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Book Reviews

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BOOK REVIEWS

THE NEW NATIONALISM AND THE USE OF COMMON SPACES: ISSUES IN MARINE POLLUTION AND THE EXPLOITATION OF ANTARCTICA. Edited by J. Charney. Totowa, New Jersey: Allenheld Osmun, 1982. Pp. ix, 343.

*Reviewed by Horace B. Robertson, Jr.**

Jonathan Charney, editor of *The New Nationalism and the Use of Common Spaces: Issues in Marine Pollution and the Exploitation of Antarctica*,[1] has combined a series of essays addressing two diverse subjects, pollution of the oceans and Antarctica, into one volume. These subjects are related only by his conclusion that "[b]oth have traditionally been considered common spaces beyond national jurisdiction."[2] As discussed in the essays on Antarctica, one of the most difficult issues concerning this continent is whether it is, or will become, a common space beyond national jurisdiction. In fact, nothing in the book suggests that any of those states having territorial claims in Antarctica intend to relinquish their claims in favor of a regime that would create or confirm Antarctica as a common space.

There is a greater sense of unity in this book than is apparent from a casual glance at its contents. Marine pollution affects all areas of the oceans—those within national boundaries (internal waters and the territorial sea), those outside national boundaries but within areas subject to special coastal state jurisdiction or control (contiguous zone, exclusive economic zone, and continental shelf), and those beyond national jurisdiction (high seas). Pollution of the marine environment can also emanate from a variety

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1. THE NEW NATIONALISM AND THE USE OF COMMON SPACES: ISSUES IN MARINE POLLUTION AND THE EXPLOITATION OF ANTARCTICA (J. Charney ed. 1982) [hereinafter cited as USE OF COMMON SPACES].

2. *Id.* at 1.

of sources: land-based runoff (from land and rivers, dumping, airborne particulates), offshore petroleum production, ocean transportation (operational discharges and marine disasters), natural seepage of petroleum from the seabed, and, prospectively, exploitation of the deep seabed. The international community's attempts to deal with the problem of ocean pollution therefore must include those areas of the oceans that are subject to territorial or jurisdictional claims as well as those that are truly "common spaces." The success or failure of methods adopted may afford some timely lessons for the international community in grappling with the issues to be faced in Antarctica.

The contributors to this volume, all acknowledged experts in their fields, bring a depth of knowledge and experience to the subjects discussed and to the solutions for some of the seemingly intractable problems proposed. Although not every reader, including this reviewer, will agree with all of their suggestions, the arguments are carefully reasoned, well documented, and persuasively argued.

Part One of *The New Nationalism* contains four chapters dealing with marine pollution. The author of the first, Jan Schneider, aptly subtitled the chapter on prevention of pollution from ships, "Don't Give Up the Ship."[3] She describes the efforts of the world community within the past thirty years in "groping toward" an "effective compromise"[4] that adequately protects and preserves the marine environment without crippling international shipping or making it prohibitively expensive.

Ms. Schneider identifies two strategies present in these international efforts. The first strategy is the negotiation of agreements that focus primarily on crude oil, the largest but not the most dangerous pollutant of the oceans. The second is the development of an overall framework for the preservation of the marine environment in the context of the "umbrella treaty" of the third United Nations Conference on the Law of the Sea.

The large number of multilateral treaties, regional agreements, voluntary agreements among operators, and national laws directed at the problem of oil pollution, catalogued in the text,[5] suggest that impressive progress has been made since the adoption of the 1954 Convention for the Prevention of Pollution of the

3. *Id.* at 7.
4. *Id.*
5. *Id.* at 9.

Seas by Oil,[6] the landmark agreement that initiated worldwide efforts to protect the ocean environment. These developments coupled with the 1982 adoption of the "umbrella treaty," the United Nations Convention on the Law of the Sea, indicate that the international community has done more than merely "grope toward" a solution to ocean pollution. Schneider, however, is not so sanguine. She points out a number of problems that either have not been considered or have been papered over by ambiguous or meaningless language. The most significant of these problems[7] is that many important states are not parties to the relevant agreements; in fact, some agreements have so few signatory states that they have not yet come into force.

Although Ms. Schneider states that a workable balance has not been achieved because environmentalists have so little power compared to that of larger commercial interests, she concludes her chapter with a note of optimism: "there has been some impressive development of international maritime law toward a viable regime, taking better account of environmental variables and considerations."[8]

The remaining three chapters of Part One treat land-based pollution. Although oil spills have received a great deal of publicity in the past several decades, land-based pollution deserves this greater attention and emphasis. It is the most toxic to the marine environment and, except for petroleum, accounts for almost all oceanic pollution. "Perhaps the most intractable conflict between nationalism and the marine environment is found in the area of land-based sources of marine pollution."[9]

William Whipple, Jr. addresses two discrete subjects in his chapter on land-based pollution.[10] The first half of his chapter

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6. Convention for the Prevention of Pollution of the Seas by Oil, May 12, 1954, 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3.

7. Among those problems singled out are: (1) the continued lax enforcement of "flags of convenience" shipping, (2) the excessive deference to coastal state sovereignty in the territorial sea, (3) the merely hortatory language of the U.N. Convention, (4) the ambiguity of terms such as "generally accepted" or "applicable" rules, (5) the operation of the International Maritime Organization (IMO) as a "ship-owner's club", and (6) the ineffectiveness of the UNEP. USE OF COMMON SPACES, *supra* note 1, at 19-22.

8. *Id.* at 22.

9. *Id.* at 29.

10. Whipple, *Land-Based Sources of Marine Pollution and National Controls*, in *id.* at 29.

presents an overview of land-based pollution, including its effects on the oceanic ecological system. He also gives some perspective to the doomsday data cited occasionally by strident environmentalists and dispels some of the popular misconceptions about the effect of pollutants.[11] He disagrees with earlier projections of the Club of Rome and others that the marine environment was headed rapidly for disaster, but emphasizes that the data on the effects of pollutants on the oceans is too incomplete to evaluate the future threat.

