Buchbesprechungen

***Blattner, Charlotte E.*: Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization.** Oxford: Oxford University Press. 2019. ISBN 978-0-19-094831-3 (Hardback). liii, 465 pp. £ 55,-

States and regional organizations have recently started to extend their animal welfare legislation abroad, thereby exercising a form of "extraterritorial jurisdiction". For instance, in 2009, the European Union (EU) adopted the "Seals Regulation",[1] which bans the trade in seal products in the EU in response to concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals. The killing and skinning of seals largely occurs *outside* the EU, notably in Canada. In another EU example, the Court of Justice of the EU held, in the *Zuchtvieh* case, that an EU Regulation concerning the welfare of animals during transport is not just applicable to transports on EU territory, but also to transports between an EU place of departure and a non-EU place of destination.[2] These assertions of extraterritoriality have at times proved internationally controversial, as they purport to regulate foreign activities and/or limit market access to foreign products. Notably, Canada complained against the aforementioned EU Seals Regulation with the World Trade Organization's dispute-settlement mechanism, which went on to find that the EU had breached World Trade Organization (WTO) law.[3] At the same time, such assertions may deserve support insofar as they raise animal welfare standards worldwide.

The extraterritorial projection of animal law calls for thorough scholarly investigation. And there is no more thorough investigation than *Charlotte Blattner's* "Protecting Animals Within and Across Borders: Extraterritorial

[1] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16.9.2009 on trade in seal products, O.J. L 286/36 (2009).

[2] Council Regulation (EC) No. 1/2005 of 22.12.2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No. 1255/97, O.J. L 3/1 (2005); Court of Justice of the EU, Case C-424/13: Judgment of the Court (Fifth Chamber) of 23.4.2015 (request for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof — Germany), *Zuchtvieh-Export GmbH v. Stadt Kempten*, O.J. C 205/5 (2015).

[3] WTO, DS 400: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, Report of the Appellate Body (AB) as adopted by the WTO Dispute Settlement Body, 18.6.2014. While the AB held that the EU Seal Regime is "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994, it found that the EU had not demonstrated that the EU Seal Regime meets the requirements of the chapeau of Article XX GATT, as the Regime was considered to be discriminatory towards Canadian and Norwegian producers.

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Jurisdiction and the Challenges of Globalization", which is based on the author's Ph.D. manuscript defended at Basel University (2016). *Blattner* later went on to collaborate with, *inter alia*, *Will Kymlicka*, a pre-eminent animal rights philosopher, and developed an interdisciplinary research agenda on animal law and policy which she is currently carrying out at Harvard University.

In her monograph, *Blattner* attempts to shift the boundaries of legal extraterritoriality to better protect animal welfare threatened by transnational production chains. She explores how the existing jurisdictional principles and legal arrangements could be productively relied on to improve animal welfare worldwide. *Blattner* does not hide her normative preferences in this respect: while analyzing the positive law, she consciously looks for interpretations *that advance animal welfare* (an approach she terms "critical positivism"). Where the law is absent, or yields undesirable results, she does not refrain from making recommendations for legal reform. A fine example is her proposal to confer nationality on animals ("passportization"), which would then ground the exercise of passive personality-based jurisdiction over animal abuse and exploitation abroad. This is reformist, as animals, being objects of the law, do not have a nationality under the dominant interpretation of the concept.[4] Accordingly, from a methodological perspective, her research is a mix of doctrinal and normative, ethically-inspired scholarship that gives pride of place to the interests of a particular object – or rather subject – of the law: animals. This approach somewhat resembles the approach that is often espoused in human rights scholarship, which interprets international legal sources in light of the inherent rights of human beings (*pro homine* principle),[5] and criticizes existing legal arrangements that fail to adequately protect human rights. In fact, *Blattner* draws inspiration from the trajectory of human rights law, in particular the doctrine of extraterritorial obligations – a doctrine that could have traction in the field of animal law as well, and ground obligations for home states to regulate transnational corporations carrying out activities which compromise animal welfare.[6]

Blattner's monograph is extremely wide-ranging. Inevitably, a brief review like this one can only fail to do justice to the book's richness. I will

[4] See *C. E. Blattner*, Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization, 234 et seq.

[5] See, e.g., *Y. Negishi*, The *Pro Homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control, EJIL 28 (2017), 457 et seq.

[6] Compare UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, in particular Pillar II (state obligation to protect).

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

limit myself to an engagement with two fundamental, interrelated issues: the author's conception of extraterritoriality on the one hand, and the interventionist character of unilateral extraterritoriality on the other.

