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Book Reviews

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BOOK REVIEWS

THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS. Edited by R. Lillich. Charlottesville: Michie, 1981. Pp. xii, 164. *Reviewed by Stephen C. Hicks**

The articles in this book comprise the Proceedings of the Third Sokol Colloquium held at the University of Virginia in April 1979 to commemorate the International Year of the Child. The book is a handsome library edition of 150 pages with four chapters and a full index. Each of the chapters is written by a separate contributor and two of the articles already have appeared in print. The Proceedings have been published in book form to reach a wider audience, especially overseas. Four articles, however, do not make a book. Three of the articles concern children's rights and two of these present different perspectives on the Draft Convention on the Rights of the Child. The authors' different opinions about parental control and the best interest of the child remain independent. Neither of these two articles refers to the other. The third article describes the resolution of issues of the child's best interest by the United States courts in one class of cases. The first article in the book stands on its own, focusing on the validity of marriage. As a record of the Proceedings of the Sokol Colloquium, the book lacks the vitality of the event. It lacks the Proceedings' continuity and self-reflection through questions and comments. It is a pity that an introduction, an overview, or even a concluding essay was not added. Even so, the two longest articles successfully combine a good overview of current international efforts to protect children with a thorough discussion of the problems of current domestic family law. The book thus provides an excellent introduction to the area of children's rights in international law by discussing the problems that a nation such as the United States has in recognizing certain kinds of rights and that drafters of international conventions have in formulating statements of rights.

If this book has a message for students of international law, it

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is the problem of the process of creating common understanding and commitment in international relations. All the articles in the book testify to the conflict between national interest and international order, mediated as it is by the practical concern of politics. In the first article,[1] by Willis L.M. Reese, the author concludes that "adherence to the Convention may not be worth the trouble,"[2] because it will be inapplicable in most situations and because it will be troublesome when it does apply. For example, when the validity of a marriage is not incidental to another issue, such as succession, the United States would be required to recognize a marriage valid under the law of the state of celebration even if that marriage were incestuous under United States law and between domiciliaries who had gone abroad expressly to avoid United States law.[3] Therefore, the Convention should be adhered to, even for international appearances, only when the price of compromising the national interest in the sanctity of the domestic rules of marriage is not too great to pay. But there is more here than a conflict between two states with different conceptions of an incestuous marriage. An international agreement has value even if its application creates occasional conflicts of principle in the domestic forum. This seems illogical only if we think of national law as a system of rules organized by the sovereign authority of the state in a closed and logical way and if that model is applied to international law. On the other hand, if law is thought of as an open ended process in which shared values are articulated as legal rules that come into play when values conflict, then recognizing another nation's rules and rites of marriage through an international agreement promotes the tolerance and diversity which underlies all general principles of law, including reciprocal recognition of national sovereignty.

In the gradual process of the creation of international law, each nation must accomodate others, so that the product will represent its own values and principles. This is especially true when what is given up (such as certain requirements for the validity of mar-

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1. Reese, *The Hague Convention on Celebration and Recognition of the Validity of Marriages*, in THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS 1 (R. Lillich ed. 1981).

2. *Id.* at 17.

3. THE HAGUE CONVENTION ON CELEBRATION AND RECOGNITION OF THE VALIDITY OF MARRIAGES, arts. 9, 11, *opened for signature* Oct. 1, 1977, *reprinted in* 16 I.L.M. 18 (1977).

riages) does not threaten national sovereignty. The act of agreement reinforces the respect for differences that constitutes the basis of United States society and is the goal of international society. Where that respect is compromised by the subordination of one nation's rule to another nation's rule, then public policy can provide a way out,[4] so that if the incestuous marriage is incompatible with public policy it need not be recognized. This public policy exception shifts the actual differences back into the national forum, but the Convention at least provides a means for development of a jurisprudence of international marriage law from the principles and values upon which agreement is reached. This is surely worth the trouble. Further, because the Convention has been open for signature since 1977, we may assume it represents agreement, and that the development of international law is complete except for matters of form. This is very different from other areas of international politics where, for example, the actual nature of the family as a social institution is being examined. The contrast between this first article and the other three is between discussions of the expediency of ratification and the principled debate about fundamental values. Agreement is sometimes best expressed in general statements leaving room for independence and sometimes the issues seem so important that a binding agreement is called for, even though the need may be greatest in those areas with the most exaggerated differences. Agreement on children's rights, unlike agreement on requirements for a valid marriage, if it is to be realistic and more than a catalogue of welfare needs, must challenge a nation's determination of its family structure.

Richard E. Crouch, in his article entitled, *International Declaration/Convention Efforts and the Current Status of Children's Rights in the United States,*[5] warns against expedient adherence to the Draft Convention on the Rights of the Child[6] because it is too vague and because its language conflicts with certain provisions of the United States Constitution.[7] Harvey Schweitzer takes

4. *Id.* art. 14.

5. Crouch, *International Declaration/Convention Efforts and the Current Status of Children's Rights in the United States,* in THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS 19 (R. Lillich ed. 1981).

6. Draft Convention on the Rights of the Child, E.S.C. Res. 20, U.N. ESCOR, Supp. (No. 4) at 123, U.N. Doc. E/CN.4/1292 (1978).

