Australian Journal of International Law
(2004) 11 Aust. I.L.J. 207-213

BOOK REVIEWS & NOTES

John F. Murphy
The United States and the Rule of Law in International Affairs

(Cambridge University Press, Cambridge, 2004, ix+360 pp., index)

Ivan Shearer A.M. R.F.D.[*]

This book, which the author confesses in his introduction to have been an obsession in its writing, succeeds brilliantly in providing a context, and - to an extent – a corrective balance, in which to assess the current practice of the United States in relation to the international rule of law. Important aspects of that practice have rightly attracted condemnation, not only in relation to the "war" against terrorism.[1]

How is one to understand the many examples of abstention from participation in international treaty regimes, such as the Law of the Sea Convention, Additional Protocols I and II (1977) to the Geneva Conventions in relation to armed conflict, the Rome Statute for an International Criminal Court, and the Kyoto Protocol in relation to global warming? While there are specific reasons for each of these abstentions, which may be more or less persuasive, there seems to exist an almost visceral aversion by United States governments to being tied down to any international agreement. More worrying still to friends of the United States (since adhesion to treaty regimes is, after all, voluntary) are negative

---

[*] Emeritus Professor of International Law, University of Sydney.

[1] A recent and notable example is Philippe Sands, *Lawless World : America and the Making and Breaking of Global Rules* (2005).

attitudes expressed in certain government (and even academic[2]) circles towards undoubtedly binding customary international law, and to international law itself.

It would be wrong to say that these negative attitudes came in with the Administration of President George W. Bush. Their roots lie deeper. While one hears today of American "exceptionalism, provincialism, and triumphalism" in association with an acknowledgment of the present position of the United States as the world's sole superpower, these same words could describe a long standing attitude of many politicians and opinion leaders in the United States towards the rest of the world, from at least the enunciation of the Monroe doctrine. It is these roots that Professor Murphy seeks to uncover, while at all times balancing examples of isolationist trends in United States foreign policy with many examples of opposite trends, where the United States has contributed positively to the advancement of the good of the international community.

The book is divided into ten chapters. Each looks at a specific field in which United States legislative, executive and judicial actions and policies related to international law are displayed. Beginning with a general chapter on attitudes towards international law, and international legal process, in general, the author proceeds to examine in the following chapters the status of international law under U.S. law, the payment of U.N. dues, the use of force, arms control, the law of the sea, the International Court of Justice, international crimes, human rights, and international environmental issues. The book ends with a summary, conclusions, and some suggestions of possible future scenarios.

International lawyers, whether they share the author's views or not, will delight in the rich store of citations and references to be found at the end of each chapter. This alone could be said to constitute a most valuable achievement of the author, in that he has assembled the most significant literature, of the past two decades at least, bearing on the questions raised. Like the book as a whole, the choice of literature is well balanced and representative of major schools of thought. If one were to teach a general course in international law at a university in the United States one could

---

[2] Michael Glennon, "Why the Security Council Failed" (2003) 82:3 Foreign Affairs 16.

hardly do better than to prescribe Murphy's book as a course text. For non-Americans it is an invaluable reference text.

The general Australian reader will be most interested in the introductory chapter on attitudes to international law, the chapter on the use of force, and the summary and conclusions.

The book begins with a quotation from John Bolton, appointed in 2005 (after the book was written) U.S. ambassador to the U.N. Explaining why the US is not obligated to pay its dues to the U.N, he declared that treaties are not law but only "political obligations." In part, this view of treaties is based on a misreading of the Supreme Court's decision in *Foster v. Neilson*, which distinguished self-executing from non-self-executing treaties for the purpose of article VI of the Constitution declaring treaties to rank with statutes as the supreme law of the land.[3] But it also stems, in my opinion (although Murphy does not say so), from the corrupting effects on recent generations of American international lawyers of the "policy-science" approach to international law advanced by Myres S. McDougal and Harold D. Lasswell at Yale.[4] Although not intended by those eminent scholars, that approach has since degenerated in the minds of some to the view that international law is whatever suits the foreign policy interests of the United States. It is an omission, in this reviewer's opinion, that the author did not engage with this and other legacies of legal realism in American legal scholarship (which inevitably also influences the government advisers and decision makers taught by those scholars), and in particular with the following observation of Martti Koskenniemi under the heading "Empire's law":

> ... (T)he interdisciplinary agenda itself, together with a deformalized concept of law, and enthusiasm about the spread of "liberalism", constitutes an academic project that cannot but buttress the justification of American empire, as both (Carl) Schmitt and McDougal well understood. This is not because of bad faith or conspiracy on anybody's part. It is the logic of an argument – the Weimar argument – that hopes to salvage the law by making it an

---

[3] 27 U.S. (2 Pet.) 253, 7 L. Ed. 415 (1829).

[4] Myres S. McDougal, "International Law, Power and Policy : A Contemporary Conception", (1953/1) 82 Receuil des Cours 138; and Myres S. McDougal *et al.*, *Studies in World Public Order* (1987).

> instrument for the values (or better, "decisions") of the powerful that compels the conclusion.[5]

The author does, however, engage with McDougal's "policy-oriented and configurative approach" towards the interpretation of treaties (at p. 40).

