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RECENT ARTICLES

ANTITRUST

Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 YALE L.J. 268 (1974). — The effects of United States antitrust law on American cooperative buying groups seeking to purchase scarce or monopolized goods in international trade are examined by the author. The buying groups current role in the domestic economic system serves as the touchstone for an exploration of the future use of joint buying efforts abroad.

Buying groups have received limited judicial approval in the United States. Groups developed to facilitate economies of scale, thereby enabling its members to compete with larger buyers, and groups with insignificant market shares are the only cooperative efforts that have been sanctioned by the courts. In the international market it is expected that these buying groups will be accorded comparable treatment by American courts. The position of groups not heretofore accepted within the domestic context, however, might be affected by factors present in international trade.

The questionable jurisdictional propriety of extending American antitrust legislation abroad and the need for joint efforts in obtaining competitive bargaining positions with foreign governmental and private monopolistic sellers are cited as elements suggesting restraint in the application of antitrust regulations. Similarly, the article explores those factors weighing against antitrust exemptions for international buying groups. The "sweet-heart deal" with a foreign cartel, designed to insure high profits for self interested corporations, is noted as being an inherent risk of sanctioned joint buying groups. Furthermore, a buying group's ability to regulate membership and impose coercive measures against dissidents poses a danger to free market activity.

The article concludes by addressing the government's role in developing policy objectives and guidelines for cooperative purchasing groups. It is the author's opinion that "we must . . . hold fast to the . . . principles of competition embodied in our laws, before they are . . . washed away in the . . . currents of international economic crises."

B.C.R.

Kintner, Joelson & Vaghi, *Groping for a Truly International Antitrust Law*, 14 VA. J. INT'L L. 75 (1973). — Because unilateral attempts to control restrictive business practices are inadequate and contradictory, there is an increasing need for a “supra-national” regulatory scheme for world trade. In support of this contention the authors note, first, that each nation’s domestic law is limited by its geographical jurisdiction. Second, efforts by one nation to control monopolistic trade practices of its national corporations might have consequences on subsidiaries (or parent firms) in a foreign country. This is often considered a breach of comity between nations and an interference with the sovereignty of the foreign state. Third, there is a fundamental division in policy; some nations prohibit restrictive business activities, while others find monopolistic practices beneficial and in their national interest. This presents business with the dilemma of conducting operations legally in one country while violating antitrust laws in another. Finally, the growth of the multinational enterprise clearly renders unilateral regulation ineffective because no one state has jurisdiction over the entire corporate structure. The authors illustrate their contention by reference to United States law and policy.

The authors also review the historical and current progress leading toward uniform antitrust regulation. As early as 1948 the Havana Charter proposed a system for overseeing trade practice through an International Trade Organization. But in 1950, because of a lack of enforcement powers and the unyielding strength of national sovereignty this effort was abandoned. In 1960, the General Agreement on Tariffs and Trade was signed, heralding the first commitment of nations to cooperate on a general antitrust policy. Although not binding, it did pledge the signatory states to consultations on antitrust problems. The European Economic Community (EEC) has had the most success dealing with antitrust matters. Employing a regional basis, the EEC has adopted a group competitive policy which is stricter than the law any member state had previously enacted, and supercedes the separate national laws. The authors also approve of the work of the organization for Economic Cooperation and Development, which compiles information and stimulates international communication on anticompetitive practices.

The authors conclude that as world economic interdependence increases, the international community will find it in its self interest to reach accord on a global antitrust policy. Until a fully international antitrust agreement is concluded, the authors

suggest an expansion of the EEC "regional experiment" to include an Atlantic Community model that would embrace North America.

H.M.J.

CRIMINAL LAW

Cohn, *Criminal Records—A Comparative Approach*, 4 GA. J. INT'L & COMP. L. 116 (1974). — The author compares the United States' approach in dealing with criminal records with that of four civil law countries: Switzerland, France, Italy, and West Germany. He emphasizes the deficiencies in the current system of handling criminal records in the United States, the most important being a misplaced emphasis on arrest irrespective of conviction. For example, the Federal Bureau of Investigation (F.B.I.) and police files contain records of mere arrests without dispositions and are available to persons outside law enforcement. In the United States, an arrest is the usual method of beginning a criminal prosecution. To avoid the unnecessary social stigma attending arrest, the civil law countries employ a summons procedure. Furthermore, only convictions are recorded and the records may be maintained for only a specified time. The author suggests that the United States adopt the more organized and comprehensive approach of the civil law countries.

A thorough review of the federal and state statutes and decisions indicates little uniformity in the United States. The author quoted extensively from the case of *Menard v. Mitchell*, which describes the workings of the F.B.I. data-gathering system. *Menard* held that information should only be released to the federal government and law enforcement agencies. A more far-reaching case is *Eddy v. Moore*, which held that absent a compelling showing a defendant is entitled to the return of fingerprints and photographs upon acquittal. Both *Eddy* and *Menard* were based upon the right to privacy; other decisions have been based on the Civil Rights Act or, in juvenile cases, on the lack of a technical arrest. Many courts profess to a lack of authority to handle the situation and defer to the legislatures. Unfortunately, proposed federal legislation has been unsuccessful. Therefore, the author feels that the basic key to reform is a modern system of record-keeping in conjunction with detailed regulatory procedures.

