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Book Review

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statutory limitations by Judge Abraham Sofaer and a thoughtful analysis by Kenneth de Graffenreid of the lack of any formal mechanism in the American policy-making process for consideration of moral issues raised by proposed uses of force.

This book's discussions of the application of the just war concept to low-intensity conflict and of the related issue of the capacity of international law to take into account the range of considerations employed in just war analysis are interesting and provocative. Further, a number of points made in the work are sure to stimulate debate—for example, the argument made by both Turner and Judge Sofaer that, while situations may present themselves requiring the United States to violate international law, the health of the international legal system demands that such violations be admitted and explained rather than obfuscated.

However, certain aspects of the book limit its utility somewhat. First and most basically, the book contains no really satisfactory definition of the phenomenon it addresses—low-intensity conflict. Second, the section on international legal constraints on low-intensity conflict concentrates almost exclusively on whether the concept of self-defense set out in Article 51 of the UN Charter would permit an armed response to a low-intensity conflict launched against a state by another state. But this approach begs a number of important questions. Should there be a legal difference under Article 51 between a situation in which a state foments an insurgency elsewhere that remains entirely dependent on the sponsoring state, a situation in which a state foments an insurgency that takes on a life of its own while continuing to receive aid from the original sponsor, and a situation in which a state provides assistance to a genuinely indigenous insurgency? What is the legal status of low-intensity operations, such as provision of support for groups opposed to an unfriendly government—as given by the United States in both Guatemala and Iran in the 1950s—which are hard to fit under any reasonable definition of self-defense? Third, with the exception of the discussions by Johnson and O'Brien of the ethical standing of assassination (in which they reach somewhat different conclusions), neither the legal nor the ethical sections of the book address certain of the most interesting specific tactical issues raised by low-intensity conflict, as contrasted with conventional warfare. Suppose, for example, that a state, in an effort to erode popular support for a target government, attacks elements of the target government's civilian infrastructure that have no military use but whose destruction could increase popular discontent—for example, the civilian electrical grid. Is such a use of force aimed purely at causing hardships to civilians ever permissible either legally or morally, even if it involves no direct loss of life? Fourth, the discussion of American domestic constraints on low-intensity conflict fails to consider contemporary attitudes toward the risks of combat. Fifth, the connection between the concluding chapter and the rest of the book is not entirely clear; in other words, it is difficult to relate several of the recommendations to the conference papers and discussions. Finally, while the conference was primarily concerned with modes of ethical analysis associated with the just war tradition, it would have been interesting to have had at least some discussion of other approaches as well. For example, a consideration of low-intensity conflict employing John Rawls's "veil of ignorance" approach might yield insights additional to or different from those reached through a just war analysis.

In sum, while this work has some gaps and limitations, the questions it provokes make it a useful starting point for anyone setting out to think about the complex and interesting issues of law, morals and uses of force raised by low-intensity conflict short of full-scale war.

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Intentional Oil Pollution at Sea. By Ronald B. Mitchell. Cambridge MA: MIT Press, 1994. Pp. xii, 346. Index. $36.50.

Ronald Mitchell raises two endemic and entwined questions that perennially challenge lawyers and policy makers dealing with international law in general, and international environmental law (IEL) in particular. First, do treaty rules matter and can they change behavior? Second, can the lessons learned from the international regulation of relatively moderate and limited occurrences, such as vessel-based oil pollution, be applied to the control of other, more serious and widespread environmental problems, such as climate change and the protection of biodiversity, and, if so, to what extent? Mitchell, assistant professor of political science at the University of Oregon, brings his own disciplinary perspective and insights to bear on these

important questions and answers, offering an analysis that prompts a better understanding of the nature and character of compliance, implementation and enforcement within the international legal process.

He answers the first question by reviewing the theoretical overlay of treaty compliance and then moves beyond this scholarly base with an empirical study that examines the application of treaties regulating intentional oil pollution during the past forty years. The empirical data lead him to conclude that treaty rules can positively influence international behavior at both national (governmental) and corporate levels. The answer to the second question, summarily stated, is that the example of intentional oil pollution could be of use in other regimes, depending on the circumstances.

Do treaties make a difference? Much legal analysis centers on the jural nature of treaties, and their interpretation and applicability, making the a priori assumption that treaties do shape and change the behavior of the relevant parties. It is therefore useful to be reminded about the substantial body of realist thinking that defines international behavior and practice in terms of geopolitical power rather than law. According to the realists, nations agree to treaties and the rules therein embodied because they codify the existing or intended behavior or practice of the parties. Parties conform their behavior to treaty provisions because it is in their self-interest to do so, not because they are obliged to by law. The realists argue that it would be a mistake to equate this spurious correlation with true causation, as international lawyers tend to do. Despite the strenuous exhortations and exertions of international lawyers, realist thinking is alive and well.

