

BOOK ANNOTATIONS

BEGLEY, LOUIS, *WHY THE DREYFUS AFFAIR MATTERS* (New Haven, Connecticut: Yale University Press, 2009).

CIPRIANI, DON, *CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE* (Surrey, United Kingdom: Ashgate Publishing Company, 2009).

CLARKE, KAMARI, *FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* (New York, NY: Cambridge University Press, 2009).

GREENBERG, KAREN, *THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS* (New York, New York: Oxford University Press, 2009).

JACOBSEN, TRUDY, CHARLES SAMPFORD AND RAMESH THAKUR, EDs., *RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA?* (Surrey, United Kingdom: Ashgate Publishing Company, 2008).

STACY, HELEN M., *HUMAN RIGHTS FOR THE 21ST CENTURY* (Stanford, California: Stanford University Press, 2009).

TEMKIN, MOSHIK, *THE SACCO-VANZETTI AFFAIR: AMERICA ON TRIAL* (New Haven, Connecticut: Yale University Press, 2009).

WETTSTEIN, FLORIAN, *MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE: HUMAN RIGHTS OBLIGATIONS OF A QUASI-GOVERNMENTAL INSTITUTION* (Stanford, California: Stanford Business Books, 2009).

WILLIAMSON, MYRA, *TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001* (Farnham, England: Ashgate Publishing Ltd., 2009).

YORKE, JON, ED., *AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS* (Surrey, United Kingdom: Ashgate Publishing Company, 2008).

Why the Dreyfus Affair Matters. By Louis Begley. New Haven, Connecticut: Yale University Press, 2009. Pp. xiv, 204. \$24.00 (hardcover).

REVIEWED BY HUGH K. MURTAGH

The story of Guantanamo Bay is not over. President Obama will not be able to shutter the island prison until at least 2011, and then only by moving the remaining detainees to a stateside facility. Time passes, details emerge: the “Camp Delta Standard Operating Procedures” find their way onto the internet; a military judge will not allow the prosecution of a terrorist leader because he has been so badly abused; Sami al-Hajj, the al-Jazeera journalist held for years on changing unsubstantiated charges, is finally released to Sudan, with his diaries. There are more chapters to be written, and perhaps the worst are yet to come.

If history is any guide, in fact, this is almost certainly true. A hundred years ago, another country—reeling from a debilitating attack, recommitted to its military, and rent by racism—treated a prisoner almost exactly as the United States has treated the Guantanamo detainees. The result was a decade-long scandal that convulsed the nation—and portended a continent’s darkest days. The country was France; the prisoner was Alfred Dreyfus. The cautionary tale of *The Dreyfus Affair* deserves an important place in our current political and legal memory.

In *Why the Dreyfus Affair Matters*, Louis Begley brings us the story of the Affair. Begley is a brilliant choice for this examination, the latest in the “Why X Matters” series from Yale University Press. Begley is an experienced lawyer (he retired in 2004 after 45 years at Debevoise Plimpton) and an acclaimed novelist (*About Schmidt, The Man Who Was Late*). And he has written a brilliant book, using a lawyer’s skill to marshal the facts and a novelist’s art to relate them. The result is a history that drives the reader forward and occasionally steals his breath.

What startles here is not just the story itself but how clearly the story evokes Guantanamo Bay. In 1894, the French

army accused a Jewish officer of treason, on the basis of thin evidence leavened by anti-Semitism. He was tried before a closed military tribunal and ultimately convicted on the strength of a secret dossier of hearsay and altered documents submitted to the judges and hidden from the defense. He was sentenced to life in exile. The punishment should have been transportation to New Caledonia, the usual home of political prisoners, where Dreyfus might have lived in relative freedom with his family. However, France passed a special law, with Dreyfus in mind, that enabled Dreyfus to be sent to Devil's Island, a malarial rockpile off the coast of French Guinea, and there imprisoned alone in a small cell watched over by guards forbidden to speak to the prisoner.

As Begley notes, Guantanamo Bay jumps "irresistibly" to mind, as do the Bush administration's attempts to restrict judicial review of charges against enemy combatants. Just as in the initial trial of Dreyfus, the Combatant Status Review Tribunals (CSRTs), established grudgingly by the Bush administration in 2004, were closed military tribunals where hearsay and other questionable evidence was admissible, and the prosecutor could offer evidence to the judges without revealing it to the defense. However, the Supreme Court repeatedly heard challenges from the detainees and rejected the Bush administration's attempts to put Guantanamo beyond meaningful judicial review. And although Begley suggests this echoes the actions of the equivalent French court, the *Cour de Cassation*, a closer examination suggests it does not: political and procedural hurdles delayed and diminished the intervention of the *Cour de Cassation* in the case of Dreyfus. (Most notably, a request for review had to come from the government.) The availability of U.S. courts to Guantanamo detainees seems a true and positive distinction from the Dreyfus Affair.

But the interventions of the U.S. Supreme Court erase neither the wrongs of Guantanamo nor the analogy to the Dreyfus Affair. In fact, examining the larger forces behind the Dreyfus Affair, as Begley does after establishing the particular parallels, tends to deepen the similarity. Begley sees two larger forces at work in the Affair, both clearly relevant to the United States and Guantanamo Bay: national security and racism. As to the former, France suffered a serious psychological blow when it lost the Franco-Prussian War in 1871. Thereafter, it recommitted to its military, and by the 1890's, with French so-

ciety beset by internecine conflicts, the army had become the “ultimate source of national stability and pride.” During the Dreyfus Affair, the army was able to insulate itself behind its popular support and to invoke the imperative of national security when challenged. As a result, it was able to carry out abuses of power and outright crimes: creating a secret dossier, hounding a whistleblower from the army and accusing him of treason, shielding the true traitor, forging documents, and suborning military judges.

But why do it? Part of the answer is simply that little wrongs beget greater ones. But then why begin? Here, Begley points to racism. Dreyfus was an available, even an attractive, target, because he was Jewish—the only Jewish officer on the elite General Staff. Not only was he an “other,” but his otherness could absorb the stain of treason, leaving the French army clean. And anti-Semitism was not limited to the army’s senior staff: it infected the whole of French society. Although (or perhaps because) Jews enjoyed full citizenship in France—a measure of equality absent elsewhere in Europe—and success in every area of life, they were the targets of virulent racism. This racism was potent even before Dreyfus was wrongly condemned, but his condemnation, and the tireless campaigning of his supporters, sped it and spread it, until it was pandemic and deadly.

