Review Essay: The International Judicial Function in Its (In)finite Variety

BOISSON DE CHAZOURNES, Laurence


Available at: http://archive-ouverte.unige.ch/unige:75463

Disclaimer: layout of this document may differ from the published version.
RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

REVIEW ESSAY

THE INTERNATIONAL JUDICIAL FUNCTION IN ITS (IN)FINITE VARIETY


As Hersch Lauterpacht described, judges play a central role in the promulgation of the rule of international law and help to keep the peace among states. Despite the relative paucity of international judicial institutions in Lauterpacht’s time, as well as the presence of less “progressive” views about the judicial function (which continue to exist in international legal scholarship (chapter by Tom Ginsburg in Oxford Handbook of International Adjudication (Oxford Handbook), p. 495 (overview of Hans Morgenthau); chapter by José E. Alvarez in Oxford Handbook, p. 161 (overview of Eric Posner and John Yoo)), contemporary international dispute settlement has nevertheless evolved along the lines of his thinking: “International judges, as judges, were obligated to find solutions to questions properly posed, and there was no dispute, in principle, that was not capable of judicial resolution, according to Lauterpacht” (Ginsburg, Oxford Handbook, p. 485). In other words, the judicial function may be expansive in many dimensions.

Today, it is widely appreciated that the judicial function in the international legal order has various facets, not only in terms of the subject matter to which international judges may be exposed, but also in terms of the specific activities with which judges may be tasked. They retain a primary function in resolving international disputes. However, they are also required to engage in “fact finding, law-making, or governance functions” (Alvarez, Oxford Handbook, p. 176). More abstractly, we might say that they have an important role in providing norm support, offering regime support, and legitimizing public authority, for example. As observed by many international lawyers, alongside this expanded range of judicial functions has been a significant proliferation of international courts and tribunals in recent years.

These contemporary aspects of international judicial activity have been the locus of analysis for legal scholars and others who have studied various issues, ranging from the role of international courts and tribunals and their effectiveness to the mapping of the international adjudicative system. In the three books that form the subject matter of this review, the principal unifying theme is the judicial function, albeit viewed through different lenses.

As well as bringing into sharp focus the multiplicity of contemporary judicial functions, these recent works also illustrate an increasing diversity of approaches for analyzing dispute settlement.

1 HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 64–65, 100–04 (1933).
For example, dispute settlement may be analyzed through institutional, actor-centric, or functionalistic prisms, each of which paints a different picture. Yet the predominant approach in these books has been functionalistic, and they all recognize the central role that international courts play in the promulgation and development of the rule of law, in line with Lauterpacht. As such, the book edited by Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice (Development of International Law)*, brings to light the judicial influence of the International Court of Justice (ICJ) on the development of international law. The volume edited by Cesare P. R. Romano, Karen J. Alter, and Yuval Shany, entitled *The Oxford Handbook of International Adjudication (Oxford Handbook)*, elaborates on the development and present state of the judicial function in the international realm, while the book by Yuval Shany, *Assessing the Effectiveness of International Courts (Assessing the Effectiveness)*, evaluates the international judicial function from the standpoint of effectiveness.

The findings of these volumes will surely be important outside academic circles as well as inside them, and they are also likely to attract interest across different disciplines. Contemporary international adjudication has many stakeholders, from the litigants that seek remedies to international disputes to the benefactors that pay for international adjudicative mechanisms and, of course, to a variety of lawyers—practicing, academic, and judicial—seeking to make sense of the complex system of international dispute settlement. They all have an interest in the questions that arise from the broadening of the international judicial function, such as those related to the legitimacy of international courts, their effectiveness, and their symbiosis with other international institutions, along with systemic problems like fragmentation in international dispute settlement.

