. Article XX provides exemptions for policies protecting public morals,

human life, and natural resources, among other things. The authors claim that Article XX's drafters anticipated balancing human rights and trade. However, trade dispute panels have been "endlessly creative in finding reasons" to defeat this balance (p. 95). First, earlier GATT panels demanded physically alike products be treated alike, regardless of production processes or methods (PPMs). For example, the *U.S.-Tuna-Dolphin* cases held that tuna is like tuna, regardless of dolphin-safe fishing techniques. Second, earlier GATT panels required that Article XX's trade restrictions be necessary or directly related to human rights ends. This effectively restricted Article XX exemptions to domestically attainable human rights objectives.

The authors laud recent WTO Appellate Body interpretations of Article XX, which they style a "swift neutering" of the relationship test and its domestic objectives constraint (p. 99). They commend the *EC-Asbestos* decision, which established a balancing test between a policy's human rights goals and its less GATT-inconsistent alternatives. The authors also praise the *U.S.-Shrimp-Turtle* cases, which permitted the United States to ban shrimp suppliers that harm sea turtles. These cases validated a PPM distinction, "the lifeblood of human rights" (p. 90), and "project[ed] the U.S. objective to every nation that . . . wished access to the large U.S. market" (p. 291).

The authors claim that these Appellate Body cases pave the way for human rights advocates. Article XX's public morals exemption is now an "especially fertile source of discretion to apply human rights law" (p. 282). Moreover, multilateral treaties articulating global human rights standards should increasingly obviate territorial limitations on trade restrictions' aims. The only limiting factor is that policies must advance "universal or international moral standards contained in widely accepted human rights treaties" (p. 149).

This agenda opens the door to unilateral trade restrictions between asymmetric actors for broad, extraterritorial purposes. A balancing test between protrade solutions and human rights norms offers the only boundary. Without anticipating this tradeoff, countries have penned thousands of pages of human rights treaties. It is not clear exactly which pages trump trade. The interconnections between rights to a living wage, to a clean environment, and to health are enormously complex and not always synergistic. At least four pitfalls should be addressed before trade law is wielded on behalf of such rights.

First, the authors' agenda may provide cover for protectionism. They argue that Article XX's *chapeau* precludes "'disguised restriction[s] on international trade'" (p. 101). Elsewhere, however, they note that developed country protectionism currently magnifies global poverty. Disciplining protectionism is difficult, and the authors would add two further complications. First, it is unclear which human rights norms would tip a balancing test toward trade restrictions. Second, the authors attempt no bright line between disguised restrictions on trade and protectionist policies with plausible human rights justifications. Countries may shop among newly validated trade restrictions for protectionist benefits, and the appropriate outcome is unclear.

Second, protectionism is not the only problematic motive for trade restrictions. Political gamesmanship may be one as well. U.S. special interest groups, for example, will likely solicit U.S. trade law to advance their agendas abroad. A politician seeking an interest group's support could face a choice: push controversial extensions of the group's domestic agenda or use its most domestically accepted values, couched in human rights language, to restrict trade with a minor partner. If declarations of values drive trade restrictions, attention to the distant and complex consequences could prove lacking.

The authors' language on environmental and labor issues underscores this problem. They state, "it is unacceptable that simply because the First World two centuries ago used resources in an unsustainable manner . . . developing nations should be permitted" to do the same (p. 112). Developing states "must accept today's moral standards" (p. 113). Moreover, "workers simply cannot be asked to support a country's comparative advantage" by forfeiting rights (p. 169). Yet, many states adopt unpalatable practices, in part, to combat poverty. Making these countries poorer through trade restrictions may actually intensify that impulse. If, however, a trade restriction is purely a statement of values to satiate domestic interest groups, perverse outcomes a world away seem unlikely to lead to its repeal.

Third, the authors condemn protectionism and unilateral sanctions for creating poverty, but trade restrictions carry similar risks. Many developing states export a limited array of products. These states then rely on that revenue to purchase imports. For a state dependent on a single, wealthy trading partner, restrictions on its crucial exports mimic unilateral sanctions. For a state with diversified trading partners, trade restrictions mimic protectionism. Moreover, sanctions for civil rights violations, at least theoretically, abate with government policy reversals. Trade restrictions punishing ingrained labor and environmental conditions may prove difficult for even determined states to escape.