"Extraterritoriality" is an elusive concept that defies easy definition. In fact, what is territorial or extraterritorial depends on how connections to states and their territory are framed, as a result of which territoriality and extraterritoriality may become metaphysical or even illusory concepts.[7] It goes to the author's credit that, nevertheless, she has endeavored to *categorize* manifestations of extraterritoriality. She does so by distinguishing between the "anchor point", the "regulated content", and the "ancillary repercussion", each of which may be territorial or extraterritorial (p. 28), as well as by distinguishing between "direct" and "indirect" extraterritoriality (p. 29). According to *Blattner*, "[a] jurisdictional norm is indirect extraterritorial if and only if ancillary repercussions occur on foreign territory, or, put differently, if there is neither an extraterritorial anchor point nor an extraterritorial content regulation. By contrast, a norm is extraterritorial *stricto sensu* (or direct extraterritorial) if its anchor point *or* the regulated content lies outside the prescribing state's territory." (p. 28). *Blattner* goes on to make further distinctions and combinations, depending on whether the anchor points and/or regulated content are animal or non-animal related (pp. 31 et seq.).

This may sound complicated, and makes one think of *Rudolf von Jhering's* characterization of German doctrinal legal scholarship as a hair-splitting machine capable of splitting a hair into 999,999 accurate parts.[8] Still, the distinctions made are illuminating, and an original contribution to the doctrine of jurisdiction, to the extent that they enable us to assess the interventionist character and international lawfulness of various assertions of extraterritorial jurisdiction (a functionality that is however only clarified towards the end of the book, in Chapter 10). Take notably the most common type of extraterritorial jurisdiction, i.e., jurisdiction with a non-animal-related intra-territorial anchor point and animal-related extraterritorial content regulation (type γ1 in *Blattner's* scheme, p. 270). Such jurisdiction may consist of, e.g., home state regulation of overseas activities of domestically-incorporated corporations, the exercise of jurisdiction over "animal nationals", or the imposition of reporting duties on domestic corporations regard-

[7] *P. Szigeti*, The Illusion of Territorial Jurisdiction, Tex. Int'l L. J. 52 (2017), 369 et seq.

[8] *R. von Jhering*, Scherz und Ernst in der Jurisprudenz, 1. Aufl. 1884 (unveränd. reprografischer Nachdruck der 13. Aufl., Leipzig 1924. – Darmstadt: Wiss. Buchges., 1992). See for a discussion: *W. Seagle*, Rudolf von Jhering: Or Law as a Means to an End, U. Chi. L. Rev. 13 (1945), 71 et seq.

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

ing their activities involving animals abroad (pp. 267 et seq.). Because such jurisdiction is territorially anchored, even if it regulates activities abroad, it has a substantial connection to the regulating state. This limits its interventionist character (p. 394), and renders such jurisdiction lawful under international law. Intrusion may even be more limited, and hence, international lawfulness may be beyond doubt, in the "ancillary repercussions only" scenario, which notably occurs when states enact animal welfare-related trade measures. The only extraterritorial element of such measures is that "they leave foreign producers the choice of either conforming to the importing state's laws or not placing the products on its market" (p. 268, p. 394), even if this limited extraterritoriality does not necessarily serve as a defense against WTO challenges (expounded at length in Chapters 3 and 4).[9] In contrast, more intrusive direct extraterritoriality, characterized by an extraterritorial anchor point and extraterritorial content regulation, is by all means exceptional, and even non-existing as a matter of the *lex lata* in the field of animal law. For instance, the exercise of universal criminal jurisdiction over the abuse of animals abroad may, under currently applicable international law, be unlawful – although *Blattner* argues in favor of its lawfulness *de lege ferenda*.[10]

The second issue that I would like to take up is the tension between unilateral, extraterritorial jurisdiction and the principle of non-intervention. This issue is obviously related to the first one, as the *type* of extraterritorial jurisdiction determines the extent to which extraterritoriality intrudes on a foreign state's own regulatory sphere. The drawback of typologies, however, is that they may work well in the abstract, but may fail to account for jurisdictional imbalances and imperial practices. On the basis of *Blattner's* typology, most jurisdictional assertions may appear to be relatively non-intrusive, and thus lawful.[11] This is in line with contemporary jurisdictional theory, which considers the permissive principles of jurisdiction to be so capacious as to justify almost any jurisdictional assertion.[12]

---

[9] In these chapters, *Blattner* carries out an impressive doctrinal analysis of the compatibility of animal-related trade measures with GATT and other WTO legal instruments.

[10] *C. E. Blattner* (note 4), 253 et seq.

[11] *C. E. Blattner*, (note 4), 399 (submitting that "as animal law has become so entangled across borders, many states now have a vested interest in protecting animals abroad", and that "the principle of nonintervention will only be violated if a state uses forcible, dictatorial, or otherwise coercive means when it interferes in the affairs of another state").