The force and extent of this racism seems, at first blush, inapposite to the United States today, while the national security situation seems quite familiar. Begley, for his part, lightly notes both parallels but leaves the reader to ponder their extent and meaning. Surely both are relevant. The national-security parallel between post-9/11 America and fin-de-siècle France is inescapable and its implications are rather obvious: if America has granted its military establishment the power and latitude of the French army, more outrageous misconduct may await discovery. The racism parallel fits less easily—there is no pervasive, sustained, pseudo-scientific attack on Arab- or Muslim-Americans in the United States—but it arguably demands more attention. If Americans have not encouraged the abuses at Guantanamo Bay, Abu Ghraib, and elsewhere, we have accepted them rather quietly, along with two devastating, open-ended wars in Muslim countries. Again, Begley does not press the point—he simply traces France’s uncorrected anti-Semitism to its terrible conclusion.

With this background in place, Begley delves into the byzantine, 10-year-long saga that resulted in the exoneration of Alfred Dreyfus. This comprises the bulk of the slim volume, and two things are worth noting about it. First, Begley's retelling is masterful. It is efficient, complete, and riveting, and it weaves societal, institutional, and individual forces together seamlessly into a single narrative. Second, despite this narrative balance, one factor stands out from the others: the power of individuals to force change. Although the Dreyfus Affair eventually consumed France, drew international attention, and revealed tears in the European continent's social fabric, it began as the private cause of a lonely few. Lucie, Dreyfus's wife, and Mathieu, his brother, devoted their lives to the cause; Zola, the writer, and Picquart, the whistleblower, risked their careers and their freedom. Without their actions, there would be no Dreyfus Affair. Together, they were able to uncover the conspiracy against Dreyfus, to discover the true traitor, to force a trial of that traitor (a sham, as it turned out), a military retrial of Dreyfus (also a sham in the end), a pardon after the retrial defeat, and eventually a full exoneration by the Cour de Cassation. There is true heroism here, and one wonders if there is a U.S. parallel for this as well.

Begley thinks so. He points to "journalists dedicated to exposing the abuses of the Bush administration, members of the judiciary . . . military lawyers who have put their careers at risk . . . and civilian lawyers and law professors of all ages who have devoted thousands of hours without pay as legal defenders of Guantanamo detainees." And this sounds right. In the United States, perhaps there have been Zolas and Picquarts for detainees without a Lucie or a Mathieu. If that is so, perhaps the U.S. will resolve the Guantanamo affair as France resolved the Dreyfus Affair.

But as Begley's conclusion suggests, that would still be a failure. Begley briefly canvasses the literature that followed the Affair—looking to Zola, Anatole France, Proust—for the effects of the Affair. He finds the story rarely told and never appreciated. Proust makes the most extensive use of the Affair, in *A la recherche du temps perdu*, but his narrator concludes that the Affair was forgotten even before it had truly ended: "As for asking oneself about its value, not one thought of it now It was no longer *shocking*. That was all that was required." Ultimately, the Dreyfus Affair matters for Begley be-

cause it was forgotten. That is why it recurred. But here there is a chance to end the parallels. The story of Guantanamo Bay is not yet over, nor forgotten.

Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective. By Don Cipriani. Surrey, England: Ashgate, 2009. Pp. xvi, 232. \$99.95 (hardcover).

REVIEWED BY MICHAEL V. GIGANTE

Ideas about the proper role of criminal responsibility in juvenile justice tend to fall along a welfare-justice continuum. The welfare approach, prominent at the birth of the modern notion of a juvenile justice system, essentially dismissed the notions of competence and criminal responsibility for children. State authorities intervened to make benevolent decisions on behalf of children, who were portrayed as objects without liberty rights. On the other end of the continuum, the justice approach—towards which clear shifts have occurred in recent decades—places criminal responsibility and children's alleged competence at the center of juvenile justice. Accountability, due process, and punishment are the foundations of this approach. In *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, Don Cipriani points out the flaws of both these approaches and describes the merits of a children's rights approach as a way to mediate between the tensions of the welfare and justice approaches.

Along with related instruments, the 1989 Convention on the Rights of the Child (CRC), the cornerstone international human rights treaty for children's rights, addresses the flaws in the welfare and justice approaches. The international juvenile justice standards in the CRC "help mediate but not resolve conflicts along the welfare-justice continuum," including the minimum age of criminal responsibility (MACR). One key theme in this mediation is the rights of children younger than MACRs. According to Cipriani, the welfare approach "tends to arrogate critical decisions about young children's lives and to impose state authority upon children and their families." For example, in discussing the origins of juvenile justice, Cipriani mentions that "[t]he state could directly assume parental control when parents" were unable to provide acceptable care. By contrast, in the "context of protection-oriented responses

to children younger than MACRs,” children’s rights are advantageous because “[c]hildren’s best interests drive policy and practice, respect for the role of parents and guardians is stressed, and responses consist almost exclusively of assistance to families, communities, and schools.”

Another key theme in the mediation of conflicts along the welfare-justice continuum is “[c]hildren’s rights to respect for their views and to effective participation at trial.” Cipriani states that if children cannot participate effectively at trial, “they are due greater assistance and modifications to procedures and settings.” Further, if these measures are insufficient, “cases must generally be removed from the juvenile justice context and referred to welfare oriented actions used to address the behavior of children free from criminal responsibility.” These are just a few of several key themes involving children’s rights’ mediation of conflicts along the welfare-justice continuum.

Cipriani conceives of the MACR as a general principle of international law. General principles or rules of international law “can be derived from the general principles common to the world’s major legal systems”; “they are deemed to have been accepted by countries as rules of international law because they are derived directly from legal systems around the world.” Cipriani states that general principles of international law are binding; that is, they give “rise to international legal obligations that are independent from treaty law.” Cipriani notes that nearly every country has established an MACR. One broad legal reason for establishing MACRs is that “children below some specified, fixed age limit should never be held criminally responsible for their actions.” According to Cipriani, “[t]he nearly universal acceptance of this general criminal law principle would seem to raise it to the status of a general principle of international law.” Only eight countries either do not claim to have an MACR or effectively acknowledge not having one: Cambodia (in the process of establishing an MACR when the book went to press), Democratic Republic of the Congo, France, Mauritius, Nauru, Poland, Somalia, and the United States of America.