Finally, trade restrictions based on human rights law may chill both human rights and trade negotiations. Human rights treaties often contain aspirational language. States may sign them to express presently unattainable goals. If every new treaty risks adding "human rights norms" that justify punitive trade restrictions, parties may avoid the negotiations altogether. Similarly, if every new trade agreement creates additional dispute resolution systems that enforce evolving human rights, countries may hesitate to sign on. The disproportionate bargaining power of developed countries will only magnify these effects.

Just Trade captures the impact of trade regimes on human rights and illustrates the unique stakes of WTO jurisprudence. The authors' humanitarian case for trade restrictions is less convincing. In the future, developing countries may consistently grow without sacrifices from workers or the environment. In the interim, using a country's economic vulnerability to manipulate its development strategy is unfairly heavy-handed. Achieving sustainable and just growth is a perplexing global challenge and forcing the dilemma onto the world's poorest countries is unlikely to solve it.

The Birthright Lottery. By Ayelet Shachar. Massachusetts: Harvard University Press, 2009. Pp. 1, 273. Price: $32.00 (Hardcover). Reviewed by Sara Aronchick Solow.

In *The Birthright Lottery*, Ayelet Shachar makes a powerful analogy between citizenship rights and property rights. Citizenship is a form of property-holding that confers positive and negative liberties, such as the right to exclude others and the right to be included in a common enterprise. Shachar draws from property law to suggest improvements for citizenship law. Specifically, she urges that we import three fixtures from property law—the estate tax, Eugino Rignano's principle of declining entitlements, and the doctrine of adverse possession—into the global citizenship regime. She argues that these imports will make the set of laws concerning citizenship allocation more just.

In Part I, Shachar lays out her central proposal: that the world community apply to the transmission of citizenship a tax similar to the estate tax. This is the tour de force of Shachar's work. On all persons born citizens of middle- and high-income countries—the world's children of fortune—Shachar suggests that there be imposed a "birthright levy." The proceeds of the levy would go to those unlucky persons who are born citizens of impoverished countries. Shachar's tax would operate at the state level, with wealthier states making transfers to less wealthy ones. Although the exact apparatus for the birthright levy is not specified, the goal would be to establish a global welfare fund, of sorts, that enables poor persons access to better nutrition, healthcare, and essential services. Shachar's hope is that, like the estate tax, the birthright levy will "reduc[e] the presently unacceptable disparities in life prospects that attach to birthright membership" (p. 101).

In Part II, Shachar advances several proposals that relate, not to mitigating the harsh effects of citizenship distribution, but to transforming the way that citizenship is acquired. Here, Shachar suggests two key reforms: first, that citizenship rights no longer be based solely on "blood and territory"—facts related to one's birth—but rather on "the social fact of membership"; and second, that illegal entrants who remain in a country for long periods of time acquire citizenship if a country "sleeps on its rights" of removal (pp. 179-180). Shachar's ideas for changing citizenship acquisition are again borrowed from property law. With respect to her idea that citizenship be based on *jus nexi*, or one's "real and effective link" to a country, rather than on pure *jus soli* or *jus sanguinis* rules, Shachar draws on Eugino Rignano's principle of shifting intergenerational entitlements. The basic notion is that one's property right should vary with one's closeness to the property at issue. Grandchildren can be taxed steeply on their inheritance, because their entitlement to the underlying property is diminished. Third generation *jus sanguinis* citizens can be asked to do more to preserve their status—for instance, meet longer residency requirements—because their claim to citizenship in the grandparents' country is similarly weak. For her proposal that illegal entrants be able to acquire citizenship through public actions,

Shachar borrows from adverse possession doctrine. She equates the illegal entrant who remains in a country, acts like a citizen, and develops ties to the adverse possessor who gains rights of property ownership through displaying public use over time.

The birthright levy, *jus nexi* principle, and adverse possession regime for irregular entrants are three novel, compelling, and provocative proposals for reforming the citizenship regime. All of the ideas stem from Shachar's powerful insight that citizenship is the most important property right—the gateway entitlement—that a person holds. Perhaps Shachar's most original contribution in *The Birthright Levy* is that she imagines ways to delink citizenship from the random fact of birth, while being careful to preserve bounded membership. Unlike many of her contemporaries, Shachar does not want her reforms of citizenship transmission to undermine the institution of national citizenship as such.