I. INTERNATIONAL ADJUDICATION THROUGH THE VARIOUS LENSES

While Tams and Sloan’s *Development of International Law* is not meant as a sequel to Hersch Lauterpacht’s famous book, *The Development of International Law by the Permanent Court of International Justice* (1934), it nevertheless shares a similar title and approach. It aims to tackle such issues as the status and influence of judicial decisions and opinions on the development of international law. In doing so, the book looks closely at the impact of the ICJ on various areas of international law. Its sections cover “The Law of Treaties,” “The Law of Claims” (state responsibility, diplomatic protection, and jurisdictional immunities), “Spatial Regimes,” “The United Nations,” “Armed Conflict,” and “Community Concerns” (human rights, the rights of peoples and minorities, and environmental law). The editors’ intention was to leave aside discussions of exactly how that influence is to be defined, be it “legal development,” “lawmaking,” or some other characterization. While this tactic is to be welcomed, the “traditional” chapter headings and formulaic structure used have a tendency to inhibit the treatment of some aspects of the ICJ’s work, such as its more innovative approaches to the sources doctrine.2

The volume’s focus on the “development of international law” was chosen because in none of the areas examined “has the ICJ singlehandedly ‘made law’ for the international community” (chapter by Christian J. Tams & James Sloan in *Development of International Law*, p. 5). Rather, the book sets out to “identify and evaluate the ICJ’s main contributions” (*id.*). Taken together, the chapters demonstrate that the ICJ has impacted different areas of public international law in different ways. We might broadly categorize them as “activism,” “lawmaking,” “diplomacy,” and “conservatism.”

The ICJ’s activism is particularly evident in three fields addressed by the book. First, the chapter on state responsibility describes the “important

---

role” played by the ICJ in the Gabčíkovo-Nagymaros Project case, relating to the state of necessity and the scope of countermeasures (chapter by James Crawford in Development of International Law, p. 79). Second, the ICJ’s decision in the Diallo case represented a “qualitative leap” for the law of human rights (chapter by Bruno Simma in Development of International Law, p. 308). The factual matrix in that case, which, on the surface, seemed to raise issues of diplomatic protection, actually involved important matters of human rights as well, not least because the ICJ “emancipated the case from the dogmatic straitjacket of this traditional institution [of diplomatic protection] . . . [and] . . . engage[d] in straightforward assessments of breaches of human rights treaty provisions” (id. at 311). Here, the ICJ’s activism is characterized by the manner in which it reconciled the law of human rights and the law of diplomatic protection. Third, in respect of the “law of territory,” the ICJ actively contributed to the development of the rules of law in this area and “clarified the principles surrounding the concept of territorial sovereignty, formulat[ing] an approach to pre-colonial and colonial title that has sought to maintain territorial stability, and set the stage for the rise of the legal right to self-determination, while demarcating some of its parameters” (chapter by Malcolm N. Shaw in Development of International Law, pp. 151, 176).

Turning to “lawmaking,” in Reparation for Injuries Suffered in the Service of the United Nations, the ICJ’s finding that “the UN possessed international legal personality was a ‘breakthrough’” (chapter by James Sloan & Gleider I. Hernández in Development of International Law, p. 205). Lauterpacht had qualified this advisory opinion as “a conspicuous example of judicial legislation.” For him, the development of international law in this way was not only permissible but part of the function of the Court. Indeed, he pointed out that “judicial activity is nothing else than legislation in concreto.”

As for the Court’s “diplomacy,” the Wall and Legality of the Threat or Use of Nuclear Weapons opinions highlighted that one might conclude that the Court, in two instances in which the law of armed conflict formed the core of the subject matter before it, in some way stepped out of the judicial role accorded to it. On one occasion, the Court displayed certain features of a political agent, and on the other, one might be forgiven for thinking that the Court was composed of diplomats rather than judges. (Chapter by Claus Kreß in Development of International Law, pp. 290–91)

The diplomatic opinion rendered in Nuclear Weapons gives “the impression that the judges adopted precisely that strategy to which diplomats resort at moments of crisis: the search for constructive ambiguity” (id. at 293 (footnote omitted)).