[12] See, e.g., *D. J. Svantesson*, The Internet Jurisdiction Puzzle, 2017 (proposing to abandon the first-order permissive principles, like territoriality and personality, and instead suggesting reliance on the substantial connection requirement and the principle of reasonableness); *C. Ryngaert,* Selfless Intervention: The Exercise of Jurisdiction in the Common Inter-

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

However, the political reality is that the states exercising extraterritorial jurisdiction tend to be the industrialized Western powers (labelled by *Blattner* as the "majority world", apparently taking her cue from *Kymlicka*), with less developed nations (labelled as the "minority world") being at the receiving end. Extraterritorial jurisdiction may then become a replay of colonialism's civilizing mission: extraterritoriality is used as an imperial tool to impose Western conceptions of animal welfare on non-Western cultures seen as backward, also in respect of their attitudes towards animals. Such majority imposition also plays out intra-territorially for that matter, when dominant cultures impose their value conceptions on minority and migrant cultures within the same state.[13]

As a staunch supporter of animal rights, *Blattner* is visibly uncomfortable with sacrificing animal rights on the altar of cultural diversity. In fact, she comes out strongly in favor of extraterritoriality as a means of raising standards globally in the absence of adequate multilateral action. At the same time, she is cognizant of the risks of imperialism and cultural hegemony, in particular the danger of Western states hectoring non-Western communities regarding their animal welfare practices, while sweeping under the carpet their own animal-unfriendly agro-industrial practices. Apparently inspired by *Paul Berman's* writings on global legal pluralism,[14] she sees a way out of the conundrum, however, through the creation of "overlapping forms of jurisdiction" giving rise to "legal pluralism that is conducive to multiculturalism and promotes the interests of animals" (p. 408). Her claim is that "[c]oncurring forms of jurisdiction stimulate discourse that fosters multicultural sensibility, awareness of shared histories, and an understanding of the intersectional forms of oppression, including intersections of race and speciesism, of sexism and speciesism, and of ableism and speciesism." (p. 408).

While this nuanced approach appears sensible, it is open to speculation whether extraterritoriality can and will serve all these goals at the same time. Certainly, the existence of concurrent jurisdiction in international law limits the kind of pervasive global under-regulation which haunts animal law. But it may not magically yield sensibility, awareness, and understanding. Such

---

est, 2020 (discussing the malleability of sovereignty and jurisdiction, and suggesting techniques to mitigate the exercise of potentially overbroad jurisdiction).

[13] The ongoing debate over whether or not to prohibit ritual slaughter of animals, which tends to be practiced by certain minority religious groups, can serve as an example that brings into stark relief the tension between animal rights and the freedom of religion (a human right). *C. M. Zoethout*, Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter, HRQ 35 (2013), 651 et seq.

[14] *P. S. Berman*, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders, 2012.

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

values should be accounted for at an earlier stage: they should be factored in by regulators at the moment of designing extraterritorial regulation, or by law-enforcers at the moment of deciding on an enforcement action. Rather than waiting for the fall-out of concurrent jurisdiction, states may want to *a priori* ensure the reasonableness of particular jurisdictional assertions. *Blattner* acknowledges the potential role of reasonableness at the pre-conflict stage, but does not fully see through the limitations which reasonableness may place on extraterritoriality. She submits that "[c]oncerns for animals can play a role in this assessment if they are a high priority on the regulator's agenda or if they are a common concern of states" (p. 398), i.e., concerns that militate in favor of extraterritoriality – but obviously other concerns can militate *against* extraterritoriality. Arguably, it is *Blattner's* – understandable – fear that states may invoke "reasonableness" as an excuse to limit the geographic reach of their animal laws, that brings her to downplay the importance of reasonableness. Reasonableness, as traditionally conceived (e.g., in the Third Restatement of United States [US] Foreign Relations Law), indeed serves as a technique of jurisdictional *restraint*, which limits the jurisdictional overreach flowing from the wide net potentially cast by the permissive principles of jurisdiction. In essence, reasonableness is a tool to counter *over-regulation*, whereas it is precisely *under-regulation* that plagues the field of animal welfare.

It could possibly be argued that the principle of reasonableness should not apply to fields that are globally under-regulated, such as animal welfare, insofar as such under-regulation tends to undersupply global public goods or encourage the commission of *mala in se* (acts that are wrong in themselves),[15] or alternatively that extraterritorial jurisdiction that addresses global public goods or *mala in se* is *ipso facto* reasonable. This is an avenue that *Blattner* seems to take when calling attention to the *substance* of the laws projected extraterritorially (Chapter 8). A characterization of animal welfare as a global public good, a global common concern, or a *malum in se* can be challenged, however, in view of the globally divergent practices regarding the level of legal protection offered to animals, and the absence of international animal law. But even if more stringent animal welfare standards do respond to common concerns, or are internationally desirable, it makes sense for states projecting these standards extraterritorially to pay

[15] *Mala in se* are juxtaposed to *mala prohibita*, which are only wrong because they are penalized by statute. See for one of the seminal contributions: X., The Distinction between "Mala Prohibita" and "Mala in se" in Criminal Law, Colum. L. Rev. 30 (1930), 74 et seq.