Nonetheless, each of Shachar's proposals raises a significant question, either theoretical or practical, about its ultimate feasibility. First, with regards to the birthright levy, Shachar's policy is normatively questionable because it seeks to equalize the benefits that attach to citizenship without actually requiring that wealthy states alter their immigration regimes. On the one hand, this makes the birthright levy appealing to protectionist governments of the Organization for Economic Co-Operation and Development, as it would enable such countries to satisfy their moral obligation to foreigners while keeping admissions constant. The potential pitfall, however, is that Shachar's remedy is far too weak for the problem she identifies. Shachar bemoans the unfairness of the birthright regime because citizenship in "developed" countries confers not just economic opportunities, but also self-realizing opportunities (pp. 85, 102). Granting her overgeneralization, Shachar rightly points out that citizenship in "affluent" polities is beneficial because it yields the right to vote, organize, and participate in a self-governing polity (p. 37). The birthright levy is a diminished instrument because it reaches only the material aspects of citizenship. It could help persons in poor countries by improving their access to water, infrastructure, and nutrition. The levy does not, however, reach the "enabling" aspects of citizenship; it fails to directly ensure opportunities for membership in liberal polities. Under Shachar's regime, individuals born in autocratic countries would unquestionably be better off in a physical sense. The problem is that they would still be deprived of some of the most essential privileges that citizenship bestows.

Second, Shachar's proposal that citizenship be based on *jus nexi* rather than on birth is problematic not in a theoretical sense, but in a pragmatic one. Basing the entitlement to citizenship on a totality of factors that evidence one's "real and effective link" to a country invites deep uncertainty over one's status. Shachar's goal is noble: she wants citizenship to attach only when a person's fate is truly intertwined with a given country. In the real world, however, application of this inherently case-by-case principle calls for a large amount of discretion by immigration officials. It would be hard to design clear rules that offer predictability. Has a third generation "citizen" of the United States living in France reestablished his link to the United States through

attending a semester study program in an American college? Has a noncitizen working in the United Kingdom as an illegally non-tax-paying babysitter passed the *jus nexi* threshold? In Shachar's *jus nexi* regime, individuals would constantly question the legitimacy of citizenship if the determination varied with each individual case.

Finally, the proposal to extend citizenship to irregular entrants through an adverse possession regime also suffers from a significant pragmatic shortcoming. Namely, it requires irregular entrants to act openly and publicly in order to attain citizenship, as the adverse possessor behaves with respect to physical property, despite the fact that this would likely trigger deportation. Citizenship is not a vacant tract of land that one can make use of without the involvement of the authorities. Citizenship is an entitlement to be part of a public enterprise, and the expression of citizenship, at least in its true form, requires repeated encounters with the state (paying taxes, participation in school boards, registering a mailing address, receiving public benefits, etc.). The very reason irregular entrants are able to avoid removal is because they lead low-profile lives. It is thus unclear how irregular entrants could ever "earn" their citizenship in the method that Shachar envisions without hazarding their own deportation.

Professor Shachar has made a strong contribution to the literature on citizenship and rights; she has suggested ways to make the global distribution of citizenship fairer while also preserving the institution of bounded membership and national citizenship. However, the fact that Shachar's birthright levy only provides the physical comforts of citizenship to disadvantaged persons and leaves the "enabling" aspects of citizenship aside suggests that a tax can only go so far. Expanding possibilities for self-actualizing membership might, at the end of the day, require giving up more state sovereignty than Shachar desires. Shachar's proposals to delink citizenship from birth are compelling, but they would be pragmatically hard to effectuate. Perhaps the widespread use of birth in determining citizenship is driven by a value that Shachar gives too short thrift: the benefit of predictability and clarity in an individual's legal status.

The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II. By Yuma Totani. Cambridge: Harvard University Press, 2008. Pp. 335. Price: $39.95 (Hardcover). Reviewed by Hugo Leith.

Postconflict justice is evaluated under diverse standards. Abstract concepts of justice, legitimacy, and accountability all have practical dimensions: the fairness of procedures, the breadth of jurisdiction, the strength of the reasoning behind the judgments, and the degree to which interested groups accept the procedures and outcomes.[2] These factors are complex and may be in tension, reflecting the multiple interests of states that pursue international criminal justice.[3] Historian Yuma Totani, in *The Tokyo War*

2. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 438-40 (2d ed. 2008).

3. M. Cherif Bassiouni, *The Discipline of International Criminal Law*, *in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 3, 16-17 (M. Cherif Bassiouni ed., 2008).