Finally, in respect of “conservatism,” the law of the sea is one area where the ICJ’s judicial footprint has been limited. Tams has suggested that the limitation is the result of the presence of “competing agencies of legal development” (chapter by Christian Tams in Development of International Law, p. 394). Another area of limited influence is the law related to the use of force in which the ICJ’s averting of certain issues has meant that its influence on the law has been minimal. According to Christine Gray, “The Court’s avoidance of certain controversial issues has attracted as much criticism as its actual decisions. The Court has to date expressly chosen to avoid two divisive issues in its judgments: anticipatory self-defence and self-defence against attacks by non-state actors in the absence of state complicity in those attacks” (chapter by Christine Gray in Development of International Law, p. 257).

---

3 Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 ICJ REP. 7 (Sept. 25).
6 LAUTERPACHT, supra note 1, at 320.
7 LAUTERPACHT, supra note 1, at 320.
8 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 13 (July 9) [hereinafter Wall]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226 (July 8).
In bringing these themes together, the ICJ has a role as a “law-formative agency” (Tams, Development of International Law, p. 377). The ICJ can fulfill this role because its pronouncements carry influence across international law. However, “The impact of international courts and tribunals on the evolution of international law largely depends upon how many cases are brought before them” (id. at 392). As such, matters of treaty law and state responsibility arise frequently across a variety of cases, and territorial disputes are ubiquitous before the ICJ. It is logical, therefore, that the ICJ exercises greater influence over these areas. In other words, the ICJ is more effective at promulgating the rule of international law in some sectors and less effective in others.

In Assessing the Effectiveness of International Courts, Shany proposes an analytical framework for assessing the effectiveness of international courts. His book is divided into three main parts. In the first part, he elaborates on an alternative approach to analyzing effectiveness. He points out that an increasing body of scholarship utilizes empirical data to highlight judicial effectiveness or ineffectiveness. In the second part, Shany applies his alternative “goal-based” approach to a variety of judicial functions and features. He focuses on jurisdiction, judicial independence, and legitimacy as indicators of effectiveness, and he emphasizes that the analysis used in his model centers upon judicial outcomes. In the third part, Shany demonstrates the value of the goal-based approach in its application to specific international courts.

The methodology that Shany adopts for assessing effectiveness is to compare the goals of international courts—as stipulated by their mandate providers—with the judicial outcomes produced by these courts. This goal-based approach is a conceptual framework that he has borrowed from the social-science literature, which, in that context, has been used to evaluate the effectiveness of organizations, particularly of a public (governmental) nature.

Given the state of preexisting methodologies in international legal scholarship for assessing effectiveness, the reasons for reaching into another discipline for analytical tools are clear and compelling. A critical insight that Shany’s book offers is that traditional definitions of effectiveness in the literature of international law contain an “Achilles heel” (p. 4). Indeed, Shany exposes the weaknesses of traditional—monolithic—effectiveness analyses by encouraging us to zoom in on the context and nuances that those traditional indicators hide. For example, he shows how compliance rates with the decisions of international courts provide a convenient and seemingly objective comparator of effectiveness. However, by drawing our attention to the content of judgments, as well as to the remedies dictated by the courts, Shany intimates that courts that aim low (i.e., that prescribe an uncontroversial solution or remedy) are likely to achieve higher compliance rates.

Overall, Shany identifies four generic goals that all international courts pursue: norm support, international dispute resolution, regime support, and public authority legitimization. By proposing these (common) categories, Shany does not seem to embrace a wholly relative approach whereby effectiveness is analyzed purely in discrete, context-specific circumstances, but rather he provides the methodological tools necessary for an (albeit limited) objective cross-institutional comparison. However, Shany adds to these four goals a further category—“[i]diosyncratic goals”—which may be either derived or completely independent from the generic goals (p. 46).