Implementation of such changes poses certain problems in a highly mobile American society. The European system of voluntary registration of addresses would be impractical. The author

suggests a universal fingerprinting system which, he argues, would not involve significant new intrusions into privacy and would make a conviction-based recording system possible.

E.F.S.

Collins, *Traffic in the Traffickers: Extradition and the Controlled Substances Import and Export Act of 1970*, 83 YALE L.J. 706 (1974). — The Controlled Substances Import and Export Act provides criminal penalties for United States citizens and aliens who manufacture or distribute a controlled substance with the intent or knowledge that the substance will be illegally imported into the United States. Since this act is jurisdictionally broad, extradition is becoming an increasingly important tool for bringing narcotics offenders before American courts. After a brief historical overview, the balance of the article is devoted to a detailed discussion of the difficulties in three basic problem areas: the jurisdictional competence of the requesting state, the characterization of the acts for which the request is made and the nationality of the person requested.

In dealing with jurisdictional competence, the author concentrates on section 1009 of the Act. Since most offenses committed under this section occur outside of the United States, the availability of extradition depends on the willingness of other states to recognize this attempt to extend the force of United States laws abroad. This may involve a consideration of the status of the individual and the nature and effects of the specific acts involved. When the accused is an American citizen acting abroad, the author indicates that obtaining extradition should not present any legal or practical problems. When the accused is a foreigner acting entirely outside the United States, however, obtaining extraterritorial jurisdiction presents the more complex legal issue of whether the traditional requirement of territorial nexus is still mandatory.

A second problem is whether the act of the accused is characterized as a crime in both jurisdictions. An asylum state will rarely honor an extradition request if the acts are not recognized by it as criminal in its own legal system. Because section 1009 applies to activities not normally regulated by most nations, some nations may not grant extradition. The author envisages a possible solution in the 1961 Single Convention on Narcotic Drugs because signatories are obligated to enact generally uniform legislation in the field of narcotics control.

The final problem area results from long-standing refusals of many nations to extradite their own nationals. Most United States extradition treaties have left the matter to the discretion of the asylum state. Since section 1009 is directed towards extra-territorial conduct, many offenders are likely to be nationals of the asylum state. If extradition is not available in these cases, section 1009 would be of limited effectiveness. The author finds merit in a solution proposed by Dr. Ivan Shearer. A citizen of the asylum state would be turned over to the requesting state for trial and judgment. If convicted, the requesting state would agree to return the citizen to the asylum state for execution of the sentence.

The author concludes by indicating that until these problem areas have been properly treated, enforcement under section 1009 will be largely unsuccessful when extradition is required.

R.E.N.

Moyer, *The Mentally Abnormal Offender in Sweden: An Overview and Comparisons with American Law*, 22 AM. J. COMP. L. 71 (1974). — There are many differences between the Swedish and American cultures. These differences are well illustrated by the Swedish criminal justice system and, in particular, its treatment of mentally abnormal defendants in criminal proceedings. Swedish society is a tranquil and cohesive "family" emphasizing common sense and cooperation. The organizational thoroughness of the government keeps it close to its citizens. Because Sweden is a "highly educated, homogeneous, relatively small and stable society," its criminal justice system is able to be more progressive and more lenient than that of the United States. A criminal trial is an informal non-adversary proceeding. The approach of the Swedish Criminal Code is a "socio-legal" one emphasizing alternatives to imprisonment. When imprisonment is deemed necessary sentences are less severe than in the United States. The striking difference in severity of sentence with respect to sex crimes further illustrates the cultural differences between the two countries.

The treatment accorded the mentally abnormal defendant similarly contrasts the American and Swedish criminal justice systems. Sweden does not employ a pre-trial competency hearing because the court and public defender are considered adequate protectors of the defendant's interests. A defendant who is "mentally abnormal" is still subject to sanctions and there is no

McNaughten type inquiry to avoid legal responsibility. A court which has found a defendant guilty determines prior to sentencing whether the crime is causally related to a mental aberration. In order to make this determination, the Swedish government maintains psychiatric clinics which provide the court with evaluations. The author emphasizes that although the clinics have backlogs and are subject to charges of partiality, the Swedish clinics are superior to American institutions because the staffs are legally trained and workable legal definitions exist.

Once a defendant is found to require in-patient treatment he is transferred from correctional jurisdiction to the jurisdiction of the Social Welfare Agency. It is to this Agency and not to the court which the patient must petition for a redress of grievances. The author feels this is superior to the expensive American system of appeal and habeas corpus. Trial release is possible in Sweden, and is decided by the Hospital Director and Parole Board, with appeals to the Psychiatric Board.

Although recognizing the different financial and social conditions between the two countries, the author believes the United States should emulate Sweden by developing out-of-institution programs and by improving its present facilities.

E.F.S.

ENVIRONMENT

Gutteridge, *Beyond the Three Mile Limit: Recent Developments Affecting the Law of the Sea*, 14 VA. J. INT'L L. 195 (1974). — This article examines the upcoming United Nations Conference on the Law of the Sea. Three areas are considered: the need for such a conference; the preparations for it; and the essential issues which will be discussed.

The need for a conference, the author notes, was occasioned by failures in the present law as embodied in the Geneva Conventions, to set limits on the breadth of territorial waters and on the continental shelf. These shortcomings led to divergent unilateral and regional actions. Illustrative are the conflicting claims to territorial waters. Thirteen nations claim territorial seas in excess of twelve miles; fifty states have claimed a twelve mile limit and thirty-eight have set their territorial waters at lesser distances.