The second half of the chapter surveys national pollution control programs. Whipple gives the highest marks to the Ruhr Valley program of the Federal Republic of Germany. Although the Ruhr region is the center of heavy industry, the entire Ruhr River remains suitable for fishing and swimming. The lowest marks among the European states surveyed are given to France. This country's reliance on atomic energy for electric power and the siting of most nuclear reactors on the coast have led to the discharge of huge quantities of waste heat and substantial radiation directly into the sea, "a large part of it in the rather confined waters of the British Channel."[12]

Although the United States is commended for its volume of effort, in Whipple's view its program is not cost-efficient and its efforts are misdirected in some cases. For example, the use of chlorination to make all waters swimmable and fishable may actually harm the oceans.[13]

Programs to protect the ocean environment are nonexistent in most of the underdeveloped world. The main problem is a local one—the procurement of safe drinking water. For the present, the absence of programs poses no threat to the oceans. Except for localized pollution in confined areas, toxic pollution of the oceans is a function of industrial development. Less developed countries do not pollute in proportion to their populations.

Whipple concludes by listing the priorities for controlling marine pollution. In his view, national and regional programs

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11. General Whipple posits that, from the point of view of the oceanic systems as a whole, the effects of organic pollutants or pathogenic bacteria (originating in raw sewage, for example) should not be a cause for concern even though harm to the local area may ensue. *Id.* at 46. Some substances, especially nutrients from agricultural runoff, although harmful to inland streams, may actually benefit oceanic ecosystems. *Id.* at 31.

12. *Id.* at 56.

13. *Id.* at 51, 61.

should have priority over global programs. Global efforts should be limited to a few key programs, such as oil pollution and nuclear weapons testing. He places data-gathering and scientific research on the effects of oceanic pollution ahead of any other efforts.

In chapter three, Judith Kildow discusses the enormously complex political and economic dimensions of land-based sources of pollution.[14] Not only do nations and individuals disagree on the choice of priorities between pollution control and other economic activities, there is no recognized database upon which they can base the choice. The source of funding, particularly in the developing nations, is also a key problem. Kildow attempts to ascertain the political and economic constraints that can be overcome and the types of solutions that can be implemented to control land-based sources of pollution.

Kildow identifies as a significant political problem the consensus among nations that standards for ameliorating land-based source pollution should be set at the national level. National governments are subject to the pressures of local constituencies which generally give low priority to a clean environment in relation to other goals such as development. Requiring industries to absorb the costs of pollution control could severely affect the economics of a firm, an industry, or even a nation.

The insistence of the developing states, as manifested at UNCLOS III and other forums, on a double standard has stymied the establishment of international pollution-control standards. Their major priority is development; until they attain economic parity with the developed states, the developing countries desire to have the same freedom to pollute the environment that the developed states had during their period of industrialization. Some multinational corporations knowingly or unknowingly reinforce this disregard for the environment by locating, for economic reasons, in areas where environmental restrictions are the weakest.

In spite of these difficulties, Kildow manages to see a future for improved environmental regimes for the oceans. She notes that some progress in regional and functional areas has been made in those states that are more homogeneous or have some readily identifiable common interest. She also suggests that the increas-

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14. Kildow, *Political and Economic Dimensions of Land-Based Sources of Marine Pollution*, in *id.* at 68.

ing use of the oceans, particularly by developing nations, may heighten an awareness of marine pollution and act as the impetus for environmental protection measures.

The final chapter in Part One, examining the legal aspects of land-based sources of marine pollution, was written by Robert J. McManus.[15] McManus reiterates, to some extent, many of the same themes treated in the two previous chapters.[16] In his view, the first task is to assign responsibility for various types of pollution to the appropriate political level: global, regional, or domestic.

In his assessment of the current legal climate, McManus takes a more optimistic view than Kildow with respect to states' attitudes toward international standards for land-based sources of pollution. He suggests that nations will deepen their commitment to creating international standards. For support, he points to Article 207 of the 1982 United Nations Convention on the Law of the Sea and a number of regional conventions by which nations "have at least attempted to expand on general principles of their environmental responsibility, and have attempted to deal specifically with land-based sources."[17]

McManus develops three "theoretically sound" strategies to combat "the real problem" of land-based pollution.[18] In making his argument, however, he first assumes away perhaps the two most intractable problems: the lack of appropriate scientific data and political and economic factors.[19] Because neither McManus nor any of the other authors provide evidence that either of these obstacles is likely to be overcome in the near future, his proposed strategies may be, he admits, "politically unrealistic, if not down-

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15. McManus, *Legal Aspects of Land-Based Sources of Marine Pollution*, in *id.* at 90. McManus is a former director of the Oceans Division, Office of International Activities, United States Environmental Protection Agency and an alternate United States representative to UNCLOS III.

16. *Id.* at 91.

17. *Id.* at 94.

18. *Id.* at 98.

19. He states:

> If then, marine scientific research were to provide us with reliable and relevant information . . . , and if, moreover, the community of nations were to discover previously untapped reserves of the political will needed to submerge notions of sovereignty in furtherance of a common goal, it would still be necessary to fashion the legal mechanisms needed to direct the control strategy agreed upon.

Id.

right utopian."[20] Nevertheless, several of his suggestions merit serious attention. McManus postulates three strategies that have both advantages and disadvantages: (1) a regulatory approach; (2) a liability approach; and (3) a mixed approach combining the first and second in an infinite number of combinations.