Despite the underlying premises for assessing the effectiveness of international courts that Shany sets out (e.g., “doubts about the viability of court-based governance of international relations . . . , apprehensions about the negative side effects or externalities generated by judicial activity . . . , and the problem of high costs that may outweigh the benefits of adjudication” (p. 3)), this book does not specifically determine whether international courts are effective, either in general or in particular (p. 4). Future research will need to utilize the

---


10 Shany asserts that judgment compliance is often considered as a “litmus test” of effectiveness by legal scholars (p. 117).
analytical tools that Shany provides to answer these questions. Because his book “does not seek to [analyze international court effectiveness] by way of gathering and processing empirical data” (id.), it remains to be seen whether the conceptual model that he proposes works in practice and can definitively answer the question implied by the book’s title: Are international courts effective? Scholars must decide whether the conceptual framework proposed by Shany is put to best use in a comparative analysis across different international courts, in an assessment of the effectiveness of an individual court on its own, or in both forms of application.

Nevertheless, although future research will be instrumental in testing the methodology and concepts as developed, shining a spotlight on effectiveness is an important contribution. Effectiveness, indeed, was an important aspect of the judicial function for Lauterpacht. He argued that “one of the principal features in the application of the law by the [Permanent Court of International Justice] [was] its determination to secure a full degree of effectiveness of international law . . . ” 11

In spite of some important differences, the approach elaborated in Development of International Law that seeks to portray the ICJ as an “agent of legal development” also contains material similarities to Shany’s framework given that the analysis presented aims to “assess what the ICJ has actually done in fulfilment of its mandate” (chapter by Franklin Berman in Development of International Law, p. 10). And so the ICJ’s mandate is again central to analyzing its influence or effectiveness.

Taking a different approach again to these books, the Oxford Handbook endeavors to map the evolution and contemporary landscape of international adjudicatory institutions. Moreover, and in a similar vein to Assessing the Effectiveness that reaches across disciplinary boundaries, the editors of the Oxford Handbook explicitly state in the preface that they “seek to significantly advance a new field of study: the interdisciplinary investigation of international adjudication” (Oxford Handbook, p. vii).

The Oxford Handbook is divided into six parts. Part I presents a history of international adjudication, with a particular emphasis on the proliferation of adjudicative mechanisms in recent decades, while part II sets out various categories of adjudicatory bodies in the international legal order. Part III delineates theoretical approaches to studying international adjudication, which include transnational legal process, political science, and philosophical and sociological approaches. Part IV identifies contemporary issues in international adjudication, looking in particular at judges and international judicial lawmaking. The key actors in international adjudication, from judges and counsel to prosecutors and registrars, are the focus of part V, while part VI concludes the Oxford Handbook with a review of specific legal and procedural issues in international adjudication, such as jurisdiction and admissibility; third parties; inherent powers; evidence, fact-finding, and experts; and remedies.

In addition to the content in these parts, the Oxford Handbook is innovative in its use of graphics to present data on international adjudication. For example, the book contains a pullout chart with a taxonomic timeline of international judicial bodies, along with jurisdictional aspects. This timeline provides a typology of these bodies, highlights the number of states subject to their compulsory jurisdiction, and indicates the average number of annual rulings on the merits from 2006 to 2011. Moreover, the presentation of jurisdictional aspects includes a map of compulsory jurisdiction, illustrates overlapping jurisdiction among regional integration agreements and human rights courts, and presents a map of judicial body seats. Overall, the chart offers an interesting and accessible visual representation of information relating to judicial bodies; chapter 2 of the Oxford Handbook provides further guidance to readers on how to use the chart.

The Oxford Handbook is not a simple study on the preeminent international courts in isolation. Nor does it present a linear narrative of the progressive growth and success of international adjudication. Rather, it is an ambitious project to “explore how different institutional designs, political contexts, and compositions shape judicial decision-making and the ability of international

11 LAUTERPACHT, supra note 6, at 227.
adjudicative institutions to affect political outcomes” (id.). In this broad approach to international adjudication, the contributing authors “think across international adjudicative systems” (id. at ix). As a consequence, the book asks overarching questions that relate to all adjudicatory mechanisms and actors, such as those pertaining to the legitimacy and effectiveness of international courts and tribunals, as well as questions related to systemic challenges, such as fragmentation.