The author, a pragmatic institutionalist who believes that treaties do change behavior, nonetheless accepts the existence of such realist skepticism, and examines the empirical evidence offered by intentional oil pollution to determine if the realist argument has been rebutted. After evaluating the evidence drawn from the control of intentional oil pollution, the author concludes that the empirical evidence repudiates the realist thesis and "unequivocally demonstrates that governments and private corporations have undertaken a variety of actions involving compliance, monitoring and enforcement that they would not have taken in the absence of relevant treaty provisions" (p. 299). Building upon this premise, he proceeds to establish a strong case by demonstrating that some primary rules of obligation institutionalized within the legal regimes created by IEL beget greater compliance than others, for a cluster of reasons.

One of the reasons relied upon by the author is that some rules fall within the "incentive-ability-authority triangle." He offers illuminating explanations of ability and authority that are worthy of close attention. By "ability" he refers not only to the practical ability to comply with rules, but also to situations where the ability to violate rules was actually reduced. His concept of "authority" is the power of national governments to take action against polluting ships. He illustrates that coastal states desisted from acting against polluters because of doubts about their jurisdiction to inspect and detain ships. This shortcoming was remedied only when the thorny questions of jurisdiction were seized by the International Convention for the Prevention of Pollution by Ships (MARPOL), which granted coastal states the right of inspection and detention. The granting of such power or authority led to much better enforcement and greater compliance with its rules.

The need for nations and their domestic institutions to be possessed of authority to proceed against foreign private entities that commit environmental wrongs, rather than their foreign governments, is cogently pressed home by the author. He further argues that the experience of oil pollution demonstrates why it is important that nation-states be given the right to use trade sanctions as a way of protecting the international environment. This strand of the author's conclusions can be interwoven with another of his more striking points: the importance of encouraging "hegemonic" or "leader" governments to influence compliance by other states. Such a thesis makes great sense in light of the checkered experience of the United States, a leader state that has exercised benign and beneficial power to protect dolphins and other endangered marine species, but has been assailed for doing so because of countervailing free trade obligations.

The author discerningly divides treaty regimes, or "treaty compliance systems" as he calls them, into three parts: primary rules, compliance information systems and noncompliance response systems. "Primary rules" are substantive rules, traversing a rule's ultimate goals, the methods of achieving them, implementation and enforcement. "Primary rules" refer to all and any rules stipulating discharge limits or

other environmental control measures, as well as those applicable to monitoring, reporting and judicial and administrative enforcement. He does not address the doctrine of state responsibility and does not, therefore, deal with the somewhat tortuous differences between primary rules of obligation and secondary rules of responsibility drawn by the International Law Commission.

Mitchell also embraces a wide province for IEL. He sees it as one that extends beyond wrongful acts, and doctrines of state responsibility based on the vindication of such wrongs, to a more proactive and precautionary system directed at actual compliance or implementation through machinery and mechanisms for securing compliance, and methods of patrolling noncompliance. The author thus clarifies and sheds understanding on treaty regimes of primary rules as consisting not only of substantive, goal-oriented obligations, but also of other rules promoting or supervising compliance. He does not isolate substantive rules from their implementation.

The author establishes a strong analytical framework and develops it with imagination. It is therefore disappointing that he does not deal with the implications of his clear repudiation of the realist thesis. If IEL and treaty rules make a difference, is there something about the nature of treaty rules, apart from their political appeal, that elicits compliance? The author could have consolidated his position about the value of rules by addressing the view that rules result in compliance because they are IEL—a social force in its own right that is greater than the sum of those rules. IEL commands and receives respect because it is law. Despite its renowned asymmetry with municipal law and its publicized defects in lacking a lawmaking and law-enforcing sovereign, international law does invoke compliance because it governs a law-abiding community of states, not a gang of bandits or bank robbers.[1] In this context, the author could also have better canvassed the extent to which a legal commitment to the "framework" conventions set the stage for the more detailed protocols.

Fortified by the strong foundation he has laid, the author moves to answer the second question posed—the extent to which the oil pollution experience may be generalized. He reports that it soon became evident that many of the lessons from the limited area of vessel-based oil pollution could be used to control much larger and more endemic problems of pollution. The most striking of these are the patterns of regulation falling within the "incentive-ability-authority triangle," and the "treaty compliance system." These strategies are worthy of adoption, and have in fact been adopted, to control a variety of international environmental problems. It is also evident that clarity serves compliance. In IEL, as in other areas of international law, the problem cases arise when actors confront aspirational norms creating general obligations, as contrasted with result-specific rules that contain definite duties.