The regulatory approach, within which the government is the main actor, is enormously complex, burdensome, and expensive, and ignores market forces to a large extent.[21] Within the liability approach, however, private parties are the main actors; the government's role is limited to providing forums and upholding fundamental notions of procedural fairness. The problems with the liability approach include the inaccessibility of data to private litigants, the measurement of damages to individuals, and the litigants' transaction costs exceeding the benefits of pursuing litigation. The example of oil pollution from ships demonstrates the operation of the mixed approach. A pure liability approach would not work to rectify oily waste damage inasmuch as the harm might be too small to justify the effort of private litigation. For massive oil spills, however, the IMO system relies in part upon a liability approach. Because land-based pollution usually occurs incrementally, similar to the oily waste from ships, and most of the ocean uses that would suffer from such pollution involve diffuse economic interests, McManus concludes that a regulatory approach would have to be adopted.

McManus therefore suggests fairly modest goals for international regulation of land-based pollution. He would concentrate on only a few highly toxic and persistent pollutants, thereby avoiding the problems engendered by United States statutes that attempt to regulate all sources of water pollution without regard to their relative importance.

In Part Two, the authors shift their geographical focus from the oceans to the fragile and hostile continent of Antarctica, focusing on resource development and exploitation rather than the protection of the environment. Each writer also attempts to address the effects of resource development on the Antarctic environment.

Part Two is the more interesting and provocative section of the book. It is functionally complete and explores a gamut of issues concerning Antarctica that the international community will con-

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20. *Id.* at 107.

21. This regulatory approach is epitomized by the United States environmental laws. *Id.* at 99.

front over the next several decades. Except for a textual analysis of the Convention on Living Resources, which comprises chapter nine,[22] the authors consider a very uncertain and speculative subject and rely upon even more fragmentary and uncertain data than that concerning the oceans. In addition, the crucial issues of sovereignty and jurisdiction are less settled and more controversial in this area. Even more than in Part One, the prevailing refrain among the authors of Part Two is the inadequacy of scientific data.

In chapter five,[23] Professor James H. Zumberge, one of the leading scientific authorities on Antarctica, provides a comprehensive overview of potential mineral resource availability in the Antarctic and a tentative appraisal of the environmental problems that might result from the extraction of these resources. Zumberge describes Antarctica as a "polar desert,"[24] whose principal living resources are found in the sea. Some of these resources have already been exploited for more than a century. Commercial whaling has reduced some species to near extinction, and until its termination in the 1930s, sealing had drastically diminished the seal population.

Krill and fin fish are currently perceived as the unexploited but exploitable living resources of the region. Zumberge predicts that their harvesting will grow markedly as a world market for krill develops and as distant water fishermen are excluded from 200-mile exclusive economic zones. Because krill forms an important link in a relatively short food chain (phytoplankton-krill-whales/seals/penguins), the potential for major marine environmental changes appears great. Zumberge, however, does not address this issue.[25]

The bulk of Zumberge's discourse appraises the presence of mineral resources on the Antarctic continent and surrounding seabed, their potential exploitability, and the impact of their ex-

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22. Barnes, *The Emerging Convention on the Conservation of Antarctic Marine Living Resources*, in *id.* at 239.

23. Zumberge, *Potential Mineral Resource Availability and Possible Environment Problems in Antarctica*, in *id.* at 115.

24. *Id.* at 120.

25. Zumberge's orientation is focused almost exclusively on the effects of mineral resource exploration of the seabed. A discussion of the marine food chain and Antarctica is presented in James Barnes' chapter covering the Convention on the Conservation of Antarctic Marine Living Resources, in *id.* at 239-42.

ploitation on the land and marine environments. While recognizing that only two percent of the land surface has been observed directly, Zumberge concludes that exploitation is unlikely in the foreseeable future, and perhaps forever. The costs of extraction are prohibitive in comparison with other parts of the world where the same resources are found in similar concentrations. On the other hand, hydrocarbons within the continental shelves of Western Antarctica may be commercially exploitable. Ferromanganese nodules, present on the deep seabeds of the oceans surrounding Antarctica, are unlikely to be recovered because they occur in greater abundance in other parts of the ocean.

Because the possibility that land-mineral resources can be exploited is practically nonexistent, Zumberge sees the development of the hydrocarbon resources of the continental shelf as the principal risk to the environment. The dangers will come from support stations on the land and the risk of blowouts in drilling operations. He concludes his chapter, as do most authors in this section, with a plea for more research.

Economist Giulio Pontecorvo analyzes the fragmented scientific and economic data on Antarctica's land-mineral resources to illustrate that market forces alone will not lead to commercial exploitation for a very long time, if ever.[26] On the other hand, the exploitation of the living resources of the area is immediately viable. Should a market for krill develop, there are few economic or technological constraints on the supply side to prevent commercial operations. Pontecorvo recognizes, however, that politics may ignore economics. As he points out, in the law of the sea negotiations "economic fantasy was . . . political reality."[27]

Except possibly in the area of whales, the cruel paradox of Antarctica is that there is inadequate information to assess the possibility and effects of exploitation of any resource, and there is no economic activity to lend support to the enormous cost of acquiring the information. Pontecorvo can only suggest leveling a tax, supplemented by the direct imposition of fees on Antarctic treaty members, on the existing operations of krill and whale fisheries to create a research fund.

In the following chapter,[28] devoted to the present legal and po-

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26. Pontecorvo, *The Economics of the Resources of Antarctica*, in *id.* at 155.
27. *Id.* at 163.
28. Bilder, *The Present Legal and Political Situation in Antarctica*, in *id.* at 167.

litical situation in Antarctica, Professor Bilder reminds us that the current treaty on Antarctica[29] is a product of the cooperation that developed between those states conducting scientific activities on the continent during the 1957-58 International Geophysical Year. The original twelve parties have expanded to twenty-five by accessions to the treaty, but only the "twelve" (plus two others who subsequently joined this select group) are entitled to attend the Consultative Meetings at which most of the important issues affecting Antarctica are addressed. Other parties to the treaty as well as nonparties have appeared satisfied with deferring to the Consultative Parties within this two-tier system while the principal interest in the Antarctic has been scientific research. Article IV of the treaty, which has also worked well until the present, reserves and suspends any preexisting territorial claims of the treaty parties and prevents activities during the life of the treaty from serving as a basis for asserting, supporting, or denying a claim.