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

attention to the exact design of extraterritorial regulation.[16] One should bear in mind in this respect that requiring strict compliance from (foreign) addressees of such regulation may be neither legitimate nor effective in actually improving animal welfare. For instance, such addressees may possibly already be subject to similar, even if not fully identical requirements under their domestic law, which the extraterritorial regulator may want to recognize. In the aforementioned *Zuchtvieh* judgment, the Court of Justice of the EU sensibly held as follows in this respect:

Should it nevertheless be the case that the law or administrative practice of a third country through which the [animal] transport will transit verifiably and definitely precludes full compliance with the technical rules of that regulation, the margin of discretion conferred on the competent authority of the place of departure empowers it to accept realistic planning for transport which, in the light *inter alia* of the means of transport used and the journey arrangements made, indicates that the planned transport will safeguard the welfare of the animals at a level equivalent to those technical rules.[17]

In addition, as *Blattner* could have mentioned, foreign addressees, especially in the "minority world", may lack the technical and financial capacity to fully comply with extraterritorial animal law. In such a situation, the extraterritorial regulator may want to put in place financial or technical transfer arrangements to enable operators to comply with its extraterritorial law, or to provide for a grace or transition period that allows for adjustments to production processes.

These mechanisms may not as such restrain the exercise of extraterritorial jurisdiction, but may certainly render it more legitimate and more effective. They increase the legitimacy of extraterritoriality as they recognize the situatedness and agency of the addressees. They increase its effectiveness as they enable the addressees to actually implement its requirements.

It remains, nonetheless, that sensitivity to foreign concerns will do little to improve the lot of animals if foreign operators and communities, for cultural, economic or other self-interested reasons, vehemently oppose stricter animal welfare standards. In such cases, bystander states should be allowed to draw a line in the sand and exercise forms of extraterritorial jurisdiction, in particular to avoid becoming complicit in abuses which they themselves consider as morally reprehensible or wrongful, and are in a position to pre-

[16] See on the principle of considerate design in the practice of extraterritorial jurisdiction in the environmental field: *N. Dobson,* Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law (forthcoming 2021).

[17] *Zuchtvieh-Export GmbH v. Stadt Kempten* (note 2) para. 54.

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

vent (e.g., by taking trade measures).[18] Extraterritoriality "offers hope", as *Blattner* writes on the last page of the book, and has "the potential to overcome the inertia and deregulation that characterize animal law to this day" (p. 409). As extraterritorial jurisdiction in the field of animal law does not directly contribute to a state's national welfare, unlike, for instance, the extraterritorial application of competition law,[19] realizing this hope is however crucially dependent on regulatory courage, to be kindled by sustained civil society and consumer pressure. International legal constraints should not be cited as an excuse for inaction, as most forms of "extraterritorial" jurisdiction and regulation discussed in *Blattner's* monograph are based on a sufficiently strong connection with the regulating state, allowing them to pass muster with the international law of jurisdiction.

Cedric Ryngaert, Utrecht

[18] See, e.g., on complicity and environmental abuses in an extraterritorial context: *J. Scott*, The Global Reach of EU Law, in: M. Cremona/J. Scott (eds.), EU Law Beyond Borders, 2019, 54 et seq. (submitting that "the failure of the EU to take available steps to prevent or minimize environmental wrongdoing in third countries is capable of constituting complicity").

[19] See on economic rationales of extraterritorial jurisdiction (as exercised by the US) notably *F. Irani*, Beyond de jure and de facto boundaries: tracing the imperial geographies of US law, forthcoming in European Journal of International Relations 2019/2020, doi: 10.1177/1354066119869801.

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

***Gozzi, Gustavo*: Rights and Civilizations. A History and Philosophy of International Law.** Cambridge, U.K.: Cambridge University Press. 2019. ISBN 978-1-108-47423-8 (Hardback). xxvii, 379 pp. £ 95,-

"This book is to be neither an accusation nor a confession, and least of all an adventure", with these words, *Erich Maria Remarque* introduced the reader to the English edition of his legendary novel about the First World War. More than 90 years ago, "All Quiet on the Western Front" was first published in Germany and soon became a world-wide best seller. The telling name of *Remarque's* book and its address to the reader could also well be used to summarize the impression of *Gustavo Gozzi's* new overview of the history and philosophy of international law titled "Rights and Civilizations". But it is not a new book in the literal sense. As a translation of his monograph "Diritti e civilità: Storia e filosofia del diritto" published in Italian with Mulino in 2010, the work struggles to keep pace with the latest discourses in the rapidly developing and expanding field of the history of international law.

Besides a lot of studies on particular questions about the history of international law that have been produced in the last years, also many survey companions shaped the debates in the last decade. Just to mention the Oxford Handbook edited by *Bardo Fassbender* and *Anne Peters*, *Stephen Neff's* "Justice Among Nations" or *Emmanuel Tourme-Jouannet's* "Liberal-Welfarist Law of Nations". Already before the initial publication of *Gozzi's* book in 2010, a wide range of scholarship existed on topics that the author covers in his study. The monographs of *Tony Anghie*, *Laura Benton* or *Brett Bowden* are merely a few examples that deal with the broadly discussed phenomenon of colonialism and empire. Yet, *Gozzi* does not engage very much with the recent secondary literature, instead he mainly analyzes what are for him the crucial passages from the primary sources. By doing so, he wants to take the reader through the Western imaginations of the "others" in international law. But rather than analyzing the gaze on the "others", *Gozzi* himself looks at the "others" through the lenses of the Western tradition. For the most part, he relies on an already existing historical canon and recounts familiar histories.