Cipriani’s analysis of the MACR as a general principle of international law merits critical reflection. Two initial points should be made for the sake of clarity. First, there are several sources of international law: treaties, customary international

law, general principles of law (the focus here), judicial decisions and the teachings of scholars, law-making by international organizations, and non-legally-binding norms (soft law). Second, the category of “general principles of law” has been used in several different ways: as “principles that *exist in the national laws* of states worldwide,” as “general principles of law derived from the *specific nature of the international community*,” as “principles *intrinsic to the idea of law*,” and as general principles of law arising “from notions of natural law or natural justice” (i.e., “law understood by humanity through rational reasoning”). It is not entirely clear which of these concepts Cipriani invokes when he advocates the MACR as a general principle of international law. He uses the phrase “fundamental principle of justice” in his argument, perhaps indicating that he is using notions of natural law or natural justice. However, most of his argument seems to focus on the first category of general principles of international law, as principles that exist in the national laws of states worldwide. Quoting M. Cherif Bassiouni, he states that general principles “are, above all else, ‘expressions of national legal systems’ that can be derived from the general principles common to the world’s major legal systems.” If Cipriani indeed intends to advocate the MACR as a binding legal obligation on all states regardless of their treaty obligations merely because the MACR exists in the national laws of many but not all states worldwide, this would be quite problematic given notions of state sovereignty. Perhaps, instead, he intends to advocate the MACR as a general principle of international law by using a combination of both the concepts of general principles as principles of law arising from notions of natural law or natural justice, and as principles that exist in the national laws of states worldwide. In any event, Cipriani’s argument leaves the reader confused. Given the enormous consequences that result from the recognition or confirmation of a general principle of international law (binding on all states, according to Cipriani), he could have spent more time clarifying and strengthening this argument, perhaps by incorporating the presentation of “the various moral and legal mandates for creating MACRs,” which he describes in previous chapters but mentions only curtly in the discussion on general principles. While most of his book is clear and informative, this particular portion is murky and ultimately unconvincing.

Cipriani's argument for the MACR as a general principle of international law that is thus binding on all states regardless of their treaty commitments has another major flaw: he oversimplifies the binding quality of general principles. In making his argument for the MACR as a general principle of international law, Cipriani cites Bassiouni's 1990 article, *A Functional Approach to "General Principles of International Law."* In a section of this article entitled "The binding nature of 'General Principles,'" Bassiouni notes that some do not accept the binding nature of general principles, viewing them as a subsidiary rather than primary source of international law, with the two primary sources of international law being treaties and customary international law. These critics argue that treaties and customary international law are "a more direct emanation of the will of States and are also often more specifically related to the subject matter envisaged by treaty provisions and customary rules than are 'General Principles.'" If such critics view general principles as merely having the function of "explaining inadequacies in the positive normative law" and filling gaps in the two primary sources of international law, they may not view general principles as a source of international law that binds and gives rise to legal obligations independent from treaty law, a primary source. The implication would be that states that do not have treaty obligations to implement an MACR may reject the notion of the MACR as binding and thus refuse to implement an MACR, feeling no legal obligation to do so. In making his argument for the MACR as a general principle of international law and thus as a binding obligation, Cipriani fails to address this potent counterargument.

Despite these significant flaws, Cipriani provides a well-researched work on the important subjects of children's rights and the criminal responsibility of children. The book is superbly organized and clearly written, making most of the more difficult topics it discusses readily understandable and engaging. Discussions on topics such as children's rights' mediation of welfare-justice tensions, modern trends of MACRs worldwide, and practical implications and challenges of MACR implementation are both informative and interesting.

Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa. By Kamari Clarke. New York, NY: Cambridge University Press, 2009. Pp. xxv, 240. \$29.99 (paperback).

REVIEWED BY KELLY GEOGHEGAN

Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa is Kamari Maxine Clarke's searching anthropological critique of both the international rule of law movement and its flagship tribunal, the International Criminal Court (ICC). Clarke explores the unspoken assumptions, or "fictions," that underlie this movement, showing that these assumptions privilege Western ideas of justice over African ones and obscure the post-colonial economic forces behind Africa's turmoil. Ultimately, *Fictions of Justice* is an anthropological work, not a legal text. Still, the book has potent insights to offer legal practitioners, particularly activists working "on behalf of victims" to achieve "universal" ideals of justice.

Clarke's principal subject is the ICC, a court designed to "end impunity for the perpetrators of the most serious crimes of concern to the international community." To date, the ICC has only issued indictments against Africans. In Uganda, the ICC issued five indictments against leaders of the rebel Lord's Resistance Army suspected of committing war crimes during the nation's bitter civil war. These indictments proved deeply polarizing, particularly during Uganda's peace talks in 2008. Rallying to the cry of "no peace without justice," a pro-ICC faction scorned any peace proposals that included amnesty for top leaders. Yet the traditional Ugandan view depicts justice as a process of societal healing. For traditionalists, peace *is* justice, so that an amnesty contributes to justice by hastening peace. Clarke notes that these conceptions of justice are defined in opposition to one another, and so are "incommensurable." And although Clarke meticulously notes alternative perspectives, the disagreement over the meaning of justice has mainly manifested itself as a debate of "international" versus "African" approaches. With little room for compromise between these camps, Clarke argues that the rule of law movement has progressed through the "political economy of incommensurability," with the carrot-and-stick forces of international

NGO donor capitalism and international tribunals with power over African sovereign authority ensuring that international ideas of justice prevail. Indeed, the ICC's prosecutor publicly refused to withdraw the Ugandan indictments, though the rebel leaders remain at large.

Although the project of Clarke's book is primarily descriptive, the Ugandan example showcases some of the author's poignant normative critiques. She concludes that the same humanitarian and moral imperatives that were deployed to justify colonialism are being wheeled out in this debate. Stereotypes about Africa's "political fragility, legal ineptitude, and economic volatility" ultimately underlie both the rule of law movement and the ICC's primarily African focus. She highlights the fact that the first case to come before the ICC involved child soldiers, and she accuses the international movement of likening Africa to a child soldier: immature, tragically exploited, guilty of the unthinkable, but simultaneously absolved of that guilt through the denial of moral agency. This image of the child soldier forms a "specter," a stylized (and fictionalized) idea of a victim in need of rescue. The international law movement claims this hyperbolized victim as its beneficiary, and relies on the victim as the source of its legitimacy.

Yet Clarke's child soldier metaphor represents one of the primary problems with *Fictions of Justice*. In places, the book seems symbolic to the point of inaccuracy. The ICC's first indictment, entered against Thomas Lubanga Dyilo, charged him only with the crime of conscripting children under age 15 into the Patriotic Forces for the Liberation of Congo (FPLC). Clarke never mentions that Lubanga's charges were so limited to avoid a legal problem. In 2006, when the *Lubanga* case was first presented to the court, the ICC's credibility was on the line since it had yet to begin a single case in four years of operation. To satisfy the ICC's jurisdictional requirements, however, the DRC was required to be "unwilling or unable" to prosecute Lubanga at the national level. The DRC's court system was arguably functional in 2006, and in fact the DRC had already instituted proceedings against Lubanga for many crimes. Through somewhat gymnastic logic, the ICC assumed jurisdiction over Lubanga's case because the DRC lacked any statute criminalizing the recruitment of child soldiers, and was thus "unable" to prosecute Lubanga for the totality of his offenses. Although Clarke's child soldier analogy is linguistically

and visually potent, the ICC's decision to focus on both Africa and on child soldiers arguably lacks the symbolism with which Clarke imbues it.

Similarly, Clarke overreaches in her argument that "command responsibility," a theory of individual criminal responsibility under which commanders are accountable for the crimes of their underlings, allows the rule-of-law movement to fictionalize the meaning of "guilt." She asserts that command responsibility has shallow legal roots (despite its long use in military contexts), and that command responsibility was invented to scapegoat a few select warlords as the "bad apples" who could be found "guilty" for the deeds of countless others. These fictions, Clarke continues, bolster the viewpoint that the underlings lack moral agency, and furthermore obscure the role that colonial and post-colonial economic forces have played in engendering African conflicts. Although linking command responsibility to Western ideological imperialism is narratively compelling, Clarke's analysis seems ultimately flawed. Decision makers *should* bear heightened responsibility when their decisions are carried out, and by prosecuting commanders, underlings are not necessarily thereby exculpated through a denial of agency. In fact, the ICC encourages national prosecution of "lower level" offenders. In the alternative, rooting African turmoil solely in colonial and post-colonial economic contests seems to exculpate commanders by denying *their* agency. Assuming prosecutions are a valid way of responding to atrocities committed during conflict (an assertion that Clarke never repudiates), then the ICC must focus on leaders for practical reasons, both because of limited resources and because leaders are most likely to avoid criminal charges in national courts.

By focusing on command responsibility, Clarke misses the opportunity to critique a much weaker theory of individual culpability known as "joint criminal enterprise" (JCE). This judicially created theory resembles *Pinkerton* liability in U.S. conspiracy law, pinning guilt on individuals for the foreseeable criminal acts of all other members engaged in a common criminal enterprise. JCE, nicknamed "Just Convict Everyone," has been criticized by international legal scholars since its inception, and many have speculated that JCE was created to ensure that political leaders who could not be shown to exercise command responsibility would nevertheless be convicted with

their peers. JCE is a vivid example of how the international community has been willing to fictionalize the law, valuing the “justice” of conviction over other concepts of “justice” which are arguably even dearer to Western jurists: those of due process, *nullum crimen sine lege*, and the right to a fair trial.

Part II of *Fictions of Justice* somewhat loosely reapplies the ideas of the previous chapters to questions dividing international secular ideals from Sharia law. Using Nigeria’s Sharia law movement as a case study, Clarke revisits the concepts of justice and victims’ interests. In Sharia law, acceptance of a proscribed punishment is the way that wrongdoers submit to the will of Allah. By cutting off a thief’s hand, the thief may be saved, while “the hand will go to hell.” Similarly, stoning the adulteress punishes her body but redeems her soul. To secular human rights activists, however, these defendants are “victims” who must be saved from their own repressive criminal regimes, even when the “victims” accept their punishment as a part of submission to Allah. Clarke discusses two botched international human rights campaigns designed to “save” convicted adulteresses that ultimately proved alienating to the Sharia communities and detrimental to the women involved. Rather than coerce human rights justice through NGO-run campaigns, Clarke encourages “strategic translation,” a concept derived from Sally Merry’s model that norms spread more easily when they are “vernacularized” into culturally acceptable terms. Essentially, activists should work within Sharia law, not against it. For example, invoking the Sharia belief that a child born within a few years of a husband’s death may still be attributed to the late husband may be a more appropriate way to advocate on behalf of a widow charged with adultery than decrying the entire Sharia system.

Clarke concludes that a “critically engaged transnational legal pluralism” can reorient international legal scholarship about the meanings of justice. Only then can the seemingly incommensurate become “justice in the making.” Unfortunately, Clarke never explains how this solution might help resolve the Ugandan issue, nor does she offer suggestions for responding to the problem of Africa’s economic destabilization. And by encouraging human rights activists to work against Sharia norms, even while working within the Sharia system, Clarke quietly privileges human rights justice without ever explaining how to go about choosing one vision of justice

over another. Still, *Fictions of Justice* uniquely applies years of first-hand research and powerful anthropological insights to a traditionally legal topic. Legal audiences have much to gain from this work.

The Least Worst Place: Guantanamo's First 100 Days. By Karen Greenberg. New York, New York: Oxford University Press, 2009. Pp. xvi, 260. \$27.95 (hardcover).

REVIEWED BY JOHN WUNDERLIN

In the preface to *The Least Worst Place: Guantanamo's First 100 Days*, Karen Greenberg briefly sets out the aim of the book: to describe the early days of the Guantanamo Bay detention facility, in which few abuses occurred despite incredibly trying circumstances, and to ask whether this narrative sheds any light on how later abuses came to occur and how such abuses might be avoided in the future. Perhaps in deference to the complexity and difficulty of the subject, Greenberg never tries to formulate the lessons as a set of policy prescriptions. Nevertheless, she succeeds in developing a strong understanding of how certain forces and circumstances gathered to create a disaster at Guantanamo while other forces worked to keep disaster at bay.