International courts have proliferated at an exponential rate since the end of the Cold War as a result of both internal and external pressures. Indeed, “[T]he end of the Cold War created a conjunctural moment where old international political arrangements were disrupted and governments around the world needed to search for new strategies” (chapter by Karen J. Alter in Oxford Handbook, p. 87). In this context, proliferation in international adjudication can often be perceived as synonymous with negative outcomes. However, the Oxford Handbook also presents the alternative view that the proliferation of international adjudicative mechanisms may have positive effects. For example, the “non-hierarchical proliferation of international courts and tribunals [could be] the only way—and perhaps a good way—to increase third-party legal settlement of international disputes. It may be the case that many courts can work consistently and cooperatively to build jurisprudence and respect for international law” (chapter by Mary Ellen O’Connell & Lenore Vander-Zee in Oxford Handbook, p. 60). This perspective, of course, resonates with Lauterpacht’s conception of the secondary role of the judicial function to promulgate the international rule of law, along with Shany’s objective goals of norm and/or regime support. Indeed, increased international judicial activity is likely to lead to the elaboration, clarification, and strengthening of the rule of international law.

II. ASPECTS OF THE JUDICIAL FUNCTION

Among their many other achievements, the books under review highlight the increasing attribution of functions to international judges. From these works, it is possible to identify a catalog of functions that include, but are not limited to, the pursuit of legitimacy and independence, law formation, judicial review, and dialogue with other international institutions, as well as awareness of the boundaries of the judicial function. In other words, the traditional dispute settlement function, namely the resolution of differences between parties, does not fully explain what international judges do.

The Pursuit of Legitimacy and Independence

For Shany, legitimacy is integral to effectiveness. A court must propagate its own legitimacy, particularly because more legitimate courts may be able to perform more effectively than less legitimate courts and most especially because a court’s legitimacy can contribute to the legitimacy of the system in which it is operating. As such, the “goal-based approach encourages us to evaluate the success of international courts in attaining and maintaining their internal legitimacy and conferring external legitimacy on others” (Assessing the Effectiveness, p. 137).

Assessing legitimacy involves a consideration of the broader functions of judicial activity, beyond the settlement of the immediate dispute before an international court. Indeed, as stressed in the Oxford Handbook, one must “focus . . . on what those who establish courts and tribunals seek to achieve directly in the course of adjudication, on the broader societal goals that such legal proceedings are believed to secure, or adopting a more internal perspective, on what the adjudicators themselves see as their function” (Alvarez, Oxford Handbook, p. 160 (footnotes omitted)). In the alternative view, if “international adjudicators owe their delegated powers to their principals” (id. at 161), these adjudicators may not be impartial, and the interests of other (relevant) actors may be excluded. Effective dispute settlement requires that judges be independent and not the agents of state parties.

Independence, together with impartiality and diligence, constitutes a set of “key values” that have an overarching relevance (chapter by Anja Seibert-Fohr in Oxford Handbook, p. 759). Indeed, “Almost all founding documents of international courts either require judges to be independent or demand that judges perform their
duties independently” (id. at 762 (footnote omitted)). Judicial codes of ethics that contain these values have sought to “specify the obligations inherent in judicial office, improve transparency, and promote public confidence in adjudication, thus reducing the need for outside control that might be detrimental to judicial independence” (id. at 760 – 61 (footnote omitted)). Importantly, perceptions of independence also serve to bolster legitimacy.

With the proliferation of dispute settlement mechanisms, the challenge of securing independence has become more difficult, yet remains critically important. Nevertheless, there is room for optimism given the “growing consensus among international judges on the necessary standards of behavior both on and off the bench” (id. at 777). Studies such as those under review help to catalyze this consensus as well as to facilitate “a broader dialogue among all international legal professions to avoid allegations of judicial corporatism and to increase transparency and legitimacy” (id. (footnote omitted)).