The book covers with 13 chapters a vast amount of – with few exceptions – European sources, thinkers and events that are divided into four parts stretching from (I.) the *ius gentium* of the natural law tradition to (II.) the Western international law of the 18th and 19th century and (III.) recent debates about the Third World and Islam in international law. The last part (IV.) provides a variety of discussions on recent theoretical topics, such as the constitutionalism of public international law, Third World Approaches

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

to International Law (TWAIL) and social movements. The high ambition of all this is to "mine the past so as to uncover the roots of processes that propel themselves into the future […] [T]he book highlights a significant continuity between early modernity and the tormented season of the present age" (p. xv). Applying such a *longue durée* approach is not unproblematic, particularly, in a field that became so diversified in the recent past and many legal historians treat such works with suspicion today. It obliterates sometimes whole time periods, such as the totalitarianisms of the 20th century in Europe, which are not mentioned in *Gozzi's* book.

In the first part of the book, the question is how international law or *ius gentium*, as it was mostly referred to in the pre-modern and early modern period, restrained or enabled the colonial project. *Gozzi* walks the reader through the famous pieces of *Vitoria*, *Grotius*, *Pufendorf* and *Vattel*. *Vitoria* saw in the practice of human sacrifice a sufficient reason to wage war against indigenous civilizations in the Americas (p. 7). *Grotius* stressed that the peoples' property and land rights have to be respected regardless of the people's faith (p. 32), however, the Western powers may forcefully intervene if an indigenous legal system does not respect the rights of European legal systems (p. 36). *Pufendorf's* attitude towards colonialism was less distinct, but *Gozzi* suggests that *Pufendorf* defended the rights of peoples against Western conquests (p. 61). *Vattel*, instead, distinguished the conquest between the occupation of uninhabited land that he regarded justified, such as in North America, and the foundation of colonies by conquest as in Latin America (p. 70).

With these distilled highlights of the first 100 pages of the book, the author leaves no doubt that the international legal doctrine was generally discriminatory and Eurocentric during that period – a finding that is not surprising any more. *Gozzi* buttresses this with references to TWAIL scholarship in later chapters, but he hardly cites the latest research literature of these critical streams. In contrast to the narrative of continuity, the natural law discourses of the early modern period appear rather differentiated. The ideas of justice and how to realize it were spelled out in various contexts and with diverse agendas. In particular, *Vattel's* balance of power concept presented an innovation on this field. In some parts, *Gozzi* does a good job in providing the context of these thinkers. His portray of the School of Salamanca takes the differences of the various writers into account and is not merely a discussion of *Vitoria's* work. However, latest research results on the school of Salamanca coordinated at the Max Planck Institute for European Legal History in Frankfurt a. M. and their implications for a new his-

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

torical narrative of the first encounters are too recent for finding its way in *Gozzi's* compendium.

In the following chapters, the book does not follow a strict chronological order. For example, the discussion of *Hegel's* "äußeres Staatsrecht" follows *Kelsen's* monism argument, only after that comes *Wolff's* "civitas maxima" - and then the Nuremberg trials are discussed in the book. This complicated analysis orients itself not at the historical genesis, but is the practical outcome of the author's underlying narrative that is sometimes hard to grasp. The structure is most likely owed to the determined enterprise of *Gozzi* to compile a comprehensive account of the history of international law and, moreover, write an own piece of philosophical scholarship.

As a result, complex events or historical transitions are often merely covered shortly and mostly by reference to traditional narratives. The discussion of the transition from the standard of civilization to the differentiation between developing and developed states is a case in point (p. 132). *Gozzi* describes that the change was brought about by the mandate system of the League of Nations and its new administrative mechanisms that aimed to release the mandate countries into independence after the tutelage of the mandatory powers was no longer necessary. However, even given that one accepts this narrative for the territories under the mandate system, those just covered a relatively small amount of the colonial spaces on the globe after the First World War. Furthermore, *Erez Manela's* "The Wilsonian Moment" (2007) and *Susan Pedersen's* study "The Guardians" (2015) might suggest more complicated and ambivalent dynamics than the account *Gozzi* provides.

Despite these shortcomings on the historical side of the book, the philosophical aspects deserve a more benevolent appraisal. The author's knowledge of the primary sources in many different European languages is impressive. In addition, *Gozzi* offers nuanced intellectual portrays of some key thinkers from this continent. Particularly, his treatment of *Immanuel Kant's* international legal theory and *John Rawls'* law of peoples and their ideas on an international order stand out. When the author discusses *Kant's* writings on Western colonialism, he manages to navigate insightful through the implications of *Kant's* cosmopolitan theory for this topic without neglecting problematic aspects in *Kant's* anthropological writings about race. Correctly, the author stresses the importance of a capable state and domestic legal system for *Kant* to ensure the cosmopolitan law. In a later section, *Gozzi* gives an equally detailed outline of *Rawls'* international legal theory and emphasizes the continuity between *Kant* and *Rawls* (p. 201). *Rawls'* law of peoples introduces classifications for peoples from a liberal or decent

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

state to outlaw regimes and burdened societies. These different domestic conditions of peoples are important for *Rawls's* liberal theory of justice, because he considers a domestically just system as a precondition for international order and justice.