Crimes Trial: The Pursuit of Justice in the Wake of World War II, balances the ideal vision of justice against the practical opportunities and costs of international criminal law through a broad account of the Tokyo War Crimes Trial. Totani draws on under-utilized archives to provide new understandings of the legal, sociological, and diplomatic implications of the trial. The most interesting aspect of this valuable work, and Totani's ultimate focus, is an assessment of contemporary Japanese perceptions—popular and scholarly—of the Trial. This ends-oriented evaluation necessarily affects the work's critique of the legal means.

The Tokyo Trial, convened by eleven Allied powers following World War II, tried twenty-eight high-ranking Japanese officials for war crimes, crimes against peace, and crimes against humanity. The Trial has its detractors, who offer a number of pointed criticisms: the tribunal was biased; the accused faced ex post facto justice; the prosecutors ignored the Asian victims of Japanese crimes; and the tribunal's politically constrained jurisdiction granted other authors of war crimes impunity.[4]

Totani gives the Tokyo Trial a qualified endorsement and rejects the "victors' justice" school. Totani combines empirical evidence with conceptual findings. The author balances the Trial's irregularities against the overwhelming weight of historical evidence of Japanese aggression and the utility of the Trial in demonstrating historical facts to the public.

Consider Totani's analysis of a procedural irregularity of the Trial: the challenge for bias against Sir William Webb, the presiding judge. The accused objected to Justice Webb hearing the case due to his extensive wartime work in investigating Japanese atrocities, an obvious basis for apprehended bias. The challenge was rejected, provoking fierce criticism by historians and scholars.[5] Totani suggests that the refusal to withdraw by Justice Webb may have been consistent with international norms, but the more plausible explanation is that given the preponderance of evidence against the accused, Justice Webb's position as one of only eleven judges would not prejudice the outcome. He brought, moreover, considerable qualifications to a tribunal otherwise short on war crimes expertise (pp. 15-16, 42). From a purely legal perspective, however, the challenge of alleged bias was apt.

The tribunal's confined personal jurisdiction has also attracted criticism. Notably, Emperor Hirohito was not indicted. Totani refutes the view that it was General MacArthur who excused the Emperor from facing trial; rather, Allied governments did so (pp. 43-44).[6] As the Tribunal heard evidence it became clear that Hirohito was a direct and leading participant in, at least, crimes against the peace; several judges, including Justice Webb, disapproved of his impunity in separate opinions. In the postwar era, however, the Emperor was a vital stabilizing influence of benefit to the occupying forces. He carried as much guilt for aggressive war as those actually convicted and executed, but

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4. *See, e.g.*, RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

5. *See, e.g.*, *id.* at 82-83.

6. *See, e.g.*, Peter Li, *Hirohito's War Crimes Responsibility: The Unrepentant Emperor*, *in* JAPANESE WAR CRIMES 59, 65 (Peter Li ed., 2003).

the Allied governments felt that trying the Emperor would have been a costly indulgence.

Totani's interest in the tension between justice and pragmatism engendered in the Emperor's impunity is focused on its damaging effect on popular perceptions of the Trial (p. 216), leaving open the question of legal legitimacy. The work also does not dwell on one of the most difficult problems caused by the tribunal's confined, and politically controlled, jurisdiction (p. 252). Possible war crimes committed by the Allies in the aerial bombing of Japan, including nuclear attacks, were beyond the tribunal's jurisdiction. Totani rightly suggests that extending postwar justice over the Allied armies and leaders was an improbable prospect.

Were the accused less guilty of violations against international law because the presiding judge may have been biased or because others escaped trial by reason of nationality or political status? The answer must be no; the historical record speaks for itself. However the question then is whether the tribunal was a suitable body for judging the guilt of the accused. So, while Totani is correct that the verdicts returned by the tribunal were ultimately reasonable and supported by the historical record, domestic and contemporary international courts follow more stringent legal standards. Totani's approach necessarily discounts the significance of these matters. This is not to criticize the work but simply to acknowledge its particular purpose as historical scholarship.