**A Law-Formative Agency**

The characterization of the ICJ as an “agent” for legal development is elaborated upon in Development of International Law. However, this characterization could also apply to other international courts and tribunals to a greater or lesser degree. In the analysis of legal development at the ICJ, a broad three-stage test is adopted: (1) the intention of the creators, (2) the activity of the ICJ itself, and (3) the effect of this judicial activity. The scope of analysis, in this sense, appears to be broader than that proposed by Shany’s goals-based approach in that Development of International Law considers what the ICJ actually does—its judicial activity—quite apart from the goals set by the mandate providers. As has been quoted from Lauterpacht’s work, “Institutions set up for the achievement of definite purposes grow to fulfil tasks not wholly identical with those which were in the minds of their authors at the time of their creation” (Berman, Development of International Law, p. 20 (footnote omitted)). This variance, of course, exposes the danger that a narrower goals-based approach (as proposed by Shany) may entail, namely, that it might not capture the “unknown unknowns” in judicial activity. In other words, focusing too much on the mandate of an institution may hide from view those aspects of judicial activity that are outside or not envisaged by the mandate.

The lawmaking function of international tribunals is also pursued in the Oxford Handbook. It suggests that the traditional “narrow” dispute settlement function of international courts and tribunals, with its legitimacy derived from the consent of parties (in particular vis-à-vis the applicable law), should be supplanted by the broader contemporary functions of dispute settlement. More precisely, “[I]nternational decisions are justified by functional accounts, in the sense that adjudication is taken to promote values, goals, or community interests, and—above all—international peace” (chapter by Armin von Bogdandy & Ingo Venzke in Oxford Handbook, p. 519). This broader view of the judicial function may also entail support for Lauterpacht’s view that judges may need to be creative where gaps in the law exist, although obviously within carefully prescribed limits. Arguing in favor of non-liquet prevention, Lauterpacht suggested that

while the limits of the function of courts to secure results which are ethically, politically and socially desirable, as distinguished from their task to apply existing law, are narrowly drawn, this does not necessarily mean that the area within these limits is negligible. When properly ascertained and wisely observed, these limits may permit judicial or arbitral expression of opinion which might provide an accession of strength to the basic principle of the completeness of the law.12

Lauterpacht further suggested that courts must not be “totally divorced from the social and political realities of the international community” but rather engage in “a creative activity” while taking into consideration the “entirety of international law and the necessities of the international community.”13

---

13 LAUTERPACHT, supra note 1, at 319–20 (footnote omitted).
Dialogue with Other Institutions

A further interesting aspect of the judicial function is the interaction with other institutions. There is, indeed, what we might term an “evolving symbiosis” with a variety of other international institutions, both legal and political. For example, Development of International Law highlights the interaction between the ICJ and other international institutions that are either “codifiers” of public international law, such as the International Law Commission (ILC) (chapter by Vaughan Lowe & Antonios Tzanakopoulos in Development of International Law, p. 181), or “non-judicial principal organs,” such as the Security Council (Sloan & Hernández, Development of International Law, p. 207). Many of the contributions analyze the ICJ’s decisions in light of the activities of other nonjudicial institutions that may play a role in the development of international law. If the ICJ’s judicial function influences such development, conversely, it is also interesting to see whether other actors influence the ICJ’s judicial function.

Turning to the ICJ’s interaction with the ILC, the ICJ’s endorsement of the ILC’s work has taken several forms. For example, in respect of state responsibility, the ICJ has utilized the ILC’s work without attribution. As James Crawford has noted, "The approach taken in Barcelona Traction was a manifestation of [ILC member Roberto] Ago’s view of the comprehensive scope of the law of state responsibility. It covers violations of obligations in the public interest in the fields of environmental law, human rights, and decolonization, just as much as it covers breaches of obligations in bilateral fields such as diplomatic relations." (Crawford, Development of International Law, p. 77)

Another example in which the Court did not expressly refer to the ILC’s work was in the Wall opinion. Here, the Court had to determine not only the lawfulness of the construction of the wall but also the consequences of unlawfulness. To do so, "[t]he Court essentially quoted the language of Article 1 of the ILC’s Articles without actually attributing it to the Articles. This was significant because that article is the residue of the old concept of state crimes" (id. at 82). As a consequence, the ICJ stated that when a violation of a jus cogens rule occurred, other states have an obligation to refrain from contributing to the maintenance of such an unlawful situation and, without naming it, referred to the ILC’s work on state responsibility. The ICJ seems to have similarly followed the spirit of the ILC’s distinction between injured states and states other than injured states in Questions Relating to the Obligation to Prosecute or Extradite (Simma, Development of International Law, p. 314).