It is interesting to compare attitudes towards international law as part of domestic law in the Supreme Court of the United States with the High Court of Australia. The author cites several recent decisions of the Supreme Court in which a majority of justices have had regard to international trends in opinion and judicial decisions (although somewhat coyly stopping short of direct appeals to the rules and principles of international law, especially human rights law). These cases include *Thompson v. Oklahoma*[6], *Stanford v. Kentucky*[7] (both cases involving the imposition of the death penalty on minors, the first in relation to a murder committed when the offender was under 16, the second over 16 – the Court upheld the first appeal but not the second), and *Lawrence v. Texas*[8] (constitutionality of sodomy laws). While the majority in the first and last of these cases looked to guidance beyond the United States, the minority, led by Justice Scalia, roundly condemned such an approach. His attitude is best encapsulated by his dissenting dicta in *Atkins v. Virginia* (another death penalty case, this time involving a mentally retarded offender):

> But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal ... to the views of assorted professional and religious organizations, members of the so-called "world community", and respondents to opinion polls. ... Equally irrelevant are the practices of the "world community" whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a constitution for the United States of America we are expounding.[9]

---

[5] Martti Koskeniniemi, *The Gentle Civilizer of Nations : The Rise and Fall of International Law 1870-1960* (2002) at 484.
[6] 487 U.S. 815 (1988).
[7] 487 U.S. 830 (1988).
[8] 539 U.S. 558 (2003).
[9] 536 U.S. 304 (2002), at 347-348.

By contrast, with these expressions of contempt, the recent debate between Justices Kirby and McHugh in *Al-Kateb v Godwin*[10] was conducted in a civilized fashion, the gulf between the two being principally concerned with the relevance of international law to interpretation of the Constitution, not to its possible relevance in other contexts.

The chapter of the book on human rights devotes comparatively little space to the compatibility with international law of the anti-terrorism laws, and the indefinite detention of "unlawful combatants", perhaps because they are the subjects of extensive debate elsewhere. Since the book was published, the Supreme Court has handed down its decisions in a trilogy of cases involving the indefinite detention of terrorist suspects: *Hamdi v. Rumsfeld,*[11] *Rasul v. Bush,*[12] *and Rumsfeld v. Padilla.*[13] In all cases, the right to *habeas corpus* was upheld, whether the prisoner was a citizen or an alien. Reliance was placed by the majority in all three cases on the rule of law and "the essence of a free society".[14] Absent from these decisions was express reference to international law or international standards. However, what was held and said was consistent with international human rights law.

An extensive chapter of the book is devoted to the use of force. Unilateral resort to the use of force, in the absence of authorization of the United Nations Security Council, especially in relation to Kosovo (1999) and Iraq (2003). The former was ground breaking but attracted less criticism than the latter, in part because a wider coalition of states was enlisted in the task. As to the latter, the author notes, rather dolefully, that "as of this writing (2004) the U.S. government has not issued any official statement regarding the legal justification for the coalition's attack on Iraq."[15] Instead, he discusses the opinion given by the British Attorney-General, Lord Goldsmith. Is this an example of the thesis of Robert Kagan that the United States is more result-oriented and Europe more process-oriented:

---

[10] (2004) 208 A.L.R. 124.
[11] 124 S. Ct. 2633 (2004).
[12] 124 S. Ct. 2686 (2004).
[13] 124 S. Ct. 2711 (2004).
[14] *Padilla,* per Stevens J. (Souter, Ginsburg and Breyer JJ. joining).
[15] At 170. Since then, the Legal Adviser to the State Department has contributed a brief legal justification in an article for a legal journal: William H. Taft IV and Todd F. Buchwald, "Pre-emption, Iraq and International Law" (2003) 97 A.J.I.L. 557-563.

that the United States is averse to the need to find justification for actions, which it considers necessary in its national interests, while Europe seeks peace through law and diplomacy?[16] Alternatively, is it that international law regarding the use of force has irretrievably broken down, a thesis first advanced in Thomas Franck's famous article "Who Killed Article 2(4)?"[17] To Michael Glennon's more recent espousal of the "irretrievable breakdown" thesis,[18] the author responds by pointing out that the United States has never disavowed the law but rather implicitly finds valid (if unstated) exceptions to it. He endorses the view of Yoram Dinstein who wrote:

> The discrepancy between what states say and what they do may be due to pragmatic reasons, militating in favour of a choice of the line of least exposure to censure. Even so, a disinclination to challenge the validity of a legal norm has a salutary effect in that it shows that the norm is accepted, if only reluctantly, as the rule. There is a common denominator between those who try (even disingenuously to take advantage of the refinements of the law, and those who rigorously abide by its letter and spirit. They all share a belief in the authority of the law.[19]

Is the author optimistic or pessimistic, having regard to all the areas of intersection between international law and U.S. national policies and practice surveyed in the book, concerning continued U.S. adherence to the rule of law in international affairs? The author writes:

> It is hazardous to predict what future lies ahead for the United States and the rule of law in international affairs. What may be stated is that the current situation will change. Whether it will change in favour of greater or lesser adherence to the rule of law in international affairs is the question. ... The first scenario envisages the United States increasing its adherence to the rule of law in international affairs. The second would see the United States draw back further from the international legal order and rely primarily on

---

[16] Robert Kagan, "Power and Weakness" (2002) 113:4 Policy Revew 3.

[17] (1970) 64 A.J.I.L. 809. For the riposte, see L. Henkin, "The Reports of the Death of Article 2(4) Are Greatly Exaggerated" (1970) 65 A.J.I.L. 544.

[18] M. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2001).

[19] Y. Dinstein, *War, Aggression and Self-Defence* (3rd ed., 2001) at 109.

> the application of national law and procedure and on unilateral action to resolve international problems.

Although confessing that it is only a "best guess", the author considers the greater adherence scenario more likely, "if only because the nature of the problems facing us require for their resolution the kind of cooperative effort that is conducive to the rule of law in international affairs. The chances for a successful rule of law in international affairs, however, will be greatly enhanced if the United States is 'present at the creation' of improved international institutions and an enhanced international legal process, as it was at the end of World War II." AIJ