The work brings into relief the challenge of improving the quality of justice, while maintaining the broader positive results that postwar justice may realize—illustrating the significant problems attending such justice being dispensed ad hoc. Any temporary tribunal faces the critique of ex post facto justice. At the Tokyo Trial, the accused argued (as did later critics) that the crime of "waging aggressive war" did not exist at the time of its commission. Prosecution of this particular crime was the very reason for creating the Tokyo tribunal as a separate international court, giving the accused the designation "Class A" war criminals. Totani endorses the conclusion of the majority of the tribunal, that the existing prohibition on states using aggression provided a sound basis for holding individuals responsible as criminals for such action, and cites Japanese legal scholars in support of this proposition (pp. 85-87). The certainty of the tribunal's majority, and of the prosecutors, stands in awkward contrast to the protracted postwar efforts to frame a definition of aggression, most visible today in the unresolved content of the crime in the Rome Statute of the International Criminal Court.[7] The criticisms of the Tokyo Trial, of retrospective justice, official bias, and discriminatory selection of the accused, would be neutralized before a permanent court, which would serve the same functions without the accompanying problems.

On the empirical front, Totani pursues two key objectives. First, a compelling rebuttal of the allegation that the prosecutors at the Trial failed to pursue charges for atrocities against Asian female civilians[8] due to their racial

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7. M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, *in* INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 207, 214-21.

8. *See* Yayori Matsui, *Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: Memory, Identity and Society*, *in* JAPANESE WAR CRIMES, *supra* note 6, 259, 269.

biases. Totani refers to the court records in depth: prosecutors presented charges and evidence proving massive atrocities against Asian civilians, including mass rape, and the tribunal issued convictions for such crimes (pp. 162, 166-167, 172, 174-175).

The second aspect of the empirical argument addresses the way the trials were publicized, offering in the process an explanation for the distortion of the record on key questions, such as the alleged indifference of prosecutors to crimes against Asian civilians. Totani explains, for example, the frequent use by the Trial's prosecutor of oral summaries of documentary evidence and the relatively few witnesses called upon to give verbal testimony (p. 178). This approach left an observer or journalist completely uninformed and contributed to lost opportunities for public education.

Totani's ultimate focus is the perception of the Trial in Japanese academic and legal circles, as a measure of its reception in general society. This question holds great importance to all postconflict war crimes investigations. The leading Japanese studies appearing during or shortly after the Trial regarded the outcomes as fair. The Trial's procedural safeguards, including the presumption of innocence, the right to mount a defense, and the right to cross-examine, were also instructive for Japanese courts in the postwar era (pp. 190-211). Opinion hardened against the Trial only later, after Japan regained sovereignty and conservative political elements recovered. Totani links specific aspects of the Trial to developments in public opinion, emphasizing the shortcomings of procedure that inhibited the public's capacity to follow the case (pp. 117-118) and the treatment of such substantive questions as the Emperor's immunity.

In this function of providing public education, the Tokyo Trial is instructive to contemporary war crimes courts. The Tokyo prosecutors were fairly selective in presenting charges and evidence, and that has exposed them to criticism. The alternative, proffering an exhaustive catalogue of charges (the general practice of the International Criminal Tribunal for the Former Yugoslavia), has major drawbacks as well. Lengthy and complex trials place significant limitations on the restorative effect of international criminal prosecutions.[9]

The flaws in the Tokyo Trial diminish, to an extent, its status as a legitimate legal institution—even if one rejects the crude hyperbole of the "victors' justice" label. Yet the flaws need not be replicated. The Tokyo Trial's irregularities illustrate the reasons for creating impartial institutions and standards for adjudicating international criminal justice cases. The problems the tribunal faced are not reasons for dismissing such trials altogether. Totani's approach offers legal scholars an example of international criminal justice influencing the attitudes of peoples who have lived through conflict or under authoritarian rule.

9. RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY 211 (2004).

Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law. By Mark Tushnet. Princeton: Princeton University Press, 2009. Pp. xvi, 272. Price: $24.95 (Paperback). Reviewed by Madhav Khosla.

Constitutional theorists debate the justiciability of social welfare rights. Skeptics suggest that such rights ought to be kept outside the scope of judicial enforcement for both normative and positive reasons. Adjudicating social welfare rights, it has been traditionally argued, has serious consequences for resource allocation and wealth distribution, raising concerns of democratic legitimacy. Beyond these concerns, courts face problems of capacity. Drawing on Lon L. Fuller's seminal article,[10] many highlight the 'polycentric' nature of socio-economic rights. In other words, such rights have a complex relationship with, and impact on, several factors, meaning that judges simply lack the institutional resources to effectively enforce them. Discussions of social welfare rights have, for the most part, centered on arguments either supporting or opposing the justiciability of such rights. Mark Tushnet's *Weak Courts, Strong Rights* is a sophisticated contribution to this discussion. Tushnet alters the orientation of the debate by focusing on the question of "what *sort* of enforcement?" (p. 231). Tushnet observes how opponents to social welfare rights assume that courts will perform strong-form review, emphasizing that the judicial interpretation will be the final and authoritative position on the issue. An alternative model that *Weak Courts, Strong Rights* puts forth is of weak-form judicial review.