At the same time, the frequent reappearance of these two specific writers puzzles the reader over the author's intent. This is a crucial point, because *Gozzi* uses both writers not just to illustrate the thinking of Western theorists about the role of non-Western polities in international relations. The author also uses their theories for himself as an analytical framework. By this, he reproduces discourses, categories and classifications that are already well established.

The more refreshing seems, therefore, *Gozzi's* elaboration of the human rights doctrines in Islam and the Arab states (pp. 221 et seq.). This part of his study certainly profits from insights that the author gathered in his functions as advisory board member of the King Abdulaziz Chair in Bologna and as a former visiting professor at universities in Istanbul and Tunis. The author focuses on the Islamic and the Arab Declaration of Rights of Man, the latter being more secular and closer to the Western tradition (p. 235). The chapter also contains a short sketch of the *shari'ah* doctrine of international law that developed from the early eighth century in the Hanafi school. The difference between the Muslim (*Dār al-Islām*) and the non-Muslim world (*Dār al-Harb*) is crucial for the Islamic understanding that restricts the use of force on the international plane to self-defense and the propagation of Islam.

Unfortunately, the author does not provide any history or theory of how the Western and Islamic international law interacted in the early modern and modern period, for example in Northern Africa or Eastern Europe. Such entanglements of different international normative orders seem to be beyond his theoretical interest. Instead *Gozzi* elaborates on the ambivalent relationship between Islam and democracy. The Quran as main religious and legal authority that needs interpretation stands in contrast to the sovereign will of the people (p. 258). The impetus to place this part of the study shortly after the discussion of *John Rawls* theory is not made explicit in the text, but in the introduction: applying *Rawls's* standard of a well ordered society to Islamic countries by looking at the human rights discourse (p. xxiii). Having more such directions on a meta-level of how to follow the general argument and narrative directly in the text would be certainly appreciated by the readers of the book. Plus more importantly, this proposition raises once more the concern of a confusion between analyzing the Western standards and analyzing by Western standards.

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

The last part of *Gozzi's* study is titled "conditions for peace" and contains the genuine philosophical portion of the book. Again, the author puts the question for human rights and their foundation in the center. The latest scholarship about the history of human rights, such as the pieces of *Samuel Moyn* or *Lynn Hunt*, are not a part of *Gozzi's* discussion. However, *Jürgen Habermas'* and *Otfried Höffe's* theses appear very prominently in this chapter. The difference between legality and morality becomes a key thought for the author in that part and very resonating is his plea that "*[c]ultural pluralism* must necessarily find its counterpart in *legal pluralism*" (p. 314). This is an interesting point and the outline "Toward a Multicultural Constitutional Democracy" would have deserved more room in the book, although one could wonder whether this is in essence a question about the history and philosophy of international law.

Still, it appears that *Gozzi* does not go far beyond already well-known phrases. This impression is further supported because *Gozzi* relies for the organization of his final chapters and the source material on *Koskenniemi's* analysis of global governance. Accordingly, by introducing the legal debates about the war on terror and the war prisoner cases of the United States Supreme Court, *Gozzi* aims to demonstrate how the current empire is at work on the international legal field. Another challenge, international law's fragmentation is addressed by the constitutionalism and globalization debates in the legal scholarship. After an argument for the reconsideration of the rights of peoples in international law (p. 355), the author ends by acknowledging the ambivalence of human nature, as theorized by *Kant* and *Freud*.

At this final point, one is tempted to think back to the initial aim of the book as laid down in the introduction: to leave "the West behind us and lay the foundation for an epistemology capable of making complementary the diversities by which we are otherwise divided" (p. xvii). Notwithstanding this noble objective, the author very frequently recurs in the book to the traditional European legal sources and concepts. Rather than providing genuinely new scholarship on the field of the history and philosophy of international law, the book organizes the Western canon of international legal thinking in a familiar way to highlight that its origins were not universal and that this history can be traced until today's international relations – so far, "All Quiet on the Western Front". Eventually, with *Gozzi's* work in the back, we should strive for an open differentiation between intellectual history and philosophy of international law. Finally, "new" intellectual histories, such as *Sundhya Pahuja's* account of *Jawaharlal Nehru* in her "Letters from Bandung", which look at the Western tradition through the lenses of

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

the "others" could bring innovative philosophical dialogues about the foundation of international law.