7. Crouch, *supra* note 5, at 78, 81, 83.

a more critical approach in his article entitled, *A Children's Rights Convention—What is the United Nations Accomplishing?*[8] Schweitzer believes that the Convention may fragment the law of children's rights because of its failure to specify the effects of other existing international obligations upon children's rights. Both of these articles emphasize the difficulty of reaching international agreement when basic values remain in dispute or are unclear at a national level. The issue of children's rights is interesting because it involves not only the synthesis of national laws into an international agreement, but the development of new law. The point remains, however, that the creation of international law depends on the harmonization of individual systems of law either with an international system, so certain national interests are accomodated into overriding values, or with each other, so that equal respect is affirmed but accomodated by public policy. Mutuality, however, can arise only when the overriding values are so clear that their principled expression can be taken as a starting point. The fundamental problem in the area of children's rights is not so much differences of opinion about parental control, for example, but about the limits of the law. The privacy of the family confronts the very value of the law and the state. For, as Crouch notes, if children's rights are upheld in any redistribution of parental rights, then the state and its social agencies' role must expand at the expense of the privacy of the family.[9] The law as an agent of state control is limited in its usefulness. We may ask with Crouch whether the law can deal with an unloved child.[10]

The implicit danger is that the family may be undermined by the state's enforcement of children's rights to the extent of state relocations of children, state supervision of childrearing, and other totalitarian nightmares. If the conflicting interests of parental control and children's welfare are resolved by the criterion of the best interest of the child, then this danger is avoided by the presumption in favor of parental determination absent special conditions of neglect or mistreatment. The abuses of parental control, however, are what give rise to charters of children's rights. When put in this way, the conflict appears to be between

8. Schweitzer, *A Children's Rights Convention—What is the United Nations Accomplishing?*, in THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS 115 (R. Lillich ed. 1981).

9. Crouch, *supra* note 5, at 31.

10. *Id.* at 61.

parental proprietary interests in children and the autonomy of the individual child. The issue is not this simple. Others have proprietary interests, as Thomas E. Carbonneau points out in his article entitled, *Operation Babylift—The Dilemma Surrounding Child Custody Controversies.*[11] United States courts have reaffirmed the presumption in favor of the natural parent and have not considered the possibility that it may be in the best interests of the child to stay with the de facto psychological parent in the cases of children airlifted out of Vietnam in 1975. The great potential for abuse by the adoption industry if a presumption were given to the adopting parents over the natural parents is one reason for the strength of the contrary presumption.[12] The current meaning of the best interests of the child may be determined by accomodating competing interests of adults, but any judgment about the child's best interest that does more than take the child away from unsuitable parents and place the child with someone who can provide better care threatens to eliminate cultural diversity and alternative conceptions of socialization under the guise of protecting children's rights.

The concept of "rights" is more in question than the proper concepts of children's welfare, security, and needs.[13] The assumption that children do not have interests independent of the parents and that they are incapable of participating in decisions that affect them necessarily are confronted.[14] Placing parents' rights opposite children's rights forces a determination of the limits of the role of the law in family affairs. The premise of using the law to adjust the individual and social balance between parental control and the best interest of the child represents an erosion of the family; this is an erosion of one of the few effective barriers to the legislation of the whole of human existence. The fundamental interest underlying the value of the family is parental control. Only within the matrix of family privacy can the concept of children's rights make sense. Therefore, the general principle of law, in the sense referred to in article 38(1)(c) of the Statute of the Interna-

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11. Carbonneau, *Operation Babylift—The Dilemma Surrounding Child Custody Controversies,* in THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS 87 (R. Lillich ed. 1981).

12. *Id.* at 26, 112.

13. *Id.* at 30.

14. *Id.* at 117.

tional Court of Justice,[15] is that the child's best interest is served by respecting the decisions and choices of the natural parents absent special circumstances such as abuse or neglect. Given the great differences of opinion about the relative importance of parental control, children's best interests and family privacy, and given the unsatisfactory nature of the Draft Convention in light of these competing interests, the Convention represents a great achievement in international cooperation and agreement. The problems the contributors illuminate have less to do with national differences of opinion about particular rights, because, as with the Convention on Celebration and Recognition of Marriages, such differences can be accomodated by public policy exceptions. Rather, they have to do with the significance of an international right. It seems more conceptually accurate and practically feasible to realize that through this Convention, international law is seeking to express ideals of respect for all persons rather than minimum conditions of behavior and that the language of rights can give effect to only determinate conceptions of equality and liberty. To create rights for children without clear conceptions of the liberty of the family and its members and their respective equality will restrict the Convention to a pious entreaty.

The rights of children are neither absolute nor independent. To enshrine children's interests in the form of rights crystallizes the uneasy relationship between law and society. The most interesting aspect of this topic is that the compromises and accomodations of national law are brought into sharp focus by the demands of reaching international agreement. Children's rights are, fundamentally, duties that limit state interference with equality and liberty as much as parental control. Thus, the Convention would require its signatories to grant to the international legal system a part of their determination of the practical meaning of equality and liberty. The difficulty is this: although it makes sense to talk of international politics, there is no international society. Consequently the challenge facing a Convention on the Rights of the Child is to develop a definition of international law that balances the individual rights of parents and children with the international political duties of the state and relates the values of family life to international society. Meeting this challenge would take international law a long way toward transcending the polarity be-

15. 59 Stat. 1055, 1060, T.S. No. 993, 3 Bevans 1179, 1187.

tween citizen and state that is the impasse faced by the jurisprudence of common law countries today. The key concept is the family. The idea of law as a medium through which we express ourselves rather than as a system of constraints, imperatives, or norms offers a perspective for a new jurisprudence. How families are treated in law reveals how society treats itself, through its self-representation in politics and its self-reflection in ethics. The progress made by the international legal system gives hope for the respect for differences among states and the recognition that differences exist against a background of common interest in liberty and equality. The implications of this book, therefore, are very profound for the merging problems of the family in international law and are evidence of the deeper significance of the progress of international law today. Not enough attention is paid to such developments in international law. The University of Virginia is to be commended for its ambitious undertaking to combine national and international viewpoints in what often is considered a relatively unimportant area: family law.

TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-1978: AN ANNOTATED COMPILATION. By Grant F. Rhode and Reid E. Whitlock. Boulder, Colorado: Westview Press, 1980. Pp. ix, 207. $25.00. *Reviewed by David A. Elder**

The "joint communiqué" of January 1, 1979, between the People's Republic of China and the United States, granting reciprocal recognition and establishing diplomatic relations between the two countries, was an epochal event in modern international relations. It accorded full international stature to the People's Republic of China for the first time and nurtured a resurgence of interest in contacts with it at governmental, commercial, academic, and many other levels.[1] As the authors note, however, prior to the publication of their book, parties interested in interaction with the People's Republic of China had no readily available English language compilation of Chinese treaties with which to evaluate its treaty-making posture and practice. The authors' expressed "primary aim" is to rectify this deficiency in source materials by providing an accurate translation and complete listing of Chinese treaties (*t'iao yüeh*).[2] But the limited scope of the undertaking, with its acknowledged "conscious neglect"[3] of any attempt to analyze authoritatively the texts themselves, is likewise the most noteworthy deficiency, and produces occasionally superficial introductory essays and a cumbersome listing of duplicative treaty texts. As a result of the relative dearth of available materials on Chinese treaty practice, the compilation nevertheless serves a useful function and portends the advent of more definitive interpretations of the subject matter.

With this caveat regarding the coverage of this altogether too brief volume in mind, it perhaps will be beneficial to the potential reader to sketch in skeletal fashion the general contours of the book. The pre-eminent focus of the compilation is on *t'iao yüeh* (treaties), the hierarchically most important and formal interna-

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1. G. RHODE & R. WHITLOCK, TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-1978: AN ANNOTATED COMPILATION 202 (1980).
2. *Id.* at 207.
3. *Id.*

tional accord, and the use made of *t'iao yüeh* by the People's Republic of China in pursuit of its perceived foreign policy interests. Unfortunately, however, after listing uncritically and noncomparatively the other less important forms of international accords,[4] the authors discuss the nature of *t'iao yüeh* in only the most summary fashion. After noting the "somewhat difficult"[5] task of differentiating the *t'iao yüeh* from its lesser counterparts and referring to broad and similarly unhelpful criteria suggested by other commentators,[6] the authors tersely conclude that the denomination *t'iao yüeh* is "reserved primarily for application to documents of maximum importance, requiring maximum force and maximum binding."[7] The authors' failure to define this term leaves the reader wondering while he peruses the chapters dealing with specific categories of treaties.

The first chapter, "Friendship Treaties," includes the full texts of all eighteen extant treaties, the signatories of which are fellow socialist and Third World countries.[8] These vaguely worded treaties typically grant reciprocal acknowledgement of and respect for independence, sovereignty, and territorial integrity; stipulate the maintenance and development of peaceful relations; expressly provide for settlement of disputes between the contracting parties by pacific negotiations; and specify that the parties agree to strengthen their economic, cultural, and scientific ties. By far the most interesting of the friendship treaties is the earliest one, the 1950 accord with the Soviet Union. Imbued with an almost paranoid fear of a rejuvenated, militaristic Japan, the signatories "undertake not to conclude any alliance directed against the other High Contracting Party, and not to take part in any coalition or in actions or measures directed against the other High Contracting Party."[9] Although this treaty is "ignored in practice,"[10] it is still officially in effect despite the option to terminate it unilat-

4. *Id.* at 3.
5. *Id.*
6. *Id.*
7. *Id.* at 6.
8. The countries include the Soviet Union, East Germany, Czechoslovakia, Hungary, Burma, Nepal, Mongolia, Afghanistan, Guinea, Cambodia, Indonesia, North Korea, Ghana, the Republic of Yemen, the Congo (Brazzaville), Mali, and Tanzania. *Id.* at 12-14.
9. This is provided for in article 3 of the treaty. G. RHODE & R. WHITLOCK, *supra* note 1, at 16.
10. *Id.* at 10.

erally on February 14, 1980, by giving notice one year prior to its expiration.[11] Consequently, the automatic five year extension proviso became operative, which reflects the political judgment that, despite the aura of vitriol enveloping their relations, a total lapse of the treaty was inadvisable.

Chapter two, "Boundary Treaties," includes the full texts, replete with detailed and, occasionally, vividly descriptive[12] boundary designations, of the four negotiated boundary treaties[13] (*t'iao yüeh*) and the one agreement (*hsieh-ting*). The latter, concluded by Pakistan and the People's Republic of China, is of particular interest and evidences the negotiating prowess of the People's Republic of China. Relegated to the status of an agreement (*hsieh-ting*) because of the Pakistan-India dispute over the Kashmir area, which was stated to be under the "actual control" of Pakistan,[14] the accord nonetheless provides for the continued viability of the provisions in the event of eventual Pakistani success in settling its dispute with India: "[I]n the event of that sovereign authority being Pakistan, the provisions of the present Agreement and of the aforesaid Protocol shall be maintained in the formal Boundary Treaty to be signed between the People's Republic of China and Pakistan."[15]