Weak-form judicial review flows from an acknowledgment that there can be reasonable disagreements about crucial constitutional questions. Strong-form review necessitates that a reasonable constitutional interpretation by the judiciary takes precedence over an alternate reasonable interpretation by the legislature. Weak-form review, on the other hand, "invites repeated interactions between legislatures and courts over constitutional meaning" (p. 67). This dialogic form of review reduces concerns of democratic legitimacy and self-governance that typically arise with strong-form review. Beyond acknowledging reasonable differences in constitutional interpretation, one must consider how disagreements ought to be characterized. Moreover, could there be reasons exogenous to the content of the right for believing that courts will better enforce them?

Central to Tushnet's argument is the belief that legislators can meaningfully interpret the constitution (p. 96). Tushnet develops what he terms a "constitution-based" (p. 79) criterion for evaluating legislative performance and highlights that the question cannot merely be how well legislators interpret the constitution; their performance must be judged in comparison with the performance of courts. Furthermore, in assessing legislative performance one must remember that there can be, and often is, reasonable disagreement over the meaning and nature of a constitutional provision. A responsible legislative position, therefore, will be one that rests on a reasonable interpretation of the constitution, even though it may be at

10. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

odds with the corresponding judicial position. As Tushnet acknowledges, this means that the "criterion tilts the field of evaluation in the legislature's favor—setting a baseline that is truly a line rather than a point—because of the fairly wide range of reasonable positions available on nearly every constitutional question" (p. 104). Evaluating legislative performance is a practice that receives far less attention than it deserves. Tushnet's case studies, such as his study of the Clinton impeachment controversy, provide interesting analyses, and *Weak Courts, Strong Rights* should serve to stimulate discussion on this issue.

While Tushnet makes a strong case for adopting weak-form review for social welfare rights, uncertainty about the proper structure of weak-form review exists. There are a range of possible fashions in which one could structure rights and remedies. Tushnet explores these possibilities, suggesting they indicate that "courts should not enforce strong social and economic rights with weak remedies because those remedies may well become strong ones, which in turn will lead courts to transform the strong right into weak ones" (p. 257). While Tushnet's analysis is informative, it serves only to commence discussion on this issue rather than to end it.

The structuring of rights and remedies, as Tushnet recognizes, is complex. Some argue for a flexible form of review, one that may be weak-form in most instances but still acknowledges that the judicial approach must be strong in others. It is difficult to determine the ideal structure of weak-form review. The answer could ultimately lie in courts adopting, as some suggest, weak rights or weak remedies depending on the type of jurisdiction and the nature of the case.[11] In determining how best to structure weak-form review, it is necessary to evaluate the effectiveness of remedies, an issue that Tushnet does not sufficiently consider. In some jurisdictions, like South Africa, it is perhaps too early to judge which remedies in social welfare cases have been truly effective. In the case of others, such as India, there has simply been little analysis of this issue. It would thus seem that the tentative conclusions of *Weak Courts, Strong Rights* are far from the last word on the balance between rights and remedies. They may not even be the last word on the ultimate question of whether weak-form review is feasible in the first place. Tushnet does concede that "weak-form systems of judicial review might not be stable" (p. 254). Another question that Tushnet insufficiently considers is whether a weak-form approach to social welfare rights will result in such an approach being adopted for first-generation rights. Tushnet's discussion of this concern is surprisingly brief. Like many important books, *Weak Courts, Strong Rights* provides more questions than answers.