The possible economic exploitation of the resources of the continent—even if only a gleam in the eye of the wildest dreamer—has introduced a new dimension. The treaty addresses neither the search for, nor the ownership and the exploitation of, mineral resources. The relative tranquility that has characterized relations between nations with respect to the Antarctic probably cannot continue. The competing pressures from those states with preexisting and potential territorial claims and those states that proclaim the New International Economic Order and the Common Heritage of Mankind may bring about a new regime. Bilder explores the implications of each of these factors on Antarctic resource ownership. He appraises various theories that might be applied to such resources as well as their implications for the protection of the environment.

Bilder cannot predict which of the alternative regimes may emerge due to the absence of any settled international law and the variety of positions nations may take. He suggests, however, that the treaty parties having primary interest in the region will be the moving force in creating a new regime for the control of its resources and the protection of its environment. Although territorial claims and the problem of nonparties will create serious obstacles to negotiations, Bilder predicts that the treaty parties will

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29. Antarctica Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

cope with these problems and with any ideological issues arising from the New International Economic Order and the Common Heritage of Mankind. As evidence of their intention and commitment to overcome these problems, the treaty parties recommended in their Eleventh Consultative Meeting in 1981 that a special consultative meeting be held to establish a regime on exploration for and exploitation of Antarctic mineral resources.

Jonathan Charney has written the book's most difficult chapter, *Future Strategies for an Antarctic Mineral Resource Regime—Can the Environment Be Protected?*[30] He uses the technical, scientific, economic, and legal analyses presented in the earlier chapters to develop several possible scenarios for the creation of an Antarctic mineral regime. Charney weighs the merits and problems of each scenario and gauges the likelihood that one of them might emerge. Like the other authors, he recognizes that early exploitation of continental minerals is unlikely (with the possible exception of hydrocarbon deposits on the continental shelf). He also realizes that noneconomic factors may impel the international community to consider some sort of treaty regime. He notes the scheduling of negotiations on a mineral resource regime for a Special Consultative Session of the Antarctic Treaty in 1982,[31] but cautions at the outset that "alternatives outside that process must also be considered."[32] His analysis thus takes account of initiatives outside the treaty framework, such as that which occurred with respect to the seabed in the law of the sea negotiations.

Charney suggests three basic scenarios: (1) a multilateral, universal approach; (2) a unilateral approach; and (3) a limited multilateral approach. Each poses significant risks and drawbacks. Although the multilateral, universal approach, using either existing organs or a new ad hoc conference modeled along the lines of UNCLOS III, has the capacity to create a resources regime, Charney views the UNCLOS experience as a discouraging precedent. Nevertheless, because Charney believes that a universal approach to Antarctica may be within the agenda of the Group of 77, this mode may be forced on others.

A unilateral mode would "rely on the traditional initiatives of individual nations or groups of nations, outside any formal nego-

30. USE OF COMMON SPACES, *supra* note 1, at 206.
31. These negotiations were held after this book went to press.
32. *Id.* at 207.

tiation process."[33] Although the Antarctic Treaty umbrella might conceivably remain under this approach, the most likely occurrence would be the assertion, or reassertion in the case of claimant states, of territorial claims. While territorial claims would probably foster exploitation of resources and theoretically would not be hostile to the protection of the environment, the unilateral approach would create instability, potentially result in militarization, and certainly impede the freedom of scientific research that has existed under the Treaty.

Charney believes the limited multilateral mode is most likely to ensue. He notes that the treaty parties have already taken this approach and that their experience in dealing with each other on Antarctic issues gives them a better opportunity to resolve conflicts. Although increased economic interests might intensify the conflicts between claimant and nonclaimant states, the treaty parties could mitigate the conflicts more easily than a larger group. The principal problem with the limited multilateral approach is ensuring legitimacy for the solution ultimately adopted by only a small number of states. The current actions of the Consultative Parties in this direction, in Charney's view, appear to be dangerous and unnecessary—dangerous in the sense of alerting the nonparty states to a process in which they might wish to participate, and unnecessary because exploitation of the mineral resources of Antarctica seems technologically and economically infeasible for the foreseeable future.

Charney believes the best course is for the treaty states to adopt a limited regime to manage only *exploration* activities. In the absence of a technological breakthrough, these are the only activities that are likely to occur within the next twenty years. Once this regime obtains international legitimacy, the parties can move incrementally to an exploitation regime.

Following Charney's essay, the final chapter of the book, *The Emerging Convention on the Conservation of Antarctic Marine Living Resources: An Attempt to Meet the New Realities of Resource Exploitation in the Southern Ocean*,[34] by James Barnes,[35] may seem anticlimactic, but in reality is the capstone of Part Two of the book. It provides a detailed account of treaty negotiations

33. *Id.* at 221.

34. *Id.* at 239.

35. Barnes is an attorney with the International Project of the Center for Law and Social Policy in Washington, D.C.

during which the Antarctic Treaty parties first addressed some of the key issues that must be confronted as a mineral-resource regime is created. Although Barnes points out a number of weaknesses in the resulting treaty (for example, the lack of compulsory dispute-settlement procedures, the toothless position of science, and the reliance on flag-state enforcement), it is remarkable that the negotiators were able to agree at all. The claims issue was by far the most intractable problem addressed; at stake were the rights of claimant states in the living resources of their putative exclusive economic zones and rights in any potential mineral resources of the continental shelf. The negotiators reached a consensus only through the adoption of a "bifocal" approach in which claimants and nonclaimants are allowed "to interpret the same language differently regarding a claimant's *right* to exercise coastal state jurisdiction off the continent and islands south of 60°S."[36] As Barnes points out, the regime could collapse under this arrangement unless the parties exercise restraint.