The authors conclude that there are three categories of cases in which the People's Republic of China has not concluded boundary treaties. First, in the case of the former colonial preserves of Hong Kong and Macau, the People's Republic of China "perceives it as not in her own best interest" to negotiate treaties to replace the existing "unequal treaties," preferring to leave those entities in a "nebulous state of definition" which it can "exploit" as it "sees fit and possible."[16] Predicting that it is doubtful such treaties ever will be negotiated, the authors note the indefinite future of Hong Kong when the ninety-nine year lease included in the 1898 Convention expires in 1997.[17] Second, the authors suggest that Korea and Vietnam may be the next likely candidates

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11. *Id.* at 16.
12. *See id.* at 56-97.
13. The treaties were negotiated with Burma, Nepal, Mongolia, Pakistan, and Afghanistan. *Id.* at 54-55. For useful maps displaying relevant geography, see *id.* at 98-110 (included as addenda).
14. *Id.* at 52.
15. This quotation is contained in article 6 of the treaty. *Id.* at 97.
16. *Id.* at 52.
17. *Id.* at 49.

for formal boundary treaties, replacing the antiquated treaties with former imperial powers.[18] The third category, which the authors correctly predict to be the most difficult to resolve, includes China's northern and southern neighbors, the Soviet Union, and India. Of the two, the Soviet-Chinese border dispute is undoubtedly the more intractable because of the following factors: the length of the border; the inaccessibility of the terrain through which the border passes; the issue of the ethnic minorities in the area; the vagueness of existing treaties; the Soviet Union's adherence to and the Chinese dissatisfacton with the Czarist Imperial Dynasties' boundary treaties, which the Chinese consider "unequal"; and the present reciprocally polemic relationship between the two nations.[19]

Chapter three, "Treaties of Commerce and Navigation," includes the text of six treaties, four of which are with countries bordering the People's Republic of China.[20] Of the remaining two, the Sino-Yemeni treaty is undoubtedly the most interesting and is sui generis in Chinese treaty practice because of its explicit recognition of and unusual sensitivity to the economic, religious, cultural, and political realities of the Islamic state. On economic matters, this treaty provides that "[e]ach contracting party shall endeavor to reach a balance between the value of its exports to and the value of its imports from the other party."[21] According to the authors, this provision apparently is intended to avoid impairment of the delicate Yemeni economy.[22] Additionally, the contracting parties proscribed trade in "such commodities . . . prohibited for sale and purchase by the laws and decrees in force by the religious rules of either contracting party," provided for strict observance by natural and corporate persons of "the local laws and regulations in force," mandated respect for the "religious and social customs and habits in the territory of the other party," and pledged nonintervention in the "internal affairs" of the country of residence by its nationals.[23]

Chapter four, "Consular Treaties," includes the texts of the

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18. *Id.* at 53.
19. *Id.*
20. The countries are the Soviet Union, Mongolia, North Korea, and Vietnam. The remaining noncontiguous countries are Yemen and Albania. *Id.* at 119-47.
21. *Id.* at 121 (quoting article 9 of the treaty).
22. *Id.* at 113.
23. *Id.* at 120 (quoting articles 5 & 7 of the treaty).

three similar treaties entered into during an eighteen month period in 1959 and 1960.[24] The authors frankly acknowledge that they are "at a loss"[25] to explain the rationale for the selection of the three countries[26] and the use of *t'iao yüeh* instead of the more common informal arrangements. Paralleling their treatment of similarly interesting issues elsewhere, the authors blithely conclude that they will "leave the solution to this problem for others."[27]

The authors' frustrating policy of listing lengthy treaty texts with only the most perfunctory introductory essays continues in chapter five, "Treaty of Dual Nationality," in which the interesting Sino-Indonesian *t'iao yüeh* is preceded by a singularly un-illuminating and terse two paragraph statement. In this statement the authors merely tantalize the reader by referring to correspondence prior to and subsequent to the conclusion of the treaty which "sheds tremendous light"[28] on the concerns of the contracting parties. There is no attempt to give the reader any insight into why Indonesia summarily and unilaterally terminated the treaty in 1969 despite a specific provision precluding such an action.[29]

The last two chapters are undoubtedly the most interesting sections of the compilation, though they deviate significantly from the prior focus on *t'iao yüeh.* Chapter Six, "China and Japan," includes the text of the 1972 "Joint Statement" between the People's Republic of China and Japan, in which the latter made a remarkable public obeisance, stating, on bended knee, that it was "keenly aware" of its "responsibility for causing enormous damages in the past to the Chinese people through war," and that Japan "deeply reproaches itself" for such militaristic malfeasance.[30] In terminating the preexisting "abnormal state of affairs," Japan accorded recognition to the People's Republic of China as "the sole legal government of China," and stated that it "fully understands and respects" the Chinese position that Taiwan constitutes "an inalienable part of the territory of the Peo-

24. *Id.* at 151-68.
25. *Id.* at 148.
26. The countries are the Soviet Union, East Germany, and Czechoslovakia. *Id.* at 151-68.
27. *Id.* at 149.
28. *Id.* at 169.
29. *Id.*
30. *Id.* at 178.

ple's Republic of China."[31] Japan did not, however, abnegate its prior purely hortatory stand that Taiwan should be, not is, part of the People's Republic of China.[32] China reciprocated by repudiating its prior demand for war indemnities from Japan.[33] After reestablishing diplomatic relations, providing for expeditious exchange of ambassadors, referring to the broad boilerplate principles of peaceful coexistence, promising respect for sovereignty and nonintervention in internal affairs and agreeing to settle disputes "by peaceful means without resorting to the use or threat of force," the two governments declared that neither "should seek hegemony in the Asia-Pacific region and each country is opposed to efforts by any other country or group of countries to establish such hegemony."[34] The final undertaking of the 1972 "Joint Statement," aimed at "conclusion of a treaty of peace and friendship,"[35] culminated in the 1978 "Treaty of Peace and Friendship," which affirmed that the precursor document "should be strictly observed."[36] Its most significant provision, the reiteration of the antihegemony stance contained in the 1972 "Joint Statement," is noteworthy for its extension of the precatory disavowal to "any other region."[37]