Sebastian M. Spitra, Wien

***Musa, Shavana*: Victim Reparation under the Ius Post Bellum: A Historical and Normative Perspective.** Cambridge Studies in International and Comparative Law, Vol. 139. Cambridge, U.K.: Cambridge University Press. 2019. ISBN 978-1-108-47173-2. vii, 283 pp. £ 85,-

Debates on post-war reparations tend to circle around the same few successful examples. So far, this proved insufficient to close the "implementation gap of scandalous proportions" the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence, *Pablo de Greiff*, lamented in his report on the topic. *Shavana Musa's* book "Victim Reparation under the Ius Post Bellum: A Historical and Normative Perspective" provides a refreshing and promising turn in methodology. The author assesses post-war reparation efforts over the course of five centuries and asks what lessons and insights this surprisingly rich history holds for today.

Before embarking on her impressive journey, the author begins with an introductory chapter on overarching principles of early peacemaking and reparation. She shows that amnesties were commonplace in peace treaties. The principle that all wrongdoing "shall be bury'd in eternal oblivion" (p. 11, citing the Treaty of Munster) was subject to the exception of restitution for certain selected damages. Thus, already from the 17th century onwards, the author traces a general "amnesty and restitution partnership" (p. 16), which is amended through the principle of postliminium, the restoration of a legal position lost due to capture or occupation (p. 18). From this triad of peacemaking the author turns to the implementation of reparation claims through admiralty courts, which provided a forum to (re)claim property seized through illegal privateering and compensation for other damage caused by illegal privateering. Since they existed in different nations, admiralty courts formed the first transnational litigation system for individual reparation claims – albeit for a very limited circle of privileged victims belonging to the merchant class (p. 22). In painful contrast to current transnational reparation litigation, individual claims before admiralty courts were enforceable through a bail and bond system: In order to receive a governmental permission to privateer, the aspiring privateer had to deposit money, which could be used to indemnify his victims (pp. 28 et seq.).

Against this backdrop, the author begins her journey in 1652 with the Anglo-Dutch Wars. She identifies an amnesty and restitution partnership in

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

the respective peace treaties (pp. 41, 56 et seq., 59 et seq.). The reparations foreseen for merchants and seamen were to be effected through a mixed commission and through admiralty courts. Exceptionally, Great Britain proposed to remedy all individual damages (p. 40). When the Netherlands refused, Great Britain developed its own national program to assist its war victims (pp. 52 et seq.). Thus, comprehensive individual reparation was already attempted in the middle of the 17th century and some individual reparation was actually delivered through commissions and courts. The use of admiralty courts "positioned the individual as an important player within the international sphere" (p. 60). Yet, the author also shows how political considerations were predominant in the decision to repair certain victims and that states asserted strong influence over the eventual reparation proceedings. As an example, the British Council of State outright instructed Admiralty Courts not to grant restitution for the seizure of Danish vessels and to await further orders on the matter (pp. 38, 54 et seq.).

This did not change on the next stop of the journey: the 18th century Silesian Loans Affair and Seven Years' War (1756-1763). In this chapter, the author traces continuity, gradual development, but also radical change in reparation efforts. Reparations continued to be restricted to the merchant class. Injuries incurred during the Seven Years War were addressed through admiralty courts, even though that was not expressly provided for in the peace treaty. The procedural and substantive rules before the courts developed and gradually tightened; the cases and procedures became more sophisticated (pp. 98 et seq.). In addition, the Silesian Loans Affair was one of the first instances, in which a sovereign used the termination of a treaty to force compliance with an obligation on part of another state – marking the beginning of the modern law of reprisals (p. 83).

Next, the author discovers further gradual as well as groundbreaking developments in the American War of Independence (1775-1783). She traces the complicated efforts to redress loyalists and other victim groups through claims commissions and the attempts by some states of the US to thwart those efforts. Foreshadowing future trends, some claims were ultimately enforced through an inter-state lump sum payment, which Great Britain subsequently distributed through a national mechanism. Again, the author emphasizes that political factors determined success or failure of post-war reparations (pp. 137 et seq., 145). The law on reparation made a step towards the current state of affairs, when the loyalist commission was one of the first to consider lost profit, personal injury and emotional injury as redeemable damage (pp. 117, 122). The most important change was, however, a linguistic one. Instead of justifying reparation claims on commercial

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

grounds, states began to rely on language of morality and justice, bringing us one step closer to the modern reparation discourse (p. 122).

Leaving the tumultuous waters of the 18th century, the author analyzes the 19th century Anglo-Argentinian Claims Commission. It resolved the grievances of British merchants, who fell victim to excessive privateering on the Rio de la Plata. The British continued to rely on legal language to justify their reparation claims, lending continuity to the momentous turn of the 18th century (p. 155). Still, the commission was facilitated predominantly by Great Britain's political agenda to secure important commercial activities in the region (pp. 155 et seq.).

After this short intermezzo, the author turns north to the American Civil War (1861-1865). She examines the Alabama Arbitration, along with some smaller reparation efforts and identifies another turn in language. The nation replaced the individual as center stage of post-war reparation efforts. Consequently, reparation was awarded through inter-state lump sum payments. Whether and how they were distributed to individual victims was considered to be a sovereign decision of each state (pp. 166 et seq., 169 et seq.). Unsurprisingly given the history examined up to this point, political considerations again played an important role in shaping reparation policies: The United States' acknowledgment of British reparation claims appeased investors and allowed the United States to release bonds onto the British stock exchange amidst an economic recession (p. 162).