The dialogue between the ICJ and the ILC has also helped to clarify certain fields of international law, such as diplomatic protection and the law of immunities. In Diallo, the ICJ recognized that Article 1 of the Draft Articles on Diplomatic Protection, defining diplomatic protection, reflected customary international law. A further example of the interaction between the ICJ and the ILC is the ILC’s reaction to the ICJ’s decision in Barcelona Traction. The ILC recognized that, in Article 2 of the Draft Articles, the right of diplomatic protection has a discretionary nature. Further still, as regards the law of immunities, the ICJ’s decisions have formed the “backbone” for further discussion on the topic by the ILC (chapter by Roger O’Keefe in Development of International Law, p. 124).

Other dialogue between the international judiciary and international institutions may also be cited. For example, the ICJ has sometimes lent a “stamp of authority and legitimacy” to UN practice (Shaw, Development of International Law, p. 160). To some extent, the law of territory and the principle of self-determination are the result of a constant dialogue with the United Nations. Given

---

14 Barcelona Traction, Light & Power Co. (Belg. v. Spain), Second Phase, 1970 ICJ REP. 3 (Feb. 5).
15 Wall, supra note 8.
16 Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 ICJ REP. 422, paras. 68, 99 (July 20).
19 Draft Articles on Diplomatic Protection, supra note 17, Art. 2.
the comprehensive scope of the *Oxford Handbook*, as well as its ambition to address interdisciplinary matters, it is perhaps unfortunate that this aspect of symbiosis was not portrayed as saliently as one might expect.

**Engaging in Judicial Review**

The ICJ’s rejection of a judicial review function vis-à-vis Security Council resolutions\(^{20}\) is also brought into question by the analyses presented in *Development of International Law* (Sloan & Hernández, *Development of International Law*, p. 202). For example, in the *Namibia* opinion,\(^{21}\) the ICJ “expressly affirmed its power to interpret the Charter, beginning with its very first Advisory Opinion (*Admission of a State*)\(^ {22}\), in which it concluded that a capability to interpret the Charter could not be excluded from the normal exercise of its judicial power” (*id.* at 201 (footnote omitted)). This pronouncement, of course, is also related to the symbiosis between the Security Council and the ICJ, which could be strengthened. Indeed, as the ICJ and Security Council increasingly interact, they should adopt an approach of mutual awareness to ensure that disputes are settled as peacefully and as effectively as possible. There can neither be “substitution” nor “abdication” of one institution in favor of the other since “both the Court and the Council offer states different instrumental processes within the framework of state responsibility.”\(^ {23}\)

This reviewing function is also recognized in the *Oxford Handbook*. It suggests that international judges may be tasked with “exercising constitutional, enforcement, and administrative review; stabilizing normative expectations and legitimating the exercise of public authority; improving state compliance with primary legal norms; engaging in judicial lawmaking to clarify or expand substantive obligations; and enhancing the legitimacy of international norms and institutions” (chapter by Laurence R. Helfer in *Oxford Handbook*, p. 465 (footnotes omitted)). Not only does this statement bolster the assertion that international courts may engage in judicial review, but it also adds yet another string to the bow of activities that international courts and tribunals undertake.

**The Boundaries of the Judicial Function**

The analyses in the books under review help us to identify and evaluate the roles with which judges should—and should not—be concerned. The *Oxford Handbook* asserts that there are risks in expanding judicial functions. Indeed, according to Samantha Besson, a widespread view exists that judges should be called upon more often to strengthen the international legal order. However, as she notes, “judges should not be asked to step in without previous clarification of important theoretical issues about the sources of international law itself and its legitimacy,” and, in particular, this restraint means that “processes of general international law-making are institutionalized so as to warrant the respect of the sources thesis and the democratic accountability of international judges” (chapter by Samantha Besson in *Oxford Handbook*, p. 433). While this assessment does not simply suggest that the judicial function should be limited, it does caution that any expansion of the judicial function should occur in a measured way and alongside the development of appropriate safeguards.