In light of the instabilities apparent in the foundations of the Living Resources Treaty, Barnes proposes an entirely new regime. The area south of 60°S would be declared a common heritage area, to be managed initially in trust by the Antarctic Treaty Parties and eventually by a broader group of states. Barnes acknowledges that this would require the renunciation of any territorial claims by claimant and nonclaimant states and the breaking up of the Antarctic "club." He does not view the proposal as totally utopian, however. Spitzbergen provides a precedent for this type of regime, and the Antarctic parties regard themselves as trustees for management of the regions. The proposal is also consistent with the trend of recent international thought, particularly the New International Economic Order. Barnes does not recommend a new effort along the lines of UNCLOS III and, in fact, thinks there would be few proponents for such an approach given the experience of that endeavor. He proposes instead, at least initially, action within the Antarctic Treaty framework with a gradual broadening of participation by other states.

> The principal difficulty with Barnes' proposal, which he acknowledges, is to convince states to renounce existing or potential territorial claims in the Antarctic. Nationalism does not yield readily to pleas for the common good. The conflict between Argentina and

36. *Id.* at 265.

> Great Britain emphasizes that national pride and prestige play a significant role in the behavior of nations. Although one can agree with Barnes' proposition that the recently completed Treaty on Living Resources papers over several of the key obstacles to an effective resource regime for the Antarctic, it is hard to believe that a better solution can be found given current international differences.

Appraising Charney's book is a difficult task. As suggested at the outset, this is really two books, one on pollution of the marine environment and one on the Antarctic. Although there are a few common threads, the principal one being the unanimous plea for more research and data, the authors, excepting Charney in his introduction, have not attempted to tie the two areas together. Within each part, and especially within Part One, the chapters appear to be more in the nature of individual essays. In Part Two, Charney has structured a comprehensive and coherent discussion of the current issues concerning the development of the resources of Antarctica and the protection of its environment.

Despite the excellence of the individual essays, the coverage of marine pollution, limited to pollution from vessel and land-based sources, is substantially incomplete. Although the latter topic receives fairly extensive coverage in three chapters, the former receives only a one-chapter discussion. Aside from incidental mention in the vessel-source and land-based chapters, the book overlooks the dangers of pollution from drilling operations on the continental shelf and the potential problems from exploitation of the deep seabed.

Nevertheless, *The New Nationalism and the Use of Common Spaces* is a worthwhile book. The essayists garnered by Professor Charney are first-rate and preeminent in their fields. They bring keen insights to long-standing and seemingly intractable problems. After a difficult and lengthy negotiation on the law of the sea, the international community has created an "umbrella" regime for protection of the marine environment. Some of the detailed framework needed under that "umbrella" is already in place, particularly with respect to vessel-source pollution. As the chapters of Part One emphasize, these existing arrangements form only an incomplete and imperfect beginning. Much remains to be done and the international community cannot be content to rest on its oars.

With respect to the Antarctic, however, the situation is entirely different. Not only is the environment much more fragile, the en-

tire international community has just begun to think about the problems of development and protection of its environment. Although the broader international community may be content to leave the management of Antarctica to the treaty parties, there are stirrings to suggest that the Group of 77 may have Antarctica on its agenda.[37] Whatever develops, it is time that thoughtful scholars address some of the difficult issues that stand in the way of a regime that will promote peaceful use of Antarctica for the benefit of all mankind. Part Two of *The New Nationalism* provides a good beginning for that effort.

37. *See, e.g., Statement of Prime Minister Mahathir of Malaysia Before the United Nations General Assembly*, U.N. MONTHLY CHRON., Dec. 1982, at 18 (proposing that land areas such as Antarctica should be administered by the United Nations or claimant states as trustees for the world).

LAW AND INFLATION. By Keith S. Rosenn. Philadelphia: University of Pennsylvania Press, 1982. Pp. xxxix, 451.

*Reviewed by W. David Slawson**

Keith S. Rosenn's *Law and Inflation*[1] is an excellent treatment of virtually everything a lawyer should know about inflation, both as a private practitioner and as a social planner. A lawyer should consult this book if his practice encompasses anything that may have future monetary consequences, including wills and trusts, corporate organizations, long-term contracts, leases and options, collective-bargaining contracts, and pension plans. Although *Law and Inflation* has no serious faults, it does contain some misleading extraneous material.

The first chapter purports to explain the causes and cures of inflation and to assess the probability that inflation will continue in the future.[2] It would take much more than a chapter to explain adequately the causes and cures of inflation, especially because no underlying consensus exists. This chapter includes summary statements and criticisms of different theories on the causes and cures of inflation. As the criticisms make clear, none of the theories is satisfactory, and thus the reader is left without the promised explanations and also without any basis to judge which theory, if any, approximates a true explanation. The author bases his predictions about the likelihood of future inflation[3] on the expected continuation of the conditions posited by the various theories as the causes of inflation, after explaining why these theories are unsatisfactory.

The only part of the first chapter that is relevant to the book's purpose is the prediction of the likelihood of future inflation. This prediction could have been more brief, more understandable, and more accurate by simply stating that because no consensus has been formed on the causes and cures of inflation, the societal problems leading to inflation are likely to continue or to recur.

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1. K. ROSENN, LAW AND INFLATION (1982).
2. *Id.* at 3.
3. *Id.* at 15-16.

We probably will see more inflation precisely because we do not know, or at least do not agree upon, the causes or cures for inflation. The author gets himself into the same type of logical confusion again in the last chapter.[4] He sets out to answer the question whether indexing contributes to inflation. He argues that indexing does because this process contributes to the conditions deemed to cause inflation under the theoretical perspectives he earlier refuted.[5]

In the Preface, the author describes the first three chapters as merely introductory.[6] He is too modest; the second and third chapters provide essential information. The second treats the various measures of inflation, including the consumer price index[7] and the gross national product deflator.[8] An attorney should have a basic understanding of the strengths, weaknesses, and general uses of these measures because many of the devices used to hedge against inflation in drafted instruments will be referenced to one or more of them. Chapter Two provides this understanding.