Towards the end of her journey, the author considers the 19th century Second Anglo-Boer War, in which Great Britain fought two independent Boer republics in Southern Africa. After the brutal conflict, Great Britain created several commissions and other mechanisms to remedy selected injuries suffered during the war. In a leap forward, victims belonging to both sides of the conflict could claim reparation and the victorious British Empire agreed to pay a lump sum to the vanquished party (pp. 178, 202). But again and as expected, the notable progress was mainly owed to political reasons. Great Britain sought to appease a population and rebuild a territory, which were soon to be subject to colonial rule (p. 204).

In the penultimate chapter, the author's journey ends in the 20th century. She quickly skims the most important developments in the law on reparation in a tour de force of international humanitarian law, state responsibility, international criminal law and human rights, before finishing with an excursion on transnational litigation and arbitration.

The last two chapters also contain the author's reflections on her journey, which proceed along two themes: The political nature of post-war reparation throughout history (pp. 238 et seq., 246 et seq.) and the possibility to

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

use historic precedents as role models for contemporary reparation efforts (pp. 216 et seq., 231).

Shavana Musa must be commended for the wealth of information she uncovered and her meticulous analysis of a multitude of sources. Her book teaches the reader many surprising facets of the history of reparation and thereby enhances his or her understanding of the topic. Her approach to view reparation efforts against their political, social and economic background reveals important contextual information. The author's look beyond the law thus proves to be one of the most important features of her book.

Unfortunately, the impressive amount of information is not always as clearly conveyed as it could have been. At times a rather essayistic style makes it hard to grasp the author's key points, especially in the last two chapters. These two chapters would also have benefited from the impressive depth earlier parts of the book displayed. The 20th century reparation efforts only receive a cursory treatment. The chapter mentions highly complicated debates only in passing, such as the relationship between amnesty and reparation (p. 245). This obfuscates rather than clarifies the debate about such sensitive subjects. It also affects her conclusions about the political nature of reparation efforts generally. The 20th century brought decisive developments for post-war reparations: The rise of human rights law gave birth to an individual right to reparation and several oversight mechanisms. Numerous international judgments and soft law documents deal with post-war reparations, most importantly the United Nation Basic Principles and Guidelines on the Right to a Remedy and Reparation. Arguably, this process situates contemporary post-war reparation efforts in a much denser normative and institutional environment, which could reign in political considerations. A more profound analysis of these developments would have allowed the author to engage more deeply with the political constraints of contemporary reparation efforts.

Musa's endeavor to use historical precedents for post-war reparation as role models for contemporary efforts is highly thought provoking. Yet, here again one wishes for a deeper analysis. The author mentions commissions and investment law as possible avenues to seek redress, without really engaging with the question how historical precedents could enrich them. A more detailed treatment is reserved for transnational litigation. Having admiralty courts in mind, the author advocates for the creation of a structure of transnational public law litigation. Ideally, domestic courts would directly apply international law on reparation and thereby provide a uniform forum for reparation claims (pp. 216 et seq., 231). Unfortunately, the author does not engage deeply with the many concerns over such a tort approach

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

to post-war reparations. The most common concerns are that a large number of highly complex cases could overwhelm courts and marginalized survivors usually face problems accessing the judicial system. Furthermore, disaggregating survivors into single cases can conceal structural causes of violations and antagonistic court proceedings can revictimize survivors. The author discusses the potential of class action suits to address some of those concerns (p. 225). Yet, in and of themselves, class action suits do not overcome those problems. Potential claimants must still receive information about the possibility to claim, have the resource to do so and procure hardly available evidence. The proceedings are still antagonistic and a wide variety of complex cases could still overwhelm a court system. It is not apparent how admiralty courts provide solutions to those problems either. Only a very limited circle of wealthy claimants with substantially similar grievances had standing before them. Therefore, the system did not face the danger of being overburdened and potential claimants had little problems with access.

These considerations do not speak against *Musa's* ideas as such. Alternatives to her suggestions, such as administrative reparation programs cannot always be implemented and face their own challenges. Given the scandalous implementation gap mentioned in the beginning, all potential avenues for redress must be analyzed. *Shavana Musa* shows that further research on the lesser-known historical precedents could be a very promising road to take. Her impressively comprehensive and detailed study provides the perfect start for such research. She provokes her readers to think along new lines and to consider ideas off the mainstream. This makes her book an important contribution to the field. Still, one needs to carefully think about how to use historic enforcement procedures so that they fit in the contemporary landscape. After reading the study, one wishes that the author will use her vast knowledge to build upon her ideas and elaborate on how exactly one can make use of the interesting historical precedents for post-war reparation she analyzed.

Fin-Jasper Langmack, Köln

http://www.zaoerv.de
© 2017, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht