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Book Reviews

Richard W. Edwards, Jr.

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BOOK REVIEWS

STUDIES IN INTERNATIONAL LAW. By F.A. Mann. London: Oxford University Press, 1973. Pp. 717. $22.50.

Probably few persons will ever read *Studies in International Law* from cover to cover. For this reviewer it has been a rewarding experience, and I wish to share my reflections. F.A. Mann, who is probably best known for his book, *The Legal Aspect of Money*,[1] now in its third edition, has devoted scholarly attention for many years to problems arising where public international law and municipal law intersect.

Dr. Mann was a practicing lawyer in Germany who came to England as a refugee during the 1930's. He has engaged in the private practice of law in Germany and in the United Kingdom. He is an Honorary Professor of Law in the University of Bonn. He has served on the Council of the British Institute of International and Comparative Law.

Studies in International Law is a collection of articles written by Dr. Mann between 1942 and 1972. All have previously appeared except "About the Proper Law of Contracts between States," which discusses the effect of a clause in a loan agreement between Denmark and Malawi[2] providing that the agreement "shall be governed by Danish law." The largest piece, 139 pages, in this thick volume is a reprint of Mann's edited lectures on "The Doctrine of Jurisdiction in International Law" delivered at the Hague Academy of International Law in 1964.

All the articles relate to points of contact between public international law and municipal law. If there is a common theme, it is the interdependence of national law and international law. The orientation is almost always practical. A problem that has arisen in actual practice or litigation appears to have typically spurred Mann to consider the broader ramifications of the application of the law to that problem.

This reviewer, reflecting on the work in this volume as a whole, has a sense of sadness. Perhaps I expected perfection. The essays

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1. F. MANN, THE LEGAL ASPECT OF MONEY (3d ed. 1971).

2. Agreement on a Danish Government Loan to Malawi, Aug. 1, 1966, 586 U.N.T.S. 3.

have not been revised and all their earlier imperfections remain. Dr. Mann quotes Goethe in his preface:

> When a writer leaves monuments on the different steps of his life, it is chiefly important that he should have an innate foundation and goodwill, that he should, at each step, have seen and felt clearly, and that, without any secondary aims, he should have said distinctly and truly what has passed in his mind. Then will his writings, if they were right at the step where they originated, remain always right, however the writer may develop or alter himself in after times.

Unfortunately, if some conclusions appear on later study to be unsound, there may be a tendency to dismiss the whole enterprise. This would be most unfortunate in the case of this volume. The legal profession is literally crying for scholarship that bridges public and private international law, international law and municipal law. Few persons have ventured to fill the gap. Dr. Mann probably more than anyone else has attempted to meet this need in scholarship. If he has failed at times it may be because there have been few persons to support and criticize his work and few persons on whose work he in turn could draw. In this reviewer's mind the articles in this volume challenge the legal profession to correct and carry forward the work that Dr. Mann has begun. Although I have never met Dr. Mann, and although his life has been spent primarily in private practice, I would suspect from reading these articles that he is an excellent teacher who would have the profound respect of his students. Perhaps like that greatest of teachers, Socrates, the author of these articles will make his most lasting contribution through the work of students and followers, who will carry forward and develop the careful study of topics touched on in this volume.

* * *

Several articles in the volume deal with the law governing contracts to which governmental agencies or international organizations are parties. In these articles, among Mann's best, he explores the applicability of public international law, of principles of municipal law commonly shared by states, and of municipal law of the contracting parties. These articles are not easily summarized; the reader would do well to begin with them. I would suggest that the reader begin with "The Assignability of Treaty Rights" in which municipal law is used to enrich international law. Then I

would suggest "About the Proper Law of Contracts between States." Following this, the reader might take up "The Law Governing State Contracts," "The Proper Law of Contracts Concluded by International Persons," "Reflections of a Commercial Law of Nations," "State Contracts and International Arbitration" and "State Contracts and State Responsibility." I cannot recommend a particular order for reading the remaining papers in the volume.