The third chapter, entitled "The Value of Money for Legal Purposes,"[9] is the most interesting chapter of the book. It provides a useful history of the numerous attempts by various governments to create or maintain a currency—a "money"—that will meet their most urgent needs at the time. As the author clearly explains, the dilemma is that these governmental needs are not always consistent with the needs of private citizens for a stable means of exchange and a reliable store for savings and investment.[10] This short summary illustrates that a nation's currency, like its other institutions, cannot always be all things to all people. The third chapter should be read especially by those inclined to agree with the theorists currently advocating a return to the gold standard, or some version of it. Gold-backing, no more than anything else, is not a cure-all for the ills that beset a currency.

In the 1930s, the United States Government and the United States Supreme Court made some instructive decisions on the subject of the legal value of money, the significance of which

4. *Id.* at 371.
5. *Id.* at 404.
6. *Id.* at xxxviii.
7. *Id.* at 21.
8. *Id.* at 26.
9. *Id.* at 36.
10. *See id.* at 40-51.

Rosenn seems to have overlooked.[11] During his first term of office, President Franklin D. Roosevelt sought to raise prices by lowering the amount of gold that could be obtained from redeeming the dollar. His proposal was based on the theory that the value of a paper currency is determined by the amounts of precious metal for which it can be redeemed. If the gold value of the dollar were decreased, the value that people generally placed on the dollar would be decreased. Sellers supposedly would demand more dollars for their goods and buyers supposedly would be willing to spend their dollars more freely. If prices rose, moreover, business profits would increase, businesses would expand, unemployment would decrease, and the Great Depression would be alleviated and possibly ended.[12] Of course, nothing of the sort happened. The only discernible effects were some newspaper headlines. Prices and profits continued to decrease and unemployment continued to increase.[13] This result serves as a lesson that the amount of precious metal for which a paper currency can be redeemed has little to do with the value people place on the currency, at least in a modern economy.

Many of the bonds outstanding during the 1930s were government or privately issued "gold bonds"[14] which included clauses giving the holder an option to take payment at maturity either in dollars or in the gold-equivalent in effect when the bond was issued. If gold devaluation had gone as intended, these clauses would have had their intended effects. The bondholders would have been able to maintain the purchasing power of their investments by electing the gold payment option. If permitted to exercise their gold options, the bondholders would have reaped a windfall of approximately sixty-seven percent[15] at the expense of

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11. *But see id.* at 50 n.77 (Rosenn briefly alludes to the facts).

12. J. GALBRAITH, MONEY: WHENCE IT CAME, WHERE IT WENT 209-13 (1975); C. KINDLEBERGER, THE WORLD IN DEPRESSION, 1929-39 at 15 (1973).

13. C. KINDLEBERGER, *supra* note 12, at 15.

14. The total amount held in government and private bonds was estimated to be about 75 billion dollars—the equivalent of almost a trillion dollars at today's dollar value and today's national population. *See* Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 313 (1935); UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1982-83, tables 2, 744, at 6, 452 (1982) [hereinafter cited as STATISTICAL ABSTRACT]; UNITED STATES DEP'T OF COMMERCE, THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 210 (1976).

15. The gold equivalent of the dollar had been reduced by approximately

businesses, the government, and ultimately the taxpayer. The gold devaluation of the dollar, however, did not have its intended effects.

Congress enacted legislation that eliminated the honoring of the gold payment options in the government bonds and prohibited the honoring of the options in the private bonds. The Supreme Court upheld both parts of the legislation on the grounds that the bondholders could show no damages, but noted that the government's refusal to honor its own contractual obligations was unconstitutional. The Court reasoned that the government could have exercised its acknowledged power over the currency to force the bondholders to exchange their gold for current legal tender.[16]

The outcome for the bond holders shows that the literal enforcement of a contract will not always be just or in line with the intentions manifested by the parties. The incident also underscores the difficulty of knowing in advance how to protect the value of a future payment. Should the bondholders have been offered a clause providing for payment with a cost-of-living adjustment? If these clauses are included in debt obligations, must they be workable in both directions? Could creditors be given their options without converting the contracts into unenforceable gambling contracts?[17] Rosenn treats such problems in later chapters.

Chapter Eight treats the subject of value maintenance in the international arena.[18] Value maintenance concerns currency exchange-rate fluctuations that result from, among other things, differences in the inflation rates of different countries. As Rosenn points out, one can be perfectly protected against the value changes associated with inflation rates and still be subject to the downward value changes from any inflation common to the relevant countries. A person engaged in international business transactions in a period of general inflation must protect himself from *both* exchange rate changes and inflation common to the countries within which his business is transacted.

This chapter is divided into two parts. The first part discusses the methods that have evolved to protect payment obligations

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40%. A bondholder paid in gold, therefore, would profit to the extent of: 100/(100-40) - 1 = .67. *Cf.* Perry v. United States, 294 U.S. 330, 354-56 (1935).

16. *See id.* at 353, 354-58; Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 305-15 (1935); J. MURRAY, MURRAY ON CONTRACTS § 202 (2d ed. 1974).

17. *Cf. id.* § 338.

18. K. ROSENN, *supra* note 1, at 267.

from exchange rate changes. The second part treats the laws of different countries that govern the evaluation of damages awards when the plaintiff and defendant are in different countries. The chapter presents a very understandable and very complete survey of the problems of international currency exchange rates and the methods developed to protect obligations from fluctuations. It is similar to a good short course in business tax law for the business lawyer who is not a tax expert. Enough information is discussed to allow the business lawyer to spot problems and to recognize when an expert should be consulted.