One of the author's significant conclusions, however, is open to criticism. He offers examples of successful and failed strategies: design and engineering rules that induced compliance, as against emission limitations that did not. While design and engineering standards might have worked in the particular circumstances, this kind of rule gives rise to significant doubts about its more general applicability. Mitchell cites the examples of limitations on the oil content of tanker discharges near shore, institutionalized by the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) in 1954, which were frequently flouted and were replaced by ship-design standards providing for segregated ballast tanks (SBT) in MARPOL, which have been successful in reducing pollution caused by near-shore discharges.

The problem with this example is that it seeks to replace discharge standards that allow shipowners the freedom to choose how they might achieve such standards in the most efficient manner with procrustean uniform equipment or engineering standards that are much more expensive and demonstrably inefficient. Such equipment standards have been excoriated in domestic environmental settings as the worst examples of command and control regulation. The author appears to recognize this criticism and contends that the more expensive and less efficient design standards may be justified because they permit much more effective compliance and enforcement. He is right, of course, and a strong case can be made for more effective, in contrast to more efficient, regulation. The problem that remains is whether nations would agree to similar costs and expenses in analogous situations. There were a number of nonreplicable factors present

[1] ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 16 (1981).

in 1972 and 1978 that led to the improbable conclusion of the parties agreeing to a significantly more expensive form of pollution control. These facts are referred to by the author, but the implication that must surely be drawn is that they will not easily be reproduced.

A few reservations do not detract from the impressive achievement of Ronald Mitchell in writing a very well analyzed, conceptually clear, thoughtful, timely and well-conceived book that offers many insights into the questions of treaty compliance. His book should present IEL lawmakers, policy makers and practitioners with ample food for thought.

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The Precautionary Principle and International Law. The Challenge of Implementation. (International Environmental Law and Policy Series, Vol. 31.) Edited by David Freestone and Ellen Hey. The Hague, London, Boston: Kluwer Law International, 1996. Pp. xv, 268. Index. Fl 195; $130; £84.

In their conclusion to this collection of essays on the precautionary principle, the two editors remind the reader that the precautionary principle, while new as an environmental policy imperative, is not new as a human concept. Arguably, the principle's appeal to common sense underlies its remarkably swift international acceptance. The failure of environmental policy to prevent environmental degradation and the emergence of various potentially irreversible environmental problems have forced international environmental law to take a new approach to uncertainty. Where risks of serious or irreversible damage are identified but conclusive evidence is not available, a legal framework demanding certainty cannot produce appropriate responses. This insight is now translated into international environmental law and policy. Most recent legal instruments or policy documents endorse the general idea that absence of conclusive scientific evidence should not be used to postpone responses to threats of serious or irreversible damage. However, although it seems difficult to argue with this proposition, the simplicity of this "better safe than sorry" approach is more apparent than real. As the title of the book suggests, the real challenge lies in the implementation of the precautionary principle—in determining in what cases, at what point and to what extent precautionary measures are warranted.

This volume, edited by Professor David Freestone of the University of Hull and Professor Ellen Hey of Erasmus University, makes a true contribution to revealing the many layers and the complexity of these questions. It brings together leading experts from various disciplines and backgrounds, including international lawyers, economists, scientists and policy makers. The book is divided into three parts of roughly equal length, framed by an introductory and a concluding piece written by the editors. According to Freestone and Hey, the collection is intended as a "second generation" contribution to the debate on the precautionary principle (p. 14). Consequently, rather than reexamining the rapid emergence and the legal status of the precautionary principle, the book focuses upon issues related to the principle's refinement and implementation.

Part I, The Legal Challenges of the Precautionary Principle, begins with a contribution by Alexandre Kiss. He examines the important links between the concept of intergenerational equity and the precautionary principle, placing most emphasis on the analysis of the former concept. James Cameron and Juli Abouchar offer a detailed and informative exploration of the precautionary principle's scope and status in international law. Reviewing relevant literature and drawing upon a broad range of international documents and domestic sources, they conclude that the precautionary principle has become customary international law. In their view, an agreed-upon core can be distilled from the varied formulations of the precautionary principle, although disagreements remain as to the threshold at which the principle is triggered, whether it mandates only "cost-effective" or any necessary preventive measures, and the impact of the concept of "common but differentiated obligations." Catherine Tinker, in her article on the implications of the precautionary principle for the law of state responsibility, does not explicitly address Cameron and Abouchar's arguments about the binding core of the principle. However, she does suggest that the principle's varied formulations would make a finding of internationally wrongful behavior and state responsibility difficult. Tinker argues that the precautionary principle gives rise to a series of procedural obligations, such as duties to warn or notify, or requirements of environmental impact assessment. In her view, the prin-