Supporters of social welfare rights adjudication have attempted to demonstrate the polycentric nature of private law with respect to the problem of institutional capacity. *Weak Courts, Strong Rights* contributes to this theory through an analysis of the state action doctrine, demonstrating that social welfare rights cannot be ignored, for constitutions "must do *something* about the constitutional implications of . . . the background rights of property,

11. Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007).

contract, and tort law" (p. xii). Tushnet shows that "the state action question is analytically identical to the question of identifying constitutionally protected social and economic rights" (p. 225). Tushnet's study of the enforcement of the right to free speech demonstrates that resource concerns regarding social welfare rights are misplaced. The analysis of the state action doctrine and free speech law illustrates how social welfare rights adjudication is similar not only to adjudication in many areas of private law, but also in substantive areas of constitutional law. This contribution should be a step towards resolving the debate on polycentricity, a concern that has had a remarkable influence on skeptics of social welfare rights adjudication. Social welfare rights adjudication does not raise any particularly different concerns from adjudication in other private and public law areas. Courts in many developing countries, however, have yet to formulate coherent doctrinal approaches to the question of resource allocation. This is something to which judiciaries should pay greater attention.

Distinct from its contributions in the areas of judicial review and social welfare rights, *Weak Courts, Strong Rights*' methodological approach is noteworthy. Tushnet's arguments are consistently informed by the experiences of a range of countries. For instance, Tushnet demystifies weak-form judicial review by analyzing the British Human Rights Act (p. 139). Under the Act, the judiciary can issue a statement that a statute is incompatible with fundamental rights. While the declaration has no legal impact, it nonetheless prompts legislatures to react. Tushnet also explores the possibility of nonjusticiable declaratory rights through a study of the Irish Constitution, which lists social welfare rights but contains a provision explicitly barring their enforcement. On social welfare rights in particular, Tushnet examines decisions of the South African Constitutional Court to explore how weak-form and strong-form judicial review may work in practice. This approach illustrates his argument with remarkable clarity, reminding us of the value of comparative constitutional study.

Greater reference to the experiences of states in Latin America and Asia, which have adjudicated social welfare rights with some success, would have been useful and insightful. For instance, a serious examination of the Indian Supreme Court, which has adjudicated social welfare rights for three decades, is conspicuously absent.

In the end, Tushnet's most significant contribution is more than merely making the case for social welfare rights adjudication; he demonstrates the need to question how courts should best enforce such rights. Advocates of social welfare rights adjudication must now seriously examine whether the most appropriate way for society to achieve more is for courts to do less.

Democracy Goes to War: British Military Deployments Under International Law. By Nigel D. White. Oxford: Oxford University Press, 2009. Pp. xv, 296. Price: $120.00 (Hardcover). Reviewed by Daniel Hemel.

In July 2009, Keith Simpson, a member of the House of Commons and the shadow foreign minister for the U.K.'s Conservative Party, recommended that his fellow Tories read Nigel D. White's *Democracy Goes to War* over the summer recess.[12] It is doubtful that many Members of Parliament (MPs) followed Simpson's suggestion—Conservative Party leader David Cameron admitted that he would prefer to start his holiday with a "really trashy novel"[13]—but the few parliamentarians who did peruse the pages of White's new book would have found that their institution is not portrayed in a particularly flattering light. "Parliament is simply not independent enough, nor, it seems, strong enough, to scrutinize the actions of the executive in matters of such importance as decisions to go to war," White laments (p. 280).

White argues that—especially in matters of national security—the United Kingdom has come to resemble an "elective dictatorship" (p. 22). The Prime Minister only consults with an inner circle of advisers before he (or she) chooses to use force. The Cabinet as a whole has little input on decisions to deploy troops. Parliament acts as a rubber-stamp. Not only does the Prime Minister face few domestic constraints on matters of national security, but he is also unencumbered by international legal constraints. Indeed, White concludes that the United Kingdom violated international law in the Corfu Channel incident (1946), the Suez crisis (1956), the Kosovo War (1999), and the invasion of Iraq (2003), with the legal basis for the 2001 invasion of Afghanistan shaky at best. White's in-depth analysis of the legal arguments for and against these troop deployments makes this a useful reference work for scholars, if not scintillating summer reading for politicians.

White's final chapter sets out a roadmap for constitutional reforms designed to enhance "democratic accountability" in matters of national security. First, White argues that the Prime Minister, before deploying troops, should secure the approval of Parliament. Second, he and his Cabinet should "clearly state" the international legal basis for any military actions (p. 279). Third, domestic and international courts should exercise judicial review of military deployments. But a tone of pessimism pervades these recommendations; not only does White write off Parliament as weak, but he adds that "the prospect of developing a more than incidental form of judicial review of decisions to go to war is remote" (p. 294).