Except for the last chapter, the remaining chapters of the book are a comprehensive, well-documented description and analysis of practically every aspect of the law that is affected by inflation. In each situation, the treatment includes legislation dealing with inflation (for example, indexing of social security systems), judicial decisions taking inflation into account (the indexing of damage awards), and private arrangements considering inflation (for example, indexing long-term leases to private organizations for payment of residential construction costs). Each situation is given a comparative law treatment. The reader is sure to find ideas dealing with almost any inflation-related problem, together with the author's analyses of their strengths and weaknesses.

These chapters do not address the effect of inflation on specific performance decrees. The inflationary impact can pose serious problems, especially if inflation is accompanied by lengthy procedures or court congestion. A buyer under a land contract who refuses to take the property at the contract date can effectively avoid performance or damage liability if inflation is not taken into account because by the time a specific performance decree can be issued, the real value of the contract price will be reduced by inflation to the point that the seller will no longer want to sell the land. If, on the other hand, the seller refuses to convey the land on the contract date, the buyer can obtain the property at a highly profitable, lower price by the time the court orders conveyance. In a court system that ignores inflation as a variable in specific performance, therefore, land contracts are effectively converted into buyers' options and sellers are punished for failing to convey at the buyer's option.[19]

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19. *See generally* Note, *Alleviating Hardship Arising from Inflation and Court Congestion: Toward the Use of the Conditional Specific Performance Decree*, 56 S. CAL. L. REV. 795 (1983).

In the last chapter, the author examines indexing under each of its possible applications. In addition, he discusses whether indexing is an overall good because it eases the impact of inflation (an "inflationary anesthesia") or an overall evil because it aggravates inflation (an "inflationary adrenaline"). His descriptions of indexing problems are at a very high level of comprehensiveness and quality. His analyses, however, are considerably weaker.

Rosenn fails to acknowledge that no indexing scheme can eliminate the inflationary profits available to those who increase prices and wages because a time lag exists between a price increase and the scheme's ability to implement the compensating wage and salary increases. To the extent this time lag is shortened, the inflationary effects of the indexing system are increased so that even one small price increase would cause infinite inflation in a fully comprehensive and instantly effective indexing system.[20]

The chief fault of this last chapter, however, is its failure to appreciate that some scheme of indexing, despite its dangers, is an absolute necessity in some situations. Old-age support or assistance schemes that guarantee future payments of fixed amounts are simply worthless and fraudulent because they lead the unsophisticated to think they are getting something that they are not. Most employees today start paying into pension plans within a year or two after they start working. An average inflation rate of only five percent per annum will eliminate more than ninety percent of the real value of any fixed sums that they are promised at age sixty-five. Their employers, however, will have the use of their money during the period prior to the payment of benefits at no cost while the money still has some value. Some form of indexing also is essential for long-term leases, supply contracts, and any other arrangement contemplating payments far into the future.

For the lawyer seeking guidance on how to avoid the pitfalls of inflation in litigation or in drafting long-term instruments, *Law and Inflation* is indispensable. Nothing else in print provides such a comprehensive, understandable, and interesting treatment. This is a book that should be in every sizeable law office library and that also can be taken home for an enjoyable evening's reading.

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20. W. SLAWSON, THE NEW INFLATION: THE COLLAPSE OF FREE MARKETS 340-41 (1981).

CANADIAN CRIMINAL LAW: INTERNATIONAL AND TRANSNATIONAL ASPECTS. By S.A. Williams and J.G. Castell. Toronto: Butterworth's, 1981. Pp. 513. $80.00.

*Reviewed by Don Stuart**

A unique feature of international legal research is the vast range and inaccessibility of international legal sources. The impressive *Canadian Criminal Law: International and Transnational Aspects* is an excellent source for the research of most aspects of international criminal law from a Canadian perspective.

The breadth of the book's coverage is both daunting and enlightening to those, like the reviewer, who have criminal law experience but little background in international law. The authors cover both international criminal law *stricto sensu*, which includes international offenses such as aggression, war crimes, genocide, and piracy, and "transnational" law, which involves the application of domestic Canadian criminal law to international matters. The book is divided into three major parts. The first part comprehensively treats the subject of jurisdiction and details the five general principles or bases of jurisdictional claims: territory, active nationality, passive nationality, protection, and universality.[1] The authors carefully consider each basis with insight that extends far beyond narrow Canadian parochialism. In addition, full-range discussions of more specialized topics such as the twelve-mile territorial sea rule, fishing and pollution zones, the doctrine of hot pursuit, and the extraterritorial application of Canadian laws in the areas of unfair competition, restraint of trade, and foreign investment are provided in this section. In Part Two, the authors examine a wide range of specific criminal offenses, including exotic offenses concerning foreign enlistment, submarine cables, violations of export restrictions, and traffic in cultural property. The final, more eclectic, section of the book deals with "Mutual Assistance in Criminal Matters"[2] and consid-

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1. S. WILLIAMS & J. CASTELL, CANADIAN CRIMINAL LAW: INTERNATIONAL AND TRANSNATIONAL ASPECTS 10 (1981).

2. *Id.* at 315.

ers foreign government cooperation in processing the international aspects of a domestic Canadian criminal trial, extradition and rendition, recognition and enforcement of foreign penal laws and judgments, and international criminal police cooperation.

The coverage of *Canadian Criminal Law* has one major lacuna: the important arena of international human rights. Canada acceded to the United Nations International Covenant on Civil and Political Rights[3] on May 19, 1976. Although article 2 of the Covenant obligates Canada to adopt measures giving effect to the rights recognized in the Covenant, no Canadian legislation addressing these rights has appeared or is forthcoming. As a result, the status of the Covenant as part of Canadian domestic law is disputed.[4] It is clear, however, that Canadian courts can use the Covenant to interpret ambiguous domestic laws. The Covenant also was used as a model for a Charter of Rights and Freedoms[5] in the Canadian Constitution. Writers[6] and judges[7] have urged a resort to Canada's international human rights obligations in interpreting the Charter. This reviewer hopes that this serious omission will be rectified in the next edition of *Canadian Criminal Law*. The authors' failure to consider the civil rights dimension noticeably detracts from their coverage of several topics. The section on the transfer of offenders pursuant to treaty obligations between Canada and other countries,[8] for example, provides a clear introduction and immediate access to otherwise obscure law, but lacks discussion of the civil rights dimensions.