Chapter seven, "China and the United States," includes a haphazardly written and poorly organized prefatory essay and a collection of the joint communiqués and statements that constitute the legal milieu within which Sino-United States relations have been "normalized." The "Shanghai Communiqué," issued at the end of President Nixon's historic trip to China, is by far the most interesting item in the collection. Setting forth its broad geopolitical concerns, including its interest in extricating itself from the quagmire in Vietnam, the United States emphasized its belief that "the effort to reduce tensions is served by improving communication between countries that have different ideologies so as to

31. *Id.* at 178-79.

32. In the "Joint Statement" Japan refers to its adherence to the "Potsdam Proclamation," which, in the words of the authors, had "endorsed the Cairo statement," to the effect that Taiwan "ought" to be part of China. *Id.* at 177. Unfortunately, the authors provide no citation for the "Cairo statement," paralleling their looseness, in this respect, throughout the compilation.

33. *Id.* at 179.

34. *Id.*

35. *See id.*

36. *Id.* at 183.

37. *Id.* at 184 (quoting article 2 of the treaty).

lessen the risks of confrontation through accident, miscalculation or misunderstanding."[38] In this vein, it "stressed that the peoples of Indochina should be allowed to determine their destiny without outside intervention" and stated that its "constant primary objective had been a negotiated solution."[39] Similarly, the Chinese "candidly" asserted their view that liberation and revolution are "the irresistible trend of history," that all nations are "equal" and that "big nations should not bully the small and strong nations should not bully the weak."[40] Furthermore, China stated that it eschewed status as a superpower and "opposes hegemony and power politics of any kind"; that "the people of all countries have the right to choose their social systems according to their own wishes and the right to safeguard the independence, sovereignty and territorial integrity of their own countries and oppose foreign aggression, interference, control and subversion"; that "[a]ll foreign troops should be withdrawn to their own countries"; that it firmly supports the right of the peoples of Southeast Asia and Korea to self-determination.[41] Agreeing that the countries have "essential differences . . . in their social systems and foreign policies,"[42] the two countries promised to apply the principles of "peaceful coexistence" in their "mutual relations" and concluded that "normalization" of Sino-United States relations was in their mutual interest and in the interest of world peace; that both "wish to reduce the danger of international military conflict"; that "neither should seek hegemony in the Asia-Pacific region"; that both opposed "efforts by any other country or group [of] countries to establish such hegemony"; that it is against the interests of all nations for "any major country to collude with another against other countries" or to "divide the world into spheres of interest."[43]

China reaffirmed its traditional position that Taiwan is the "crucial question" impeding normal relations with the United States, stated that the People's Republic of China is the sole legal government of China, claimed that "liberation of Taiwan" is exclusively a Chinese matter, and asserted that all United States

38. *Id.* at 197.
39. *Id.* at 198.
40. *Id.*
41. *Id.* at 198-99.
42. *Id.* at 199.
43. *Id.*

forces "must be withdrawn from Taiwan."[44] It declared further that it "firmly opposes" any semblance of a "two China" policy or any position espousing the view that the "status of Taiwan remains to be determined."[45] The United States, in response, declared that it does not challenge the position of both mainland China and Taiwan that there is only "one China" and Taiwan is an integral part of it. The United States "reaffirms its interest in a peaceful settlement" of the Taiwan issue by the Chinese peoples, endorsed the "ultimate objective" of withdrawal of all United States forces and installations from Taiwan, and undertook to "progressively reduce" the United States presence "as the tension in the area diminishes."[46]

The final three documents regarding Sino-United States "normalizaton," listed for some reason in reverse chronological order, are the United States "Statement" of December 15, 1978, the Chinese "Statement" of the following day, and the "Joint Communiqué" of January 1, 1979. The latter accorded reciprocal recognition and established diplomatic relations from that date forward. The United States formally recognized the Government of the People's republic of China as the "sole legal Government of China." The Communiqué provided, however, that "[w]ithin this context the *people* of the United States will maintain cultural, commercial, and other unofficial relations with the *people* of Taiwan."[47] It is noteworthy that the United States "Statement" terminating diplomatic relations with and obligations to Taiwan and declaring that it "will be withdrawing" the remaining military personnel within four months[48] was made without any formal, written assurance from the People's Republic of China that the Taiwan controversy would be settled without the use of force. The United States merely noted that it was "confident that the people of Taiwan face a peaceful and prosperous future" and stated that it continued "to have an interest" in its peaceful resolution and expects the conflict to "be settled peacefully by the Chinese themselves."[49] The Chinese "Statement" of the following day, December 16, 1978, clearly and unequivocally concluded that

44. *Id.* at 199-200.
45. *Id.*
46. *Id.* at 200.
47. *Id.* at 202 (emphasis added).
48. *Id.* at 204.
49. *Id.*

"[a]s for the way of bringing Taiwan back to the embrace of the motherland and reunifying the country, it is entirely China's internal affair."[50] The latter, viewed in conjunction with the "sole legal Government of China" language of the "Joint Communiqué," evidences that, whatever verbal assurances may have been given regarding "peaceful resolution" of the thorny Taiwan issue, the People's Republic of China left itself substantial flexibility under the public statements and communiqués contained in this compilation.