The published version of Mann's Hague lectures on "The Doctrine of Jurisdiction in International Law" delivered in 1964 is the longest piece in the book. Readers may wish to compare Mann's views with the jurisdictional provisions of the American Law Institute's *Restatement of the Law Second: Foreign Relations Law of the United States* (1965). Both Mann and the *Restatement* distinguish jurisdiction to prescribe (legislate) from jurisdiction to enforce. Mann is critical of the "effects" doctrine embodied in section 18 of the *Restatement* as an unwarranted extension of jurisdiction. Readers may recall that others have criticized section 18 as being too narrowly circumscribed.[3] Not surprisingly, Dr. Mann wishes *United States v. Aluminum Co. of America*[4] had not been decided the way it was.

Dr. Mann apparently believes it possible to formulate clear and acceptable criteria to delineate the boundaries of enforcement jurisdiction. He does not explicitly discuss the *Restatement* section 40 concept of a duty on a state to consider "moderating" enforcement jurisdiction in the event of competing claims by two states. Mann appears to believe that public international law prescribes specific rules, relatively simple in formulation, which avoid any possibility of conflict of enforcement jurisdiction. This seems the thrust of his criticism of *United States v. Imperial Chemical Industries*.[5]

With one important exception, and despite tangential remarks in other papers, this volume does not include papers on monetary law. For these, the reader should turn to *The Legal Aspect of*

3. *E.g.* Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U.L. REV. 7 (1966).

4. 148 F.2d 416 (2d Cir. 1945) (on certification from the United States Supreme Court for failure of a quorum of qualified justices).

5. 105 F. Supp. 215 (S.D.N.Y. 1952). For Mann's discussion of this case see F. MANN, STUDIES IN INTERNATIONAL LAW 132-35 (1973).

Money.[6] The exception is "The 'Interpretation' of the Constitutions of International Financial Organizations." The critical question which Mann addresses in this article is the weight that courts, arbitrators and other bodies outside the International Monetary Fund must give to decisions of the Fund interpreting the obligations of members under the Fund's Articles of Agreement.

Dr. Mann criticizes criteria developed in the practice of the Fund for determining whether or not a decision of the Executive Directors is an interpretation of the Agreement made pursuant to article XVIII. Mann argues that many decisions of the Executive Directors of the International Monetary Fund, although not characterized as interpretations of the IMF Agreement made pursuant to article XVIII, should be treated as interpretations under that article. He then turns to the binding character of interpretations made by the Executive Directors or the Governors pursuant to article XVIII. Dr. Mann argues that, although the interpretations are entitled to great weight, they are not binding on arbitral tribunals or courts in disputes between the Fund and a member-state or disputes between two member-states in which one of the states has failed to conform to a Fund interpretation of that state's obligations. Readers of this essay should reflect on the contexts in which the questions dealt with might arise and carefully examine the logic of the arguments.

Banco Nacional de Cuba v. Sabbatino[7] is a conflict of laws case familiar to most readers of this journal. This review will conclude with a few comments on Dr. Mann's paper entitled "The Legal Consequences of 'Sabbatino.' "

Readers will recall that the case involved conflicting claims to the proceeds of a sugar shipment. Banco Nacional de Cuba had presented an order bill of lading covering the shipment and a sight draft to a New York commodity broker, Farr, Whitlock & Co., for payment. When Farr kept the documents and refused to make payment, Banco sued Farr for conversion of the shipping documents. Farr's defense was that Peter L.R. Sabbatino, as receiver for the New York assets of Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V., the nationalized Cuban sugar company), was the owner of the documents and was the proper party to be paid, because American courts should not recognize the

6. *See* note 1 *supra*.
7. 376 U.S. 398 (1964).

Cuban law under which Banco obtained physical possession of the documents in Cuba before the sugar shipment left that country. Farr and C.A.V. argued that the Cuban law was ineffective because it violated public international law.