The preparatory work for the Conference was done by the Sea-Bed Committee which was established by a resolution of the General Assembly. The author traces the development of that

committee, closely considering the political differences which divided it. The writer contends that since political differences were aired in the Conference's preparatory stage, the likelihood of compromise is increased. The author believes that the proposed twelve mile delimitation of the territorial sea will probably prove acceptable if compromises can be affected. The United States, for instance, recognizes the three mile limit. Acceptance of the principle of free transit across international straits, however, could well reverse that position.

The problem of resource jurisdiction might be resolved, the author notes, through the establishment of economic resource zones and the granting of rights to landlocked states. A similar proposal attracted strong support in the Sea-Bed Committee. This proposal, furthermore, would eliminate the need for a delimitation of the continental shelf's outer limit. The author concludes that "[c]learly, the concept of an economic zone, as an answer to the problems of resource jurisdiction, cannot be ignored. It may indeed, contain the seeds of a possible compromise."

N.J.H.

Joyner & Joyner, *Prescriptive Administrative Proposal: An International Machinery for Control of The High Seas*, 8 INT'L LAW. 57 (1974). — The authors advocate a restructuring of the United Nations' (UN) framework for protecting and controlling the world's oceans. The authors contend that the present system of regulation is ineffective and must be changed in order to avoid a world environmental disaster. Currently, UN agencies function independently of each other, linked together only by the Economic and Social Council and the agencies common interest in world ocean environment.

The authors propose central coordination of the various agencies by an Under Secretariat of Marine Environmental Affairs, which would combine the efforts of a research oriented collection of experts. The Under Secretary's job would be to set the goals for and guide the progress of the Under Secretariat. Additionally, he would act as the "integrator" or "mediator" between the various agencies and as resolver of internal disputes. This would prevent duplication of work, jurisdictional overlapping, and assure the integrated functioning of the agencies.

The second aspect of the proposal would align the ocean

related segments of the UN agencies with high seas jurisdiction. The authors group the Intergovernmental Maritime Consultative Organization (IMCO) with the International Telecommunications Union (ITU) and the World Meteorological Organization (WMO) in one "pyramid". IMCO presently sets standards for the world shipping trade and is working to protect coastal states from the effects of shipping disasters; the ITU has responsibility for undersea cables which could be disrupted by ocean mining; and the WMO has the related function of providing weather data for shipping and mining operations. A second "pyramid" would consist of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO) and the Food and Agriculture Organization (FAO). UNESCO is engaged in studies of ocean life, the marine ecosystem and the interdependence of atmosphere and ocean. Its scientific work would be supported by WHO's research on ocean fisheries and pollution control, and complemented by the FAO's activity in expanding the food yield of the oceans. As a separate entity, the International Bank for Reconstruction and Development would be the enforcement arm of the Under Secretariat, using its loan dispensing authority to coerce national compliance with standards established by the other agencies.

The authors emphasize that their administrative model for ocean management should be implemented by reorganizing the existing agencies. Because of the immediate need for coordinated regulation, the slow process of international convention is rejected. Without some action, it is feared the oceans will soon be imperiled.

H.M.J.

Pollack & Congdon, *International Cooperation in Energy Research and Development*, 6 LAW & POLICY IN INT'L BUS. 677 (1974). — The authors emphasize that unrelated municipal actions will not be sufficient to solve the current energy crisis because it is in reality a problem of international interdependence. Because rising costs and increasing shortages will soon render oil and gas supplies effectively unavailable, it is important that all countries recognize the need for research and technological development (R & D) of means of energy production from other available sources.

Because the costs of R & D are so high and the need so great, duplication of efforts is wasteful. Exchange of scientific informa-

tion is the type of cooperation the authors envision and this would incidentally serve to lessen the technological gap between the developed and developing countries. This can be accomplished despite political differences. The problems which the authors envision are: the difference in national priorities; the inadequate data base on national programs which are both suited to cooperation and worldwide energy R & D; legal barriers; and, most significantly, proprietary interests.

The domestic and international efforts of the United States to cope with the energy crisis are thoroughly examined. The goal of the United States is to achieve energy independence; nevertheless, international cooperation is desired. The authors note "the sincerity of the United States commitment to undertake a massive program of cooperative energy R & D with other willing nations." They discuss the "priorities and prospects for increased international cooperation." This is based on a 1973 United States Department of State Task Force Report, which included an analysis of eighteen energy technology sectors as well as an analysis of the five criteria used to establish priority of a sector's suitability for cooperation. The Task Force concluded that the most technologically advanced nations should be cooperative partners in most of the sectors. This could be accomplished through the use of bilateral agreements. To achieve economies of scale, private industry might also participate in R & D efforts. The effects of cooperation on balance-of-trade and technology transfer present a concrete problem with unforeseeable results, however, losses and gains would likely equalize each other.

The authors examine coal technology as a particularized model and likely choice for international R & D cooperation. Although coal consumption has recently declined, the authors feel that various characteristics of petroleum production and its eventual shortage will undoubtedly cause a resurgence of coal as an energy source. Because of its importance, several U.S. cooperative activities for coal R & D already exist. Both national and private participation is envisioned. The authors incidentally indicate that United States industry has already invested more in energy R & D (particularly coal) than has the government.

E.F.S.

INTERNATIONAL COURT OF JUSTICE LAW

Goldsworthy, *Interim Measures of Protection In The International Court of Justice*, 68 AM. J. INT'L L. 258 (1974). — The

author discusses provisional legal relief in the light of two recent cases, the *Icelandic Fisheries (Jurisdiction) Case* and the *Nuclear Test Case*. These cases underscore the need for effective though temporary pre-judgment action in order to prevent irreparable harm, particularly when vital natural resources or environmental pollution are the bases of dispute. Preliminary measures, the author notes, would not be determinative of the merits of the case, but would assure the parties that their rights would not be jeopardized during deliberations. This, in turn, would increase confidence in the International Court of Justice (ICJ).

The power to grant interim relief, also called indications, is derived from Article 46 of the Statute of the ICJ, and from Article 66 of the Rules of the Court. Under these statutes, the ICJ, prior to issuing an indication, requires a *prima facie* showing that the Court will have ultimate jurisdiction over the case. Decisions indicate that the litigants must establish a reasonably probable likelihood of jurisdiction. The author supports an even more liberal interpretation; interim relief should be proper even when final jurisdiction is only a possibility.

Through the use of interim measures, the ICJ will protect only rights that fall within the realm of general international law, whether the damages are irreparable or merely pecuniary. But use of indications are limited. The ICJ will order such relief only when the petitioner has a special interest involved and, then, only to the extent necessary to protect the rights in dispute. Further, provisional remedies prescribed by the ICJ are neither very effective nor practicably enforceable because indications, as opposed to decisions, are mere recommendations. Therefore, they are not binding and can legally be ignored by the parties to the dispute. In conclusion, when the Court's jurisdiction is contested, interim measures will not be available; however, when the Court's authority is acknowledged by all sides, such relief will serve as a potent remedy.

J.M.J.

LAW: DOCTRINES AND PRINCIPLES

Salmon, *The Device of Fiction in Public International Law*, 4 GA. J. INT'L & COMP. L. 251 (1974). — The article offers a functional analysis of legal fictions and their role in international law. As in domestic law, fictions are created by falsely characterizing existing circumstances or by ascribing misleading properties to an event so as to distort the truth. Inaccurate descriptions allow

states to rationalize their intentional disregard for the facts of a situation and to accord the event anomalous treatment. The purpose of the fiction is to obtain a desired legal consequence which would not otherwise follow from the actual circumstances.

The author indicates that in international law legal fictions develop from treaties between states as well as generally accepted international doctrines. The signers or adherents can devise any fiction and employ it to serve their purposes and, often, these purposes are at odds with reality. In effect, therefore, fictions undermine the law through the guise of upholding international law. Because they contradict world realities and facts, the author believes that legal fictions should be abandoned or replaced by other legal constructs.

The author differentiates between two types of legal fictions in international law: first, devices of legal technique; and, second, ideological fictions. These are not mutually exclusive and one fiction can have attributes of both. The legal technique group is comprised of fictions developed by draftsmanship and interpretation of documents. Included therein are: deliberate exclusion of facts which belong in a class; deliberate inclusion of facts which do not belong to the class; attempts to arbitrarily broaden, narrow or set aside an applicable principle of law; and, fictions which result from fear of innovation and lack of imagination. Legal fictions for ideological ends arise because states have unfettered power to deny reality and to accept those legal illusions which are consonant with their national policy. This form of fiction encompasses: intentional mischaracterizations which justify the use of force; fictions founded upon legal formalism and legal doctrine; and, fictions which mask the truth for the sake of courtesy or hypocrisy. The author contends that these fictions have been employed by colonialist and imperialist powers. They camouflage fictions in legal ideals in order to gain the acceptance of the nations they dominate.

H.M.J.

Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974). — When a case involves multistate interests, difficult conflict of law problems often arise. The author examines different choice of law theories which have dealt with these problems and offers a new approach to their resolution.

The author notes that choice of law rules should be responsive to two fundamental objectives: first, the application of the most appropriate law under the circumstances; and second, the attainment of uniformity to prevent forum shopping. He demonstrates that the present method of choosing between competing domestic laws has invariably caused these objectives to become mutually exclusive. In fact, an analysis of contemporary thinking reveals that decisional harmony has been subordinated to the policy of achieving the most apt decision. As an alternative, the author would develop special substantive rules for use in multi-state conflicts. The author's approach is based upon the premise that problems involving two or more states are, in certain circumstances, sufficiently unique to require the use of special substantive rules; application of domestic laws to these multistate problems may result in a less apt solution and encourage forum shopping.

Three classes of situations present the most appropriate opportunity for the employment of these substantive rules. In the first class, the involved jurisdictions are sufficiently concerned with the situation. The application of either state's law, however, will not produce the desired result. The author offers rule 4(i) and rule 29(b) of the Federal Rules of Civil Procedure as examples. The second class is comprised of those situations where the multistate character of the problem involves considerations that are wholly inapplicable to the use of domestic law. Illustrative of this are decisions from the French Cour de Cassation and the United States Supreme Court. A situation from the third class is presented when two interested states have diametrically opposing viewpoints; i.e., a true conflict. The application of one state's policies automatically defeats the relevant interests of the other. The author suggests a compromise. For example, if one state would deny recovery and the other would permit compensation of \$10,000, the author suggests that an award of \$5,000 would recognize both states' interests and simultaneously advance the fundamental objectives of aptness and decisional harmony.