As this synthesis of the topics in the sourcebook amply demonstrates, the authors have provided the reader with a wealth of potentially useful information. It is unfortunate, however, that the authors rarely discuss the treaties and other international agreements in sufficient depth. They regularly nullify the utility of texts included by providing brief or superficial background information. Three other features of the book likewise warrant critical note. First, magnifying the self-proclaimed absence of intent to interpret the texts authoritatively, the authors provide precious little in the way of collateral sources or suggested additional reading to enable the reader to analyze the texts intelligently. Also, even where the authors do provide reasonably helpful factual information, they rarely cite to source authority. The net result is a frustrating lack of direction for one interested in pursuing the topic in greater depth. Second, in terms of style, the authors' translations often are awkward, though perhaps this is attributable to the phraseology of the original language. Third, there are numerous spelling errors and sentence fragments in the commentaries to and texts of the treaties themselves; the authors' writing style often borders on being counterproductive.

The reviewer's conclusion is that the book may provide a useful research tool to China scholars and may be of significant utility to readers with sufficient expertise generally in Chinese affairs. Nevertheless, this book has noteworthy substantive deficiencies that make it of only marginal usefulness to the relatively untutored reader who desires additional information or who hopes to develop expertise in the area of Chinese treaty-making practice.

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50. *Id.* at 203.

STATE AND DIPLOMATIC IMMUNITY. By Charles Lewis. London: Lloyd's Press of London, Ltd., 1980. Pp. xv, 135. 16f. *Reviewed by Edward A. Laing**

State or sovereign immunity law is a fascinating field in which to study the classification techniques of the legal profession worldwide, the apparently widely differing legal methodologies of the civil and common law "worlds," and the national attitudes about the relationship between the international and national legal systems and their bodies of law.

Quot homines, tot sententiae: suo quoque mos, said the Roman writer Terence. This, in the translation of Lord Denning, the English Master of the Rolls,[1] means "so many men, so many opinions: his own a law to each."[2] The statement probably epitomizes the phenomenon of judgments which serve the cause which one represents. It probably also highlights the interminable nightmare for honest lawyers: the difficulty of fitting facts into preordained molds or of extrapolating from apparently diverse facts the appropriate descriptive or prescriptive systems of classification. This problem is illustrated vividly and sometimes amusingly by decisions about state immunity. Most jurisdictions in the world today fit state immunity questions into a somewhat crude classification matrix comprised of two elements. The restrictive theory of state immunity is based on the Latin dichotomy of *acta imperii* and *acta gestionis,* which are translated roughly as acts or transactions in the exercise of sovereign authority[3] and acts or transactions not in the exercise of sovereign authority and essentially identical or similar to acts of an ordinary citizen. It is thought by some[4] that juridical acts or transactions can be fitted under one or the other of these two labels. Consequently, state immunity will be accorded to acts labelled *acta imperii* but not to acts labelled *acta gestionis.* Judges, however, have had notorious

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1. As such, he presides over the Court of Appeal.
2. C. LEWIS, STATE AND DIPLOMATIC IMMUNITY 87 (1980) (quoting The I Congreso del Partido, [1980] 1 Lloyd's Rep. 23, 30).
3. *Id.* at 7.
4. *Id.* at 80.

problems applying the labels, often coming to different conclusions about the same facts. Lewis illustrates the problem by stating that in France, a contract to supply cigarettes to the Vietnamese army and, in the United States, a contract for the purchase of army boots, have been held to be sovereign acts, but, in Italy, a contract for the purchase of army boots has been held to be *actum gestionis*.[5]

These judgmental problems stem from the excessive breadth of the classification dichotomy. Efforts to refine these abstract Latinized labels, however, have not been overwhelmingly successful. This is evidenced by the somewhat half-baked, but quite popular, attempt by the United States Court of Appeals for the Second Circuit to tabulate what "*jure imperii*" includes.[6] One might ask, for instance, whether the purchase of cigarettes for the armed forces or whether, in a civil law country, the administrative act of riot control, during which plaintiff is injured due to a malicious act, are exclusively or dominantly sovereign acts. There is a similar degree of imprecision in the legislative formulation introduced by the United States Foreign Sovereign Immunities Act of 1976,[7] which departs from the ground-breaking Tate letter of 1952[8] in one important respect. In the Tate letter, the Department of State announced its adherence to the restrictive theory of state immunity as a new executive policy of the United States and its adoption of the dichotomy of sovereign and non-sovereign private acts. The Tate letter's formulation of the dichotomy had long been articulated in civil law countries, where it originated, because the civil law system categorizes all legal acts and transactions either as private or as public, which is the equivalent of sovereign. The 1976 Act follows cases[9] purporting to implement the

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5. *Id.*

6. Victory Transport v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964). The court listed:

(1) internal administrative acts, such as expulsion of an alien;
(2) legislative acts, such as nationalization;
(3) acts concerning the armed forces;
(4) acts concerning diplomatic activity, and
(5) public loans

Id.

7. 28 U.S.C. § 1330 (1976).

8. The Tate letter was written by the Acting Legal Adviser to the Department of State, Jack B. Tate. *See* 26 DEP'T ST. BULL. 984 (1952).

9. *E.g.*, *Victory Transport*, 336 F.2d 354.

Tate letter's policy, but it articulates a dichotomy of public acts and *commercial* acts. Because conceptually and in practice, commercial law and activity are a relatively small subspecies of the generic class of private law and activity, it might be concluded that, at least at the level of theory, the formulation of the 1976 Act and the cases on which it is based is not entirely successful.