At the center of the story is Brigadier General Michael Lehnert, a marine assigned to set up and oversee the initial operation of Guantanamo Bay with virtually no guidance from his military or political superiors. Most of the narrative focuses on the tough decisions he and his closest adviser faced during the first 100 days of Guantanamo. However, Greenberg's scope is broad, and we also learn about the experiences of actors ranging from ordinary army privates to members of the Bush administration and their legal teams.

In the preface, Greenberg states that this history shows us "the human condition when it tends toward dignity rather than disgrace," and it is not hard to figure out which personalities she finds dignified and which disgraceful. The book is conspicuously biased. At times the writing is suffused with the language of value: Greenberg speaks of dignity and disgrace, humanity and dehumanization. However, these values emanate from sensibilities that most readers will share: respect for the rule of law, a belief that prisoners should be treated hu-

manely (especially when no evidence has been presented against them, much less a jury verdict), and a deep concern over abuses of power—in this case, brutality, indefinite detention, and torture. This is a story about our deepest values, Greenberg seems to be insisting, and it would be a mistake to tell it in purely clinical terms.

At the same time, she does not speak in moral absolutes and acknowledges the risks and benefits of the policies under examination. For example, one of the central narratives of the book is the conflict between Colonel Carrico, the head of detention operations at Guantanamo, and Lehnert over the extent to which the officials should seek to accommodate some of the prisoners' wishes (for example, regarding religious observance or diet). Colonel Carrico, the head of detention operations at Guantanamo, believes that a display of unyielding authority without any shred of accommodation is necessary to maintain order in the camp, whereas Lehnert favors a more accommodating approach. This tension comes to a head when the prisoners begin a hunger strike after prison guards mistreat the Koran twice in quick succession. Carrico maintains that the hunger strike is a product of excessively lenient policies: Lehnert has granted so many of the prisoners' requests that they have lost respect for his authority, and the only appropriate response is to clamp down aggressively. Although Lehnert recognizes the force of Carrico's argument, he ultimately decides to put together a more conciliatory response that succeeds in reducing the number of strikers from nearly a hundred to a dozen. Typical of her approach, Greenberg does not attempt to argue that Lehnert's approach is always better nor does she attempt to provide guidance as to when a disciplinary approach is better than a conciliatory approach, or vice versa. Instead, she tells the story of how, in this instance, the more humane approach worked.

As noted above, one of Greenberg's goals is to identify some of the crucial factors that led to the abuses that occurred at Guantanamo Bay and elsewhere in the War on Terror. Several factors stand out in her narrative, but one stands out above all the others: the absence of the rule of law. This legal vacuum had, broadly speaking, two main components. The first was that there simply were not preexisting laws to provide guidance to administrators. The military had not engaged in major detention activities since World War II and conse-

quently had neither the human expertise nor guidelines needed to handle such activities. If Lehnert and the other prison administrators wanted to apply rules to the camp, they would either have to make the rules themselves or borrow rules from other sources.

The second, and far more ominous, sense of “a legal vacuum” was the notion that no law should apply to the handling of the detainees. In fact, perhaps the primary reason that Guantanamo Bay was chosen as a detention site was that it was a place in which neither domestic nor foreign law applied. In the early days following 9/11, the War Council (a group of close advisers to the president who effectively dominated decisions of national security law) put forth the argument, based on a radical interpretation of the Geneva Conventions, that international law also did not apply to the detainees. Eventually, over the protestations of the lawyers at the State Department, this became official policy.

The consequences of this legal vacuum range from banal to terrifying. One of the most basic consequences was that Lehnert and his staff had no choice but to create rules on the fly. Although every body of law contains imperfections, most can be assumed to contain much accumulated wisdom. Some representative problems his team faced included: How does one provide medical care to potentially dangerous detainees without risking injury to the medical staff? How should the medical staff reconcile Muslim practices with concerns about safety? Many of these problems had to be resolved through the wits of those administering Guantanamo Bay, and there were certainly mistakes along the way.

A much more terrifying feature of the absence of law was that it meant that there was no sanction standing between the detainees and brutal, inhuman treatment. Early on, the Bush administration lawyers aggressively argued for exclusion of the detainees from coverage by the Geneva Conventions, without exactly explaining their motives or purposes. But, as the lawyers at the State Department presciently asked, “If you’re not going to violate the Conventions, then why create the legal space to do so?” As we know now, that legal space was created in part to allow egregious violations of the Geneva Conventions, most notably by allowing torture.

However, Greenberg also seeks to show how the worst abuses of the War on Terror could have been avoided. To this end, she provides a compelling account of how—in spite of the absence of law and its sanctions—Lehnert managed to create a camp that was remarkably ordered and humane, considering the circumstances. No prisoner appears to have been tortured on his watch, and great efforts were made to ensure that any abuses or grave and unnecessary deprivations suffered by the prisoners were promptly ended, to the extent that this was possible. What factors aided Lehnert and the other military officials in this endeavor? Undoubtedly, there are far more than can be described here, but several stand out.

Perhaps Lehnert's greatest tool, in this regard, was the Geneva Conventions themselves. Lehnert had received instructions that he was to act consistently with the Geneva Conventions, but should not feel bound by them. He received virtually no further guidance as to what was meant by this cryptic phrase. In the face of this silence, Lehnert committed himself to following the Geneva Conventions to the greatest extent possible, considering the circumstances.

Yet applying the Geneva Conventions in practice proved to be a rather complex endeavor, and the experience and impartiality of ICRC observers were essential to their successful application. How far did the camp need to go to comply with the Geneva Conventions requirements to respect the religious beliefs of prisoners? How much force was acceptable to maintain discipline? The ICRC representatives present at the camp were able to give more specific content to the Geneva Conventions in order to resolve these and other questions. They helped communicate the concerns of the detainees to military officials, and were also able to provide an impartial perspective on conflicting interests. Although the camp was unable to implement all of the requirements of the Geneva Conventions—for example, it was some time before they were able to set up a secure means of providing recreation time to prisoners—they did comply with many of its provisions.