White wants the Prime Minister to be more accountable to domestic constituencies and to be more faithful to international law. However, efforts to achieve these two goals may work at cross-purposes with each other. White argues that courts ought to review the Prime Minister's decisions to deploy troops abroad, but this would allow unelected judges to overrule a

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12. White's book was one of twenty-seven titles on Simpson's summer reading list. *See* Terry Stiastny, *Beach Reading for Tory Bookworms*, BBC NEWS, July 15, 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/8152669.stm.

13. Michael White, *Cameron Starts Holiday with 'Trashy Novel'*, THE GUARDIAN, July 26, 2009, http://www.guardian.co.uk/politics/2009/jul/26/david-cameron-holiday-trashy-novel.

democratically elected executive. This may be less problematic when judges enforce constitutional rules that were previously endorsed by an electoral supermajority (or, in the U.K. context, when judges enforce an unwritten constitution to which generations of voters have implicitly assented). But international law does not instantiate the will of the majority. Treaties are often made behind closed doors, while customary international law comes to life through state practice over the course of centuries. Neither involves the actions of mobilized masses. White acknowledges that "[a]t the moment, decisions to go to war appear to suffer from a democratic deficit" (p. 73), but he fails to acknowledge that the democratic deficit might be even wider if decisions to go to war were removed from elected officials and remanded to the courts.

White's recommendations regarding Parliament present a different set of difficulties. In an "elective dictatorship," in which a Prime Minister unilaterally decides whether to deploy troops abroad, voters express their approval (or disapproval) for the deployment by casting their ballots for (or against) the Prime Minister's party in the next general election. Granted, this accountability mechanism is imperfect; national security will be only one of many issues at stake in the general election, "[s]o individual decisions to go to war will not generally be the issue upon which the electorate decides the fate of the incumbent government" (p. 271). The lines of accountability are even more tangled when—as White suggests—MPs exercise independent judgment regarding troop deployments. If each MP simply supports his or her party's position on national security matters, then parliamentary review of military deployments is only window-dressing; the Prime Minister, whose party enjoys a majority in the House of Commons, has little to fear from parliamentary review. If, however, majority party MPs dissent from the Prime Minister's position, then voters are presented with a dilemma. Should they express disapproval for the Prime Minister's position by voting for the dissident MP, or by voting against the Prime Minister's party? If voters choose the latter option, then MPs are not held electorally accountable for their positions on national security. If voters choose the former option, then the Prime Minister's ability to retain office becomes further removed from voters' views of the Prime Minister's policies, and he or she becomes less—not more—accountable to the electorate.

Even if parliamentary review *does* enhance electoral accountability in matters of national security, White might not be happy with the results. At the outset of the 2003 Iraq invasion, survey data showed that 53% of U.K. adults supported the U.S.-U.K. military action.[14] An even larger majority of Britons supported the Kosovo War in March 1999.[15] U.K. public opinion was more sharply divided at the outset of the Anglo-French invasion of Egypt in

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14. *See* Anthony King, *The Rank of War Supporters Is Growing*, DAILY TELEGRAPH, Mar. 21, 2003, at 11.

15. *See* Joe Murphy, *Britons Back the Bombing by 2 to 1*, MAIL ON SUNDAY, Mar. 28, 1999, at 1 (finding that 55% of British adults supported the NATO bombing campaign); *Britons 'Support Nato Strikes,'* BBC NEWS, Mar. 28, 1999, http://news.bbc.co.uk/2/hi/uk_news/306010.stm (reporting results of one survey showing 56% support for the NATO bombing campaign and another survey showing 69% support).

October 1956, but one month after the military campaign began, a plurality (49%) of Britons said that "we were right to undertake military action in Egypt," and only 36% disagreed.[16] Importantly, these are all cases in which—according to White—the legal justification for British military action was weak. The fact that these military actions enjoyed plurality support suggests that enhanced democratic accountability on issues of national security will not necessarily bring the United Kingdom in line with international law.

In sum, White treats accountability and legality as though they were mutually attainable objectives. His final sentence calls for "greatly increased levels of democratic and judicial accountability for decisions to go to war" (p. 296). But "democratic accountability" and "judicial accountability," rather than being complimentary goals, often conflict with one another. White leaves us with an unresolved question: what should the United Kingdom (or any similarly situated democracy) do when popular support for military action is strong, but the legal basis is shaky? As long as White leaves this question unresolved, his roadmap for constitutional reform will remain radically incomplete.

16. *See* Jean Owen, *The Polls and Newspaper Appraisal of the Suez Crisis*, 21 PUB. OPINION Q. 350, 353 (1957).