The classification problem in part highlights facially significant differences between the approach to legal reasoning used in civil and common law systems. The common law's empirical inductive approach has contributed to a piecemeal approach to the classification of legal phenomena. The legal system pressures decisionmakers to force juridical facts into myriad watertight rules, which are the crystallization of allegedly distinguishable fact patterns. When that is unsuccessful, the system invents new watertight rules of black letter law.[10] The inherent instability of such a method is shored up by the doctrine of binding precedent, which is a testimonial to the belief that in empiricism there is certainty. A rigid precedential system, however, easily can be the handmaiden of inflexible and irrelevant norms. This is what happened in England after 1880, when the Court of Appeal, in *The Parlement Belge*,[11] misread previous authority, which was reasonably consistent with the restrictive theory of state immunity, and adopted the absolute theory.[12] This theory got entrenched by the strict, inductive doctrine of *stare decisis*. Until the 1978 English Act, the strongest attack on the absolute theory by a purely English court[13] was pressed in *Trendtex Trading Corp. v. Central Bank of Nigeria*,[14] where one of the grounds for deciding that the defendant bank was not immune from suit was the *acta gestionis* formulation of the restrictive theory. Unfortunately, because the case apparently was settled, the House of Lords never got the op-

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10. This is probably what the judge was trying to do in *Victory Transport*.

11. 5 P.D. 197 (1880).

12. *See* C. LEWIS, *supra* note 2, at 10-15.

13. The ground-breaking case of The Philippine Admiral (Owners) v. Whallen Shipping (Hong Kong), Ltd., 1977 A.C. 373 (P.C.) (holding that the absolute theory of state immunity excluded actions in rem regarding state-owned ships) is not an exception. That case was decided by the Judicial Committee of the Privy Council, largely composed of judges of the House of Lords, the highest English Court, but sitting as a purely Commonwealth Court in a case from Hong Kong.

14. [1977] 1 All E.R. 881.

portunity to rule definitively on the *Trendtex* decision.[15]

By way of comparison, one probable reason why most civil law countries firmly adopted the restrictive theory long before the common law countries did is their open approach to legal reasoning, which actively operates with relatively broad norms, compared with the tight jurisprudential and statutory formulations popular in common law countries, and relies on progressive and evolutionary interpretative methodologies.[16] These flexible methodologies have not been found in common law jurisdictions, where judges at times pursue a "sturdy independence, not to say insularity," as Lewis says[17] when discussing an English judge's refusal to adopt "the Continental approach to statutory construction."[18]

It would be interesting to discover the extent to which the persistence of dualism[19] in the foreign relations law of the United Kingdom[20] helped to entrench the absolute theory. It might be that subconscious perceptions that the universal popularity of the restrictive theory and its probable validity as a normative reality of universal international law might have set the English judiciary against altering the precedent-based absolute theory of state immunity. Always an iconoclast, however, Lord Denning in the *Trendtex* case[21] undertook to turn his back on the obvious *de facto* dualism of the approach of the English courts to the question of the relations between the international legal system and the English legal system. Following dicta saying that "the Law of Nations in its full extent [is] part of the law of England,"[22] he concluded that the domestic law of other countries and other evidence of international law demonstrates that the theory was man-

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15. C. LEWIS, *supra* note 2, at 22.

16. For a recent discussion, see Laing, *International Economic Law & Public Order in the Age of Equality,* 12 L. & POL. INT'L BUS. 727, 745-48 (1980).

17. C. LEWIS, *supra* note 2, at 80-81.

18. *Id.* Lord Wilberforce was the presiding judge in James Buchanan & Co. v. Babco Forwarding & Shipping Co. 1978 A.C. 141 (P.C.).

19. For a discussion of the theory that international law and the international legal system are not, per se, part of the national corpus juris and legal system or, that the national corpus juris and legal system are subsets of international law and the international legal system, see 1 D. O'CONNELL, INTERNATIONAL LAW 56-61 (2d ed. 1970).

20. And, for that matter, of the United States.

21. [1977] 1 All E.R. 881.

22. *See, e.g.,* Triquet v. Bath, [1764] 3 Burr. 1478, 1481 (citation omitted). Lord Denning's view was shared by one of the other two judges deciding the case, namely Shaw, L.J. *See Trendtex,* [1977] 1 All E.R. at 908-09.

dated by universal customary international law, which, by virtue of the doctrine of incorporation (an aspect of monism), was a part of the English body of law.

Although Lewis' book contains materials which are relevant to the matters discussed so far in this review, he does not engage in detailed discussion of them. Instead, his task is to summarize the 1978 statute and the common law on state immunity together with two statutes on diplomatic privileges and consular immunities[23] in a manner which apparently is intended for the practicing English bar.[24] This somewhat limits the appeal of the book to foreign readers and is regrettable because foreign states and their non-English legal advisers presumably are the primary consumers of a work on state immunity. Nevertheless, the book provides some important insights into the statutes and the common law which are useful because: (1) the common law still governs pre-1978 acts; (2) transactions will be used as a backdrop for interpreting the 1978 Act; and (3) the common law remains the living law in many members of the Commonwealth that follow the English common law and have not yet enacted new state immunity statutes. This book's utility is heightened by its brief discussion of a number of important facts. Some form of an English restrictive theory probably preceded the adoption of the absolute theory[25] late in the nineteenth century.[26] There are several exceptions to the absolute theory, the most important of which probably is state non-immunity with respect to real property, trust funds, and debts for services to state property situated in England.[27] Finally, the new Act, which adopts a basic rule of immunity subject to stated exceptions, now imposes the burden of disproving immunity on the plaintiff.[28] For those who did not already know it, the approach of the 1978 Act follows the 1972 European Convention on State Immunity on which it is based and states some exceptions to immunity which are not clearly articulated in the 1976 United States Act. These exceptions apply to

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23. *See infra* note 42.