Victor Rabinowitz for Banco, and Nicholas deB. Katzenbach for the executive branch as amicus curiae, argued to the United States Supreme Court that the act of state doctrine required American courts to recognize that the Cuban law was effective to vest ownership in Banco whether or not that law violated international law. Eight justices "bought" that argument.

Dr. Mann is unwilling to accept the act of state doctrine as a complete explanation of the Court's decision. He believes that the Court decided, without so stating, that the Cuban Government's acts did not violate international law. He also believes the Court was wrong in reaching this unstated conclusion. Dr. Mann takes off from the following statement in Mr. Justice Harlan's opinion for the majority:

> [W]e decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[8]

Dr. Mann, after puzzling over the words "even if the complaint alleges," concludes that "unambiguous agreement regarding controlling legal principles" should include customary international law.

Dr. Mann then goes on to say:

> It is quite true that the Court chose formulations which avoided the blunt statement that there existed no such rule of international law as was contended for [by Farr and C.A.V.]. But this is what the Court in effect said by speaking in a circuitous manner of lack of consensus, of disagreement, of divergences. Where there is no consensus there is no rule of international law.[9]

Mr. Rabinowitz had argued that if the Court did not apply the act of state doctrine, it would have to find that the Cuban decree did not violate international law even though the executive branch

8. 376 U.S. at 428.

9. F. MANN, *supra* note 5, at 474.

had publicly said that it did.[10] When Mr. Justice Stewart asked Mr. Katzenbach if the executive branch took any position on whether the Cuban acts violated international law, Mr. Katzenbach said he was not before the Court to argue that point.[11] The Court saved the executive branch the embarrassment of being told that the Cuban decree was not violative of international law. It held that the act of state doctrine prevented the Court in this case from considering whether the decree violated international law. Dr. Mann is of the view that had the justices believed that the Cuban acts violated international law, the majority opinion would not have said what it did about the lack of consensus on relevant international law standards respecting nationalization of property.[12]

Having determined what the justices in fact decided, Mann proceeds through a two-step analysis to conclude that the Court's unstated "decision" was wrong. The Cuban decree, he argues, did violate international law. The first step in Mann's argument is that "unambiguous agreement on controlling legal principles" is not the proper test for the existence of a rule of customary international law. The proper test is a "reasonable level of agreement." This is an interesting step and the reading of the development of this argument in the paper will be rewarding to any reader.

The next step is frankly less appealing and I found the argument neither novel nor convincing. Dr. Mann assembles data on state practice and concludes that there is a reasonable level of agreement that the Cuban decree violated international law, notwithstanding the nationalization practices of many socialist and developing states. Thus Mann arrives at a conclusion similar to that of many others.[13] However, the earlier parts of this analysis are unique and merit continued study.

An interesting paper to read with the one on *Sabbatino* is "The Sacrosanctity of the Foreign Act of State" originally published in

10. For a summary of the oral argument see 2 INT'L LEGAL MATERIALS 1124, 1126-27, 1132, 1140-41 (1963).

11. *Id.* at 1125, 1134.

12. For a discussion of this point in the majority opinion see 376 U.S. at 428-30.

13. *See, e.g.*, Stevenson, *The State Department and Sabbatino—'Ev'n Victors are by Victories Undone,'* 58 AM. J. INT'L L. 707 (1964). *See also* 2 INT'L LEGAL MATERIALS 1159 (1963) (C.A.V.'s brief in the Supreme Court).

1943. One wonders what would be the state of the law today had the act of state doctrine been limited as Mann then proposed.

The purpose of discussing the *Sabbatino* paper at some length is to illustrate Dr. Mann's ability to probe important aspects of a problem that have been relatively overlooked. The starting points of his analyses are often fascinating. However, his approach almost inevitably involves an appraisal of competing factors at some midpoint in the argument. Readers may part company with Dr. Mann at that point and thus reach different conclusions.

*Richard W. Edwards, Jr.**

* Associate Professor of Law, University of Toledo. A.B., 1957, J.D., 1959, Cornell University.