Unfortunately, Greenberg does not provide as much precise legal background here as she does in some other sections of the book. We largely learn about the content of the Geneva Conventions through the demands that the ICRC makes on the detainees' behalf. However, the narrative does make clear the important role that the Geneva Conventions played in the

governance of the camp. They provided standards and norms according to which the military could work—standards that contained the wisdom of over a hundred years of debate and practice regarding the treatment of prisoners—and helped restrain forces working to make life more difficult for the detainees.

There was an obvious downside to this ad-hoc, unbound approach to implementing rules in the camp: the rules could be abandoned at any time without legal consequence, and their survival depended to a large extent on the presence of a leadership committed to their implementation. Lehnert departed after only a few months at the camp and was replaced by leadership more amenable to the goals of the Bush administration, which placed increasing pressure on the leadership to aggressively interrogate prisoners. The final section, or Postscript, of *The Least Worst Place* briefly sketches the changes that occurred in the several years following this change in leadership. Torture occurred, random abuse by the guards became more common, and prisoners came to feel more isolated. These harms throw the positive features of Lehnert's leadership into sharp relief, and drive home the impressiveness of his and his staff's accomplishments.

One limitation of Greenberg's account is that the administrators during the first 100 days of the camp were not under orders to interrogate the prisoners, nor did they have to make the difficult choices that such a mission would entail. As Greenberg makes clear, there are some tensions between the goals of detention and the goals of interrogation, and Lehnert and his staff did not have to deal with these tensions. One of the most important questions raised by *The Least Worst Place* is how these goals could best be reconciled. Although Greenberg does not address this question head-on, her account undoubtedly provides many important insights in thinking about this question.

The Least Worst Place is, at its heart, a story about a place to which the rule of law was never intended to reach. As such, it does much more than tell a story about soldiers and politicians squabbling over the rules that will apply to the detainees under their control. It throws into stark relief the role that law plays in our society. It raises numerous questions about just how the Bush administration's national security policy developed and how things could have been done differently. Those

who would hope for in-depth, legalistic treatment of each of these questions will likely be disappointed. Greenberg's legal analysis is often brief (though carefully argued and supported). However, those looking for an exhaustively detailed and insightful narrative account of extraordinary events that shed light on these questions will be richly rewarded.

Re-Envisioning Sovereignty: The End of Westphalia? Edited by Trudy Jacobsen, Charles Sampford, and Ramesh Thakur. Surrey, United Kingdom: Ashgate Publishing Company, 2008. Pp. xvi, 375. \$124.95 (hardcover).

REVIEWED BY PAUL MIGNANO

For a concept that is so central to international relations and public international law, the meaning of "sovereignty" is surprisingly difficult to articulate. At its essence, Westphalian sovereignty is about the ability of a state to engage in political self-determination, to be considered a legal equal of other states, and to ensure non-interference of outside states in its own internal affairs.

Today, there are many challenges to these three basic principles, ranging from the Bretton Woods institutions to global climate change, and from the advent of international criminal law to global health threats. The authors of *Re-Envisioning Sovereignty: The End of Westphalia?* take different approaches to the subject of Westphalian sovereignty, from reexamining its historical underpinnings to approaching sovereignty as a doctor would diagnose a complaint. The various approaches of the authors serve as a reminder of the great difficulty even the most accomplished international scholars have articulating both the core and outer reaches of the concept of Westphalian sovereignty.

A key point that many of the authors overlook, but that is worth articulating, is that Westphalian sovereignty is and has been under threat *only to the extent that states find it to be in their self-interest*. The only non-state actor that can truly interfere in the internal affairs of another state is the United Nations Security Council, which is itself composed of states. The Security Council typically acts only when it is in the self-interest of its individual member states to do so. In peacekeeping operations (aside from extremely rare actions under Chapter VII of

the UN Charter), peacekeepers enter a country with the consent of its government according to a carefully negotiated set of terms regarding the size of the peacekeeping force, the duration of its stay, and the scope of its mission. States in turmoil allow an international peacekeeping force to come in because it is within that state's self-interest to do so.

The first few essays, which collectively challenge the traditional understanding and historical underpinnings of Westphalian sovereignty, are perhaps the most interesting of the book. Wayne Hudson's examination of the literature on sovereignty rightly points out the biases towards English sources and the tendency to view history as an unerring march from antiquity to the modern nation-state. Joseph Camilleri expands on this idea, describing much of the recent literature on sovereignty as some sort of salvage operation designed to repair sovereignty, given the pounding it has endured since the end of the Cold War. Camilleri stresses the "relatively uncharted waters" in which states function, and that international intervention must be done carefully to avoid being a series of neo-imperialist dictates from the global North to the South. Rather than the Westphalian sovereignty concept of each state having the ability to truly exclude all outsiders, today numerous interdependencies have created a fetal world society.

Seemingly prematurely, Jan Aart Scholte declares the world to be post-statist, saying that "even the most powerful country governments are unable to enact anything close to sovereignty in its Westphalian sense." His point is directly contradicted several chapters earlier, when Roland Rich correctly points out that the Democratic People's Republic of North Korea almost completely closes off its borders to outside trade and outside diplomatic relations and refuses to accept foreign investment, with its attendant strings. Short of a U.N. Security Council resolution, no force besides North Korean self-interest can force it to engage with the outside world.

That is the key underlying all of the challenges to sovereignty presented by the authors. The problem of official developmental aid (ODA) not achieving true aid for the neediest countries is closely linked to the fact, as Rich points out, that the rich countries who wield the most power within the IMF and World Bank attach strings to their loans. These conditions help such rich and powerful states to achieve their own

policy goals. This self-interest becomes even more self-evident when foreign direct investment from one government to another is considered.

Globalization is another force typically seen as a threat to Westphalian sovereignty. However, there is no requirement for a state to join free trade organizations such as the WTO, or to sign bilateral trade agreements. Rather, states join these organizations and sign these treaties because the resulting increase in imports and the ability to export more goods cheaply serves their own self-interest. That is, fostering a more interconnected world can be in a sovereign state's self-interest. Barry Hindess' article about indirect rule explores globalization based on the premise that members of global trade organizations are clearly not effective equals, but it fails to mention that a developing state that joins an international trade agreement does so of its own free will.