24. This is evidenced by his discussion of the procedural aspects of the 1978 Act in chapter 9 and his mention of the so-called "Mareva" orders on page 23. He refers to English Supreme Court rules and procedures without proffering an explanation for non-English readers.

25. C. LEWIS, *supra* note 2, at 13.

26. *Id.* at 15.

27. *Id.* at 16-24, 34.

28. *Id.* at 25.

contracts of employment,[29] state membership of private corporations incorporated in or with their principal places of business in the United Kingdom,[30] and matters related to industrial or intellectual intangible property registered or protected in the United Kingdom.[31]

Lewis' discussion of doctrine is very limited, and in fact, rather lame for one who was a "quondam Open Scholar at Oriel College, Oxford." Therefore, rather than being synthesized or analyzed, cases are summarized in fine print replete with quotations. One must concede that there is some utility in this because the non-English reader, for whom the book apparently was not intended, gets access to some of the decided cases. For example, Lewis summarizes the *I Congreso del Partido* case,[32] which discusses the question of whether the defendant Cuban state corporation, when sued for breach of contract in connection with what was clearly *acta gestionis,* could claim the defense of state immunity by asserting that the act which gave rise to the breach was an act of sovereign authority pursuant to the high public policy of the Cuban Government in the realm of foreign relations.[33] The majority of the Court of Appeal accepted the defendant's contention.[34] Lord Denning, however, correctly dissented, pointing out that the majority's conclusion was tantamount to applying the universally discarded methodology of assessing state immunity claims by analyzing the subjective *purpose* of the act rather than its inherent and objective nature.[35]

In addition to the problems with its presentation of materials, especially cases and doctrine, there are quite a number of flaws in Lewis' book. In several places it fails to cite or demonstrate that

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29. *Id.* at 39-42.

30. *Id.* at 47.

31. *Id.* at 48.

32. *See id.* at 87.

33. A Cuban state enterprise had breached its contract to deliver sugar to a Chilean company, because of the Cuban Government's displeasure with the right wing coup which displaced the Marxist Chilean Government of President Salvador Allende. Cuba's displeasure also led it to sever diplomatic relations with Chile.

34. *See id.* at 83-86. One might, perhaps facetiously, query whether the court's decision was influenced by the name of the ship, the translation of which is "The First Congress of the [Communist, *semble*] Party."

35. *Id.* at 86-88.

the writer consulted authority.[36] There are several errors[37] and some statements are vague or difficult to comprehend.[38] Finally, there are awkward parenthetical phrases reminiscent of prolix legal drafting.[39] On the other hand, this reviewer is unsure how to react to statements like

> The State Immunity Act . . . brought the law of the United Kingdom into line with that of most other civilized countries. Judicial activism had sought to bend the cripple-gaited common law back upon itself so that it should reflect the views of yesteryear, but the labour pains of the new doctrine were prolonged and disquieting to witness. Nor had they yet produced a healthy child, whose survival was assured (for an account of these travails see Chapter 3).[40]
> The theoretical basis of the rule of sovereign immunity can be traced to a time when most States were ruled by personal sovereigns who, in a very real sense, personified the State (*"L'Etat, c'est moi"*). In time the diplomat's immunity came to be based on a formal view of the rightful demands of a king or other head of State. Even after the demise of the doctrine of the Divine Right of Kings and its last exponent, at least its last explicit one, on the block at Whitehall some three hundred and thirty years ago, kings and gov-

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36. For example, its assertion that the "doctrine of sovereign immunity found its earliest manifestation in the protection afforded to diplomatic agents," *id.* at 11 is undocumented; later, Lewis poses the questionable proposition that § 5 of the 1978 Act (denying immunity in actions relating to certain torts taking place in the United Kingdom is similar to a "provision in [a] United States statute [which] has been used to support an action by the wife of the former Chilean ambassador in respect of his alleged murder in Washington by agents of the new Chilean Government," *id.* at 43. In fact the correct analogy is not with the Long Arm statute probably relied on in the *Letelier* case, but with § 1605(5) of the Foreign Sovereign Immunities Act (1976). A running summary of eight leading cases on the immunity of states with respect to their ships "is based on the Privy Council's judgment in The Philippine Admiral . . .," *id.* at 52-56; and the citation of several French cases. *Id.* at 93, 95.

37. An example is the assertion that in the case of The Philippine Admiral, the Privy Council reaffirmed "the absolute rule" of immunity for actions in rem when actually in personam is more appropriate. *Id.* at 20.

38. For example, after stating that the immunity of states grew out of personal immunity of sovereigns, *see id.* at 1, the assertion is made that "[i]t seemed a natural extension at the time, though now, with the enthusiastic participation of governments in the commercial arena, and the proliferation of State-organized or State-controlled enterprises, the considerations that arise on the immunity of States seem a far cry from those relevant to a sovereign's personal immunity." *See also id.* at 2, 23 (reference to "a Mareva injunction").

39. *See id.* at 1, 3.

40. *Id.* at 6-7.

ernments have felt that the law should accord them special treatment.[41]

At least one must say that readers of Lewis' book will find more than statutory summary and exegesis.[42]

41. *Id.* at 11-12.

42. This is essentially what the book does in its last three chapters, which concern the Diplomatic Privileges Act of 1964 and the Consular Relations Act of 1968.