The depth of coverage in this pioneer work is uneven. The

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3. 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A16316 (entered into force Mar. 23, 1976).

4. *Compare* DEPARTMENT OF THE SECRETARY OF STATE, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: REPORT OF CANADA ON IMPLEMENTATION OF THE PROVISIONS OF THE COVENANT 3 (1979), *with* Claydon, *The Application of International Rights Law by Canadian Courts*, 30 BUFFALO L. REV. 727 (1981).

5. S. WILLIAMS & J. CASTELL, *supra* note 1, at 88-90.

6. *See* Claydon, *The New Constitution and Charter of Rights*, 4 SUP. CT. L. REV. 287 (1982); Cohen & Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CAN. BAR. REV. 265 (1983); Ewaschuk, *The Charter: An Overview of Rights and Remedies*, 26 C.R.3d 54 (1982); Tarnopolsky, *A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights*, 8 QUEEN'S L.J. 211 (1983).

7. R. v. Cameron, 29 C.R.3d 73 (Alta. Q.B. 1982) (McDonald, J.); Mitchell v. Attorney General of Ontario, 35 C.R.3d 225 (Ont. S.C. 1983) (Linden, J.).

8. S. WILLIAMS & J. CASTELL, *supra* note 1, at 434-69.

presentation of the central, major topics such as jurisdiction and extradition is clear, detailed, and insightful. References to primary and secondary sources in these areas are conscientiously complete. Unfortunately, the coverage of other topics is quite inadequate. The four-page chapter, "Double Jeopardy," for example, purports to introduce the principles of double jeopardy in domestic Canadian criminal law, but the treatment is not comprehensive enough to sustain this claim.[9]

In several areas of the book, alternative perspectives and views differing from those expressed by the authors are presented. In the section dealing with jurisdiction,[10] the authors favorably consider the Criminal Code[11] provisions that assert Canadian jurisdiction over any conspiracy to commit an offense outside Canada occurring in Canada, or any conspiracy to commit an offense in Canada occurring outside Canada. They express disappointment, moreover, that similar jurisdictional provisions do not cover the other inchoate crimes of attempt and incitement. The contrasting position, however, views the Canadian jurisdiction provisions as too far-reaching, even in the case of conspiracy. Proponents of this view contend that asserting jurisdiction is appropriate only when some *act* connected with the conspiracy is *actually performed in Canada.* This is the position taken by the House of Lords in *D.P.P. v. Doot.*[12] The authors present an informative discussion on the doctrine of diplomatic immunity,[13] explaining it as "based on reciprocity of treatment."[14] The authors, nevertheless, are not receptive to this controversial doctrine and do not consider whether it should be extended to cover all types of crimes or infractions.

With the benefit of hindsight, the chapter on "War Crimes"[15] is unduly cautious. The authors conclude that the extradition of Nazi war criminals residing in Canada would be "difficult, if not impossible." A suspected Nazi war criminal, Albert Helmut Rauca, was extradited to the Federal Republic of Germany from Canada on May 20, 1983. Rauca argued that as a naturalized Ca-

9. *See id.* at 432-35.
10. *Id.* at 88-90.
11. *See* CAN. REV. STAT. ch. C-34, § 423 (1970).
12. 1973 A.C. 807 (H.L.).
13. S. WILLIAMS & J. CASTELL, *supra* note 1, at 149-54.
14. *Id.* at 149.
15. *Id.* at 163-78.

nadian citizen he was entitled to remain in Canada under the Canadian Charter of Rights and Freedoms. The courts[16] dismissed this plea, concluding extradition was a reasonable limitation demonstrably justified in a free and democratic society, within the meaning of section 1 of the Charter.[17] Although the authors conclude that it would be "difficult, if not impossible"[18] to prosecute such alleged war criminals in Canada, the War Crimes Act,[19] the Geneva Conventions Act,[20] or special, new retrospective legislation are reasonable avenues for supporting prosecution or extradition.[21]

The authors do, however, give several other contentious matters an open and balanced discussion. In the chapter entitled "Enforcement Jurisdiction in the Territory of Another State,"[22] the authors critically analyze the rule that an illegal arrest does not affect the competence of the judge or the jurisdiction of the court. Their analysis suggests that the Ontario Court of Appeal may have wrongly decided *R. v. Walton*.[23] In that case, the court asserted jurisdiction over a defendant who was wrongfully arrested in Buffalo, New York, and then forcibly taken to Canada. This issue continues to receive coverage in the Canadian press because a Canadian businessman from Toronto was brought to trial in Florida in connection with fraudulent Florida land sales. On conviction he received a thirty-five year prison sentence.

The authors are to be congratulated for undertaking such a broad and innovative project. *Canadian Criminal Law* greatly facilitates the task of those examining the Canadian criminal justice system from an international perspective.

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16. R. v. Rauca, 34 C.R.3d 97 (Ont. Ct. App. 1983).
17. *Id.*
18. S. WILLIAMS & J. CASTELL, *supra* note 1, at 178.
19. 1946 Can. Stat. ch. 46.
20. CAN. REV. STAT. ch. G-3 (1970).
21. *See* Narvey, *Trial in Canada of Nazi War Criminals: Overcoming Certain Obiter in Rauca*, 34 C.R.3d 126 (1983).
22. S. WILLIAMS & J. CASTELL, *supra* note 1, at 144-48.
23. 10 C.C.C. 269 (Ont. Ct. App. 1905).