The book also contains a few fascinating essays about perceptions of Westphalian sovereignty in different regions of the world. Amin Saikal's essay about Islamic perspectives on sovereignty is particularly interesting, with the discussion of differences between Islamic notions of sovereignty and more European approaches making for fascinating reading. According to Saikal, Islam is "essentially a religion of a borderless community of believers," with the rights of individuals existing within the Islamic framework of a communal life. However, the popular acceptance of Westphalian sovereignty has meant that a Saudi is likely to identify himself as a Saudi first and a Muslim second. The major clusters of Jihadi and Ijtihadi Islamists view sovereignty in very separate ways, with Ijtihadi Islamists arguing for a soft relationship between religion and politics, and Jihadi Islamists stating that there is absolutely no separation between religion and politics. This split leads to fundamental differences in the approach to sovereignty taken in Islamic countries, though Ijtihadi Islamists tend to include most secular elites in the Muslim world today. Other interesting regional examinations of sovereignty come from See Seng Tan and Tongjin Zhang, who write about notions of sovereignty in Southeast Asia and China, respectively. Zhang notes that while the People's Republic of China may often seem (and is often described) as though it is the last bastion of Westphalian sovereignty, China has often seen it to be in its self-

interest to open up to economic, but not political, globalization.

Transcending sovereignty when facing threats to human and global security seems an obvious example of an exercise of enlightened self-interest whereby states cede traditional aspects of Westphalian sovereignty for their own betterment. Brian Job's article on confronting international non-state terrorism demonstrates that even when states differ on the root causes of international terrorism and appropriate methods of cooperation, it is squarely within the self-interest of all states to prevent acts of terrorism from occurring on the territory of their own or any other country. A less self-evident instance of self-interested states ceding aspects of their sovereignty is the acceptance and absorption of international refugees or internally displaced persons. In their essays, both Howard Adelman and Robyn Lui discuss the threat to sovereignty that mass refugee movements might represent. Adelman writes about the balance between concerns of civil liberties and national security, employing the intriguing metaphor of a suspension bridge, supported between the poles of individual and state sovereignty with a roadway from self-sacrifice to respect for human rights. Lui's approach to international refugee protection notes that no state is obligated to accept refugees from war or disaster-torn third countries, but that liberal internationalism and the potential for reciprocity are strong incentives for states considering whether to accept refugees and to establish camps.

Other transnational issues written about in which a state may find it in its self-interest to allow for more interference in its internal affairs are global health crises, global climate change, and international criminal law. While Lorraine Elliott believes that Westphalian sovereignty is "counterproductive to the pursuit of global environmental justice," each state working towards a solution to global climate change is also trying to maximize its own self-interest. The inability of the states to draft a comprehensive and enforceable plan of action to combat global climate change is evidence that Westphalian sovereignty is alive and well, for better or worse. On the other hand, Jackson Nyamuya Maogoto's article on international justice and Westphalian sovereignty challenges this conclusion. The ad hoc international criminal tribunals in the former Yugoslavia and Rwanda seem to be blatant challenges to the

traditional Westphalian principle of non-interference. However, Maogoto rightly points out that while sovereignty bestows rights upon a state, it also imposes responsibilities and obligations. Maogoto states that among these obligations is the responsibility to protect a state's population from internal and external threats. When a state fails to meet this obligation, as tragically occurred during atrocities in both the former Yugoslavia and Rwanda, that state has lost some of its sovereignty, and the international community at large has a right and a duty to intervene. The failure of the international community to intervene on many occasions does not render this duty of intervention meaningless.

Essays in the penultimate section of the book bring together the challenges to sovereignty discussed in earlier sections and put them in a full and relevant context. The essays on development consider the incentives facing developing states to cede traditional aspects of state sovereignty. Rich's article wisely concludes that sovereignty is a porous shield against many aspects of globalization, at least for democratic states. There are states which continue to adhere to true Westphalian values of non-interference and legal equality, North Korea and Myanmar among them. Notably, these states, and other more traditional adherents to the principle of sovereignty, are not democracies. It thus appears to be the pressures of democracy, and the demands of a developing populace, that drive state governments to cede sovereign abilities. This may seem a hollow fulfillment of the Westphalian promise of legal equality of states, but it is ultimately the self-interested choice of each state to choose its own destiny.

Human Rights for the 21st Century. By Helen M. Stacy. Stanford, California: Stanford University Press, 2009. Pp. vii, 260. \$21.95 (paperback).

REVIEWED BY NALINI GUPTA

In *Human Rights for the 21st Century*, Helen Stacy addresses the major critiques of the international human rights framework, offering suggestions on how to fill gaps in the current system in order to strengthen the framework. Stacy organizes the major critiques of the international human rights system into three categories: sovereignty, civil society, and multicul-

turalism. Responding to each of these critiques, she argues that the law and the courts must continue to play a critical role in the human rights system, but their role must be adjusted to adapt to the challenges posed by the current world order. Stacy's book is a worthy read, providing a comprehensive analysis of the current challenges of the current human rights framework and offering interesting and practical proposals aimed at improving the present system.

According to Stacy, the sovereignty critique contends that international human rights standards consist of empty rhetoric; regardless of the treaties they sign and promises they make, states continue to systematically violate human rights. Human rights treaties lack international enforcement power, and thus international human rights law has force only to the extent that it overlaps with a state's self-interest. Stacy responds to this critique by proposing a new conception of sovereignty—that of relational sovereignty. While traditional sovereignty maintains that governments are the supreme authority within their state borders, sovereignty today has a new meaning as a result of global economic relationships, increased information flow leading to greater knowledge about human rights violations occurring in other states, and postcolonial ideas of equality of human rights. Relational sovereignty emphasizes a state's diplomatic, economic, and military relationships with other states, noting that in today's globalized world a state has an interest in increased cooperation with other states. Given this new meaning of sovereignty, Stacy argues that traditional sovereignty should be disregarded and states should be permitted to intervene when another state commits egregious human rights violations or allows for widespread deaths by starvation or disease despite having the resources to prevent such catastrophes.