In conclusion, the author postulates that development and expanded use of special substantive rules will be instrumental in solving conflict of law problems.

A.M.N.

LAW OF WAR

Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1 (1975). — The Geneva Conventions of 1949, the nucleus of international humanitarian law, have been frequently characterized by widespread violations and by the refusal of belligerents to acknowledge the Conventions' application to their own conflicts. One result of the efforts of the United Nations General Assembly and the International Committee of the Red Cross to rectify this situation was the Diplomatic Conference of International Humanitarian Law Applicable in Armed Conflict. The first session met in Geneva early in 1974 and was attended by 125 states. The second session is scheduled to convene in the early spring of 1975. The author presents a summary of the discussions and actions taken at the first session.

The role of national liberation movements is discussed at length. Despite the efforts of the United States and certain Western European nations, the Conference voted to invite as full participants national liberation movements recognized by regional intergovernmental organizations. A bloc of developing countries successfully lobbied for committee enactment of a text applying the Geneva Conventions of 1949 and their Protocols to wars of national liberation, disputes which have traditionally been considered internal armed conflicts. The author presents Professor Abi-Saab's legal arguments advocating international treatment for these struggles. The author argues, however, that Professor Abi-Saab's analysis fails to justify international classification for the conflicts between the largely black populations of Rhodesia and of South Africa, and their minority white governments, because these conflicts are essentially one-power, rather than two-power, situations. He illustrates the potential problems in the application of certain articles of the Geneva Conventions to wars of national liberation, and cautions that the delegates to the second session of the Diplomatic Conference will have to deal with them in adopting a final text.

Lack of substantial achievement characterized the efforts of the delegates to the first session. They did not adopt articles for the protection of medical personnel and transports. There was even less movement towards enactment of separate rules applicable to internal armed conflicts and civil war. Several articles, however, on the general protection of the civilian population against the effects of hostilities were approved. The Ad Hoc Com-

mittee on Weapons briefly discussed, but did not adopt, articles and proposals prohibiting or restricting the use of certain "conventional weapons" such as incendiaries and fragmentation weapons.

The author concludes by presenting his own thoughts on the present state of international humanitarian law and offering some suggestions to the second session delegates as to how this body of law should be modified.

R.E.N.

Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 WORLD POL. 175 (1975). — The author explores the dynamics and the outcomes of "asymmetric" armed conflicts—i.e., conflicts in which one belligerent (the "insurgent" power) does not have the military capability to invade its opponent, and in which the other belligerent (the "metropolitan" power) does. In such conflicts, several of which have occurred since World War II, superior conventional military capability has not been a reliable indicator of ultimate military success. The author accordingly rejects the "capability" conception of power, noting that military superiority, in certain instances, may even contribute to military defeat, as in the rare instances of successful nonviolent resistance to armed aggression.

Military asymmetries, the author notes, have profound consequences for both belligerents with respect to the manner in which and the extent to which each deploys its military forces; a metropolitan power experiences an asymmetric conflict as a "limited" war; the same conflict, for the insurgent power, is "total."

The author develops a perspective within which the outcomes of "asymmetric" conflicts may be explained. Of particular and often underemphasized importance in the analysis of any asymmetric conflict, in the author's view, are the form of government of the metropolitan power and the political and social changes which occur within the metropolitan power as the conflict continues. Assuming, as does the author, that a given insurgent power does not "lose" a conflict, the conflict itself imposes upon the metropolitan power political and social "costs." The extensiveness of these costs depends, for example, upon the nature of the political system of the metropolitan power, the degree of censorship in which it engages, and the degree of associational freedom enjoyed by its citizens. Metropolitan powers, when they lose asymmetric conflicts, do so not because of a material obsta-

cle, but because of a progressive attrition of their political ability to wage war. The rate of such attrition may also be affected by the nature and degree of the interest of the metropolitan power in pursuing the war, and by the existence of international constraints upon the metropolitan power itself.

The author advocates further theoretical analysis of asymmetric conflicts and insists that any such analysis should focus not only upon the tenacity of the insurgent forces, but also upon the generation of internal divisions in the metropolitan powers.

J.G.

Mallison & Jabri, *The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity*, 42 GEO. WASH. L. REV. 185 (1974). — The authors discuss the historical development of the law of occupation during war. Initially, they explain the early practice and developing concepts in the eighteenth and nineteenth centuries. At that time, invasion and establishment of authority were tantamount to immediate sovereignty and legal ownership with the accompanying right to govern the occupied territory and its inhabitants. Illustrative of this point is the Lieber Code of 1863 which stressed the occupant's broad powers, including the right to exact oaths of allegiance from the inhabitants.

The authors detail the formulation of the Brussels Declaration of 1874 which, although never ratified, was extremely influential in the development of the law of war. It mandated the maintenance of the laws in force before the outbreak of war and forbade acts of allegiance to the occupying power. Continuing this historical survey, the authors analyze the Hague Peace Conferences of 1899 and 1904 which, along with the Brussels Declaration, recognized that resistance activities by the civilian inhabitants against the enemy were lawful. Two articles contained in the Hague Regulations of 1907 protect private property from confiscation or pillage and two others impose limitations upon the taxing authority of the military occupant.