### III. Conclusion

Through their various methodologies, the three books under review illustrate the variety of contemporary functions undertaken by international judges. Regardless of whether the methodologies are complementary to or competitive with one another, each of the approaches helps us to understand better the…

\(^{20}\) See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ REP. 151 (July 20)* (noting the ICJ’s rejection of judicial review); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16 (June 21) (same) [hereinafter *Namibia*].

\(^{21}\) *Namibia*, supra note 20, para. 22.

\(^{22}\) [Editor’s note: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ REP. 57 (May 28).*]

international judicial function. Not only do they lift the veil on the range of activities pursued by international courts and tribunals, they also shine a light on the way in which these activities are pursued and give consideration to the broader consequences and challenges germane to the expanded judicial function. One particularly interesting insight is the ever-increasing dialogue between international courts and tribunals and other international institutions.

As a result, we can see that judges engage in activities, ranging from the settlement of the immediate dispute before them to regime support and governance functions, for example. However, these studies also remind us that issues such as effectiveness, independence, and legitimacy remain fundamental. Overall, the three books each contribute innovative approaches to or unique insights about international adjudication.

LAURENCE BOISSON DE CHAZOURNES
Of the Board of Editors

BOOK REVIEWS


Emilie Hafner-Burton’s recent book, Making Human Rights a Reality—the recipient of the 2015 Annual Best Book Award by the International Studies Association—is a passionate appeal for a realistic strategy for improving human rights around the world. As she describes, the current array of treaties, the patchwork of institutions, and misguided universalism have basically permitted human rights abuses around the world to continue or even to worsen over time. Hafner-Burton, a hugely respected social scientist and the John D. and Catherine T. MacArthur Professor of International Justice and Human Rights and Director of the Laboratory on International Law and Regulation at the University of California, San Diego, reviews the literature from many different angles, and she argues that only by recognizing that it is not realistic to address every right in every place in the world will it be possible to make progress on human rights overall. The book is a strong critique of the gap between legal and organizational structures, on the one hand, and effective norms and competent institutions, on the other. Her solution is a more targeted approach by committed “steward” states dedicated to the realization of human rights around the world.

Hafner-Burton develops her critique with an extended review of the social science literature as well as expert assessments. One of this volume’s strengths is the range of perspectives brought to bear on why human rights abuses occur in the first place and why they have been able to continue. Following the introductory chapter, part I (chapters 2–3) reviews the literature on the systemic conditions in which human rights abuses thrive. Conflicts and traditions of violence—war, insurgency, power struggles—“erode[] social ties while creating crisis environments and cultures” (p. 22). Illiber al political ideologies, inequality, intolerance, and dehumanization all contribute to human rights abuses. They also come from broader systemic problems, such as war, poverty, and repression, for which a century of attention has found no solution. Making matters worse, individuals are psychologically constituted to rationalize their actions, to avoid taking responsibility for abuse, and to routinize abusive practices. They may even benefit psychologically, politically, and monetarily from abusing their opponents or any social underdogs. Hafner-Burton makes these points to argue that quick fixes to endemic violations are unlikely to work.

Part II (chapters 4–7) is the heart of the case for understanding why so many people continue to suffer serious rights abuses. While acknowledging the “extraordinary accomplishment of just creating [the international human rights legal] system” (p. 42), Hafner-Burton claims that the system’s “practical impacts are few in the areas where many of the worst or most human rights abuses actually occur” (p. 43). The basic point is that states have left all the hard work to the international legal system and to the United Nations. The former is helpful as far as it goes—which is as far as articulating principles but not enforcing them—and the latter has been pernicious. In particular, the