The Geneva Conventions of 1949 embody a comprehensive codification of the law of war. The Geneva Civilians Convention extends for the first time specific protection to the "unorganized mass of civilians," including those engaged in guerilla warfare. For example, the occupant must provide adequate food and med-

ical supplies even if that necessitates importation from outside the occupied territory. The Geneva Prisoners of War Convention accords the status of privileged combatants to certain guerillas who, if captured, are entitled to treatment as prisoners of war.

The authors demonstrate that the Vietnam Agreements of January, 1973, applied the traditional public purpose doctrine. The Agreements required the expeditious return of all captured persons, whether civilian or military, who had acted for a patriotic or public purpose, even when they had been prosecuted or sentenced for violation of municipal law. Article 21(b) of the Agreement on the Cessation of Hostilities in Vietnam of July 20, 1954, provided the definition of public purpose.

The authors, in conclusion, urge the delegates to the 1974 Geneva Diplomatic Conference to create adequate and effective sanctions to enforce the existing provisions of the 1949 Geneva Conventions.

R.E.N.

RIGHTS OF THE INDIVIDUAL

Dehner, *Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right*, 15 HARV. INT'L L. J. 71 (1974). This article examines the feasibility and mechanics of establishing a worldwide policy of equal employment opportunity. While considering the nature of the multinational enterprise (MNE), the author investigates the possibility of foreign enforcement of United States policies. He discusses whether the United States should require its controlled MNEs to adopt racially non-discriminatory employment policies abroad.

Despite the United Nations Charter, subsequent U.N. declarations and municipal legislation, MNEs exhibit discriminatory employment practices. There are three reasons for this persistence. First, while many nations have formally prohibited discrimination, they lack the stringent laws and the necessary machinery with which to enforce compliance. Second, MNEs may exert such a powerful influence over the host nation that even threatened enforcement could cause an economically desirable MNE to seek a new host. Third, and of most importance, many nations simply do not want to enforce international or domestic laws prohibiting racial discrimination.

Policies of non-discrimination might be enforced globally through control of the extensive network of United States based

MNEs. Where a country is economically dependent on either the United States or a subsidiary of a United States based MNE, pressure might be exerted on the United States based parent to force compliance in that host. This would be in accord with the author's viewpoint that host countries consider United States controlled subsidiaries as elements of United States foreign policy.

Finally, the author notes the limited impact of present United States law upon discriminatory practices of United States controlled MNEs. He suggests that the United States can encourage its MNEs to implement racially non-discriminatory employment policies in all countries where they operate. This could be accomplished by imposing a fine on the United States based parent for the non-compliance of a subsidiary. This last measure, the author adds hopefully, "would nudge international reality a bit closer to the ideals of international law."

J.E.M.

Sheldon, *Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control*, 22 AM. J. COMP. L. 17 (1974). — Sweden has recently passed several pieces of consumer protection legislation: The Market Court Act of 1970, The Marketing Practices Act of 1970 (advertising), and the Act Prohibiting Improper Contract Terms of 1971 (adhesion contracts). The author focuses on the latter and examines its history, its structure in relation to the other Acts, its functioning during the past two years, and its possibilities for the future.

The Swedish scheme for consumer protection is basically administrative. The Market Court is intended to set legal precedent and hear only cases of great public importance. It is a court of first and final instance, which now derives jurisdiction from the 1954 Restraints of Competition Act (antitrust), The Marketing Practices Act, and the Contract Terms Act. A Consumer Ombudsman oversees the latter two Acts, initiating enforcement in the Market Court and receiving consumer complaints. The Contract Terms Act is restricted to sales of goods and services to the private consumer, and the Ombudsman may seek injunctions in the Market Court against terms which are "improper to the consumer" if he deems such action to be in the collective public interest. The author feels this jurisdiction should and will be extended to cover purchase and lease of real property, banking, and insurance contracts. For situations not in the collective pub-

lic interest, the Ombudsman has flexible powers to negotiate and issue cease and desist orders. He may order fines for failure to respond to negotiation, but cease and desist orders require willing compliance. A further duty of the Ombudsman is to advise entrepreneurs on how to comply with the Acts. The Market Court, in addition to the jurisdiction mentioned above, can hear cases the Ombudsman is unable to settle.

During the last two years the Market Court has rendered only four decisions. It has followed the Ombudsman's suggestions in these cases, thus legitimizing him, according to the author. The author feels the Ombudsman needs a more definite and creative policy, and should direct his attention to such projects as readjusting improper contracts already formed. He also feels tighter judicial control is needed over the Ombudsman and the Market Court, once their activities are extended.

Entrepreneurs, until recently, have preferred to negotiate with the Ombudsman and avoid the Market Court. An advertising campaign has, however, begun to encourage recourse to the Market Court. Furthermore, two new pieces of legislation will have a positive bearing on consumer protection in the future. The Consumer Sales Act (in force January 1974) and the proposed Consumer Services Act define the Ombudsman's sphere more clearly and create minimum contract standards. A Commission has also been created to revise general civil law clause provisions. The author is hopeful that the Contract Terms Act will be more fully utilized in the future, and feels that it has continuing vitality.

E.F.S.

Turack, *Freedom of Movement and the Travel Document*, 4 CALIF. W. INT'L L.J. 8 (1974). — In order to promote international mobility, various segments of the international community have made concerted efforts to ease travel restrictions and prerequisites. The author surveys various travel-related conventions, protocols and agreements and evaluates their success in achieving their stated purpose.

Several universal international organizations have taken steps to ease requirements for passage from one country to another. The author describes the procedure established by each organization, the degree of compliance by its members, and the effect of such compliance. For example, the International Civil Aviation Organization (ICAO) has declared that a contracting

state cannot require an entering traveler to possess any identification document other than a valid passport, and has encouraged its members to take measures to facilitate streamlined passport issuance. Two organizations, the International Labor Organization (ILO) and the Inter-Governmental Maritime Consultative Organization (IMCO), have attempted to simplify travel requirements for seamen.

The author deals primarily with Western Europe's efforts to relax passport requirements for travel; these efforts have taken the form of multilateral, bilateral and unilateral action. Two multilateral agreements which, in certain circumstances, waive passport requirements are the Scandinavian Passport Union and the Benelux Passport Union. Also, the Council of Europe has attempted to make presentation of a passport only one of many acceptable ways of identification upon entering a member state.

Equally significant has been the multifaceted efforts of the Organization for Economic Co-operation and Development (OECD). The author illustrates how these efforts establish greater mobility for tourists by listing various bilateral agreements which eliminate the use of passports. As a result of OECD's encouragement, the United Kingdom has devised the Visitor's Card and the British Visitor's Passport, the latter to be held in lieu of a valid British passport for travel in most Western European countries. The author briefly deals with bilateral arrangements under which nationals of either state can travel freely in the territory of the other state without a passport or national identity card.

One of the most unusual and bitter travel controversies is that which has existed between the two Germanys. The author traces its development from the post-World War II days to the present. Until recently, travel between East and West Germany has been nearly impossible, but the 1971 Quadripartite Agreement holds hope for less onerous travel restrictions in the future. The author concludes with an assessment of these attempts to remove obstacles to free travel between states, and with his own recommendations for more rapid improvement.

R.E.N.

TAXATION

Landwehrmann, *Legislative Development of International Corporate Taxation in Germany: Lessons for and from the United States*, 15 HARV. INT'L L. J. 238 (1974). — In 1972, the Parlia-

ment of the Federal Republic of Germany passed a new international tax law that is patterned after the relevant provisions of the United States' Internal Revenue Code. By analyzing the corporate income tax provisions of each, the author demonstrates that this method of taxation is appropriate for both countries and may suggest application for every nation in the prevention of double taxation. The author concentrates on the German experience and highlights the important similarities and differences in the American tax code.

Because the United States and Germany have decided to tax their corporations on a global basis, some relief from double taxation is necessary. To this end, the United States has adopted a credit system; the taxpayer is allowed to use either a per-country or an over-all limitation. On the other hand, instead of taxing the nonresident corporation itself, Germany taxes the resident shareholder on the basis of a constructive dividend. This new attribution approach makes the law flexible enough to attack specific abuses. It also limits the types of income that need be ascribed to the German parent.

The author notes that the present credit systems adopted by the United States and Germany are superior to former approaches. Foreign corporations operating within their borders are taxed upon income derived from sales activities, only if accrued through a permanent establishment. Passive income of the permanent establishment is taxed as business income, but only if it is effectively connected with business activities.

The author notes that the convergent trend toward the credit system has been juxtaposed by a potentially divergent trend in the two countries' basic concept of deferral. Aside from a few exceptions, the United States taxes permanent establishments on the income derived from sources within the country; Germany taxes permanent establishments on a global basis. The United States, in those few instances when it taxes foreign source income of the permanent establishment, grants a credit for foreign taxes paid; Germany denies any such credit.

Recent experience demonstrates that countries with large international trade sectors should provide full unilateral relief from international double taxation. Foreign income may be exempted by decree, or by direct or indirect credit. The aim is full-scale flexibility and cooperation. The coined German-American approach provides a good working model.

J.E.M.

TERRORISM

Frank & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69 (1974) — Recently, the Ad Hoc Committee of 35 States of the United Nations failed to agree on recommendations concerning the escalating problem of international terrorism. The authors analyze the various issues presented before the Committee and the solutions proposed by the different factions.

The authors first discuss the problems which arose in defining "terroristic" activities. Five categories of questions are proposed: (1) Are the acts of governments, as well as those of individuals, to be included? (2) Are the acts of accomplices, acts against property, and/or threats to be governed by an international agreement? (3) Should behavior not prohibited by law in certain nations come under international purview? (4) Is the motive of the terrorist to be considered as a potentially mitigating factor? (5) Should the nationality of the victim, vis-à-vis the terrorist and the antagonist state, be considered?

Another problem examined is: what are the appropriate remedies for terrorist activities. The writers note that "safe-havens" for terrorists must be eliminated. Any international agreement would be of questionable practical value if it created jurisdictional lacunae or precluded ratification by a number of states. Proper extradition procedures would constitute an essential element of any international agreement. Unfortunately, political crimes have historically been excluded from extradition treaties. The authors recommend that international terrorist acts, as defined by the Convention on the Prevention and Suppression of International Terrorism, no longer be exempt from extradition, regardless of any possible political motive on the part of the actor. The authors regard *mandatory* extradition as politically unrealistic, albeit a solution to the jurisdictional lacunae problem; instead, it is proposed that a prosecuting state should be obligated to proceed as if the victim were a citizen of that state.

The authors believe that any convention should be binding and enforceable between the parties, and must induce acceptance by the terrorists themselves. Hence, they propose exempting terrorists from international sanctions if the state which the terrorists oppose violates minimal standards of social, political, and economic rights, or if the terrorist movement directs and confines its use of force to the officials of the government opposed and/or restricts the level of violence to nonlethal levels.

The authors stress that prospects for agreement are linked to narrowly defining acts which are universally disapproved. They are hopeful, but not optimistic, about the prospects for a successful convention.

J.M.J.

Rozakis, *Terrorism and the Internationally Protected Persons in the Light of the ILC's Draft Articles*, 23 INT'L & COMP. L.Q. 32 (1974). — The recent increase in terrorist activities directed at international officials has led to the preparation of Draft Articles by the International Law Commission. This article is an analysis of these Draft Articles.

International law recognizes that representatives of foreign states or international organizations are entitled to protection from a host country. This protection differs with the status of the representative. The author believes that the present law is inadequate. First, the law does not protect certain state representatives, such as ad hoc diplomats who are especially vulnerable to attack. Second, since the law of special protection is a part of the more general field of privileges and immunities, it is controlled by a rationale which frames legal treatment as dependent upon the status of the official. The author maintains that the real factor to be recognized in determining uniform protection is that government representatives are "a good prize [for] terrorists in their determination to exert pressure or revenge in the name of their cause." Lastly, the author contends that the present law is faulty, because it creates no obligation to establish municipal laws providing for penalties in cases where international officials are attacked.

After surveying the present state of the law, the author examines each of the Draft Articles. He criticizes them as being, in certain cases, little more than a reiteration of the present law. For example, Draft Article 1(b), which deals with "internationally protected persons," grants protection only to the representative acting in an official capacity. This is incorrect, the author notes, because "[p]ermanent diplomatic or consular agents are always in danger of becoming a target for terrorist activities"

The author, however, generally recognizes that the Draft Articles are an improvement in the law. In particular, he cites those Articles dealing with legal protection. They state that crimes should be made punishable under municipal law "regardless of whether the commission of the crimes occurs within or

outside the territory." This would, the author maintains, be an extension of the narrow scope of the present law and "an indisputable example of progressive development of law."

N.J.H.

TREATIES

Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51 (1974). — The problems created by unilateral state declarations terminating breached treaties are discussed in this article. The effect of the 1969 Vienna Convention on the Law of Treaties and its interpretation by the International Court of Justice is emphasized.

Three cases are discussed in some detail: the *Namibia* case, decided in 1971; the *Jurisdiction of the ICAO Council* decision of 1972; and the 1973 *Fisheries Jurisdiction* case. The author generally approves of the Court's approach. He compares and contrasts the opinions with the applicable articles of the Vienna Convention, which he regards as a codification of the existing international law. He believes, however, that the Court misinterpreted the Convention in its *Namibia* opinion when in paragraph 96 it found a "general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties" The author points out that Article 60 of the Vienna Convention recognizes only a right to invoke a material breach as a ground for termination, which he distinguishes from a unilateral right to terminate.

The author's examination of the two subsequent opinions indicates no such unilateral right was found. He recognizes, though, that the agreements involved in those cases contained binding jurisdictional clauses. The parties, by agreeing to submit their disputes to a forum for determination, thereby negated any right of termination for breach. The author's position, however, is that the implications of the *Jurisdiction of the ICAO Council* and *Fisheries Jurisdiction* decisions extend beyond treaties which contain jurisdictional clauses. The *Namibia* "aberration," he explains, concerned a collective termination for breach by a number of states comprising an international supervisory organ and not a unilateral declaration of termination by a single state. The writer concludes that the Court's recent decisions construing the Vienna Convention have "been helpful in furthering the consoli-

dation of the law against unilateral denunciations of international agreements without accountability therefor."

J.M.J.

Toth, *The Doctrine of Rebus Sic Stantibus in International Law*, 1974 JURID. REV. 56 (1974). — The development of *rebus sic stantibus*, the doctrine of "termination or revision of treaties on account of a fundamental and unforeseen change of circumstances occurring after the conclusion of the treaty," is traced by the author. The teachings of publicists and the general principles of law recognized by civilized nations, sources of law enumerated in the Statute of the International Court of Justice, are the frameworks within which the doctrine's growth is measured. Leading Commentaries are examined in charting the metamorphosis of the doctrine from its source in Roman and Canon law to its contemporary application in international jurisprudence.

The article explores the changing roles played by *rebus sic stantibus* in international law. The doctrine, the author notes, was rooted in unconnected private cases of the Roman civil law and was synthesized over the centuries into a distinct rule. Beginning in the sixteenth century as a principle employed in interpreting the subjective intent of treaty signatories, the doctrine developed, by the nineteenth century, into an objective test to assess the validity of treaty commitments. The objective test reflected the political and social philosophy of the times. A party's obligations were recognized to the extent that they did not conflict with the higher objectives, such as self-preservation, of the state. The twentieth century's changing political objectives occasioned further revision of the doctrine. The common will of states emerged as the cornerstone of international law after the Second World War and the rule again assumed the role of a tenet of treaty interpretation.

The article concludes by noting the influences which the general principles of law has had upon the doctrine. Concepts functionally similar to *rebus sic stantibus* which exist in several municipal legal systems are examined by the author.

B.C.R.