Stacy makes a convincing argument about the need for humanitarian intervention, pointing to the crises in Rwanda and the Sudan to illustrate why the current framework for international intervention has failed and to the interventions in Kosovo and East Timor to illustrate why present legal definitions are outdated. Yet she is careful to advance a new framework that places constraints on the behavior of powerful states: a state exercising humanitarian intervention will be limited not only by moral considerations—such as consideration of the extent of the harm—but also by practical and procedural

considerations. Thus, a state should intervene only if it is clear that intervention will make sustainable improvements to the human rights situation and if the single motive of the intervening state is to remedy human rights violations. Stacy believes that humanitarian intervention for democracy promotion goes too far. Given the many checks proposed under Stacy's new rubric, she is successful in suggesting a principled framework that curtails the potential for powerful states to use the pretext of humanitarian intervention as a means of merely advancing their own interests.

The civil society critique maintains that extra-legal institutions are in a better position than courts to advance international human rights. For example, nongovernmental organizations have been successful in raising the profile of social justice issues, leading states to attach human rights conditions to trade and other economic agreements. Yet these approaches are inherently limited, and Stacy argues that law is necessary to supplement civil society movements. She writes that "courts provide the connection between politics and practices" by transforming abstract norms into tangible rights. Courts stand in a unique institutional position in that they are able to apply general rights in specific circumstances and conduct fact-finding to identify relevant evidence regarding a rights violation. Furthermore, since courts are constrained by procedural standards, they enjoy credibility that civil society institutions often lack.

Although from the U.S. perspective courts may be in a position to articulate human rights norms in a manner that complements the work of civil society, Stacy's argument is vulnerable to the criticism that in many states—especially those in which human rights are subject to the most abuse—national courts are not actually in an institutional position to perform this function. Instead, these national courts are often backlogged, subject to political pressure and manipulation, and viewed as entirely illegitimate by the public. While she provides examples from India and Colombia, Stacy does not sufficiently address how courts in states in which the judicial system lacks independence may be successful in furthering human rights standards that their governments otherwise flout.

Lastly, the multiculturalism critique questions whether international human rights norms are possible in a world of diverse religions, beliefs, and cultures. The tradition of human

rights has largely excluded non-Western viewpoints, and human rights are often seen by non-Western countries as a colonialist imposition of Western values. As a response to this critique, Stacy promotes regionalism as a method of bridging the gap between a completely international court system, which threatens to disregard and disrespect local culture, and a completely local court system, which often lacks credibility because of political influences that compromise judicial independence. Regional courts avoid many multicultural challenges because they are in touch with local customs and traditions and are geographically close to the people who are affected by their judgments. Stacy points to the European Convention of Human Rights, the Inter-American Commission, and the African Court on Human and Peoples' Rights as evidence of the movement toward regionalism, and advocates for the creation of an Association of South East Asian Nations (ASEAN) regional human rights court. Stacy also points to the success of hybrid courts—particularly the Special Court of Sierra Leone—in highlighting a novel method for avoiding the challenges of exclusively national or exclusively international post-conflict tribunals.

Stacy's argument highlighting the importance of regionalism and hybrid courts is her most powerful claim. As she rightly underscores, the international law regime often lacks legitimacy because it is a system based upon Western traditions. In order to be successful, human rights movements have to be, at least in part, organic movements that are rooted in and legitimized by the values and traditions of the people they affect. Regionalist systems, though not guaranteed to succeed, are in a better position to recognize and address the unique challenges of the cultures in which they operate.

While Stacy provides a clear and accessible overview of the flaws and challenges of the current human rights framework, her tripartite classification system of the major critiques is overly simplistic, as her own analysis ends up suggesting. Her own argument indicates that these criticisms are in fact very intertwined and interdependent, and thus her own responses to each critique draw heavily upon one another. In particular, Stacy keeps on coming back to the theme of multiculturalism and the risk of imposing Western ideals on non-Western cultures and traditions. Perhaps Stacy would have benefited from addressing this as an overarching theme, rather than pige-

onholling it as a distinct criticism of the current framework with a response that can be divorced from the other solutions.

While Stacy's individual responses to the criticisms of the current human rights framework are not groundbreaking, her proposals draw upon a rich mix of political philosophy, legal theory, historical accounts, and current events. In doing so, Stacy is successful in advancing a comprehensive thesis about the necessary role of law in international human rights that is grounded in a plethora of historical evidence and contemporary controversies. Thus, her argument is powerful on both practical and normative grounds. Yet in highlighting so many case studies, Stacy at times buries her thesis in an excess of stories. While for the most part her use of history and theory is successful in illuminating her argument, at times the reader may feel lost when she presents her own proposals in an overly convoluted fashion.

Overall, *Human Rights in the 21st Century* is an interesting contribution to the current human rights literature. Its strength rests on its wide-ranging responses to the criticisms of the current framework and its attempt to provide practical and attainable solutions to these problems. It is a worthy read for students and scholars seeking to gain knowledge about the philosophical and historical evolution of international human rights and the system which we have been left with today.

The Sacco-Vanzetti Affair: America on Trial. By Moshik Temkin. New Haven, Connecticut: Yale University Press, 2009. Pp. xii, 316. \$35.00 (hardcover).

REVIEWED BY J. BENTON HEATH

Two years after the 1927 execution of Italian-American anarchists Nicolai Sacco and Bartolomeo Vanzetti, H.L. Mencken wrote that their case "refuses to yield. . . . The victims continue to walk, haunting the conscience of America, of the civilized world." Eight decades have passed since Mencken's writing, yet Sacco and Vanzetti continue to stalk the public imagination, attracting renewed interest from scholars, journalists, commentators, and novelists. Temkin's engaging and insightful work attempts to establish the historical place of Sacco and Vanzetti by focusing on the nationwide and transatlantic dimensions of their case. By focusing on the international re-

actions to the convictions and executions, and on the effects of foreign criticism, Temkin finds his own unique niche among the extensive scholarship on the case.

In his analysis, Temkin distinguishes between the Sacco-Vanzetti case, meaning the actual criminal proceeding, and the affair itself. The case began with the robbery and murder of a shoe factory paymaster and his security guard in an industrial Boston suburb on April 15, 1920, resulting in the arrest, weeks later, of Sacco and Vanzetti. It culminated when the two men were convicted in 1921 and later sentenced to death. The legal case was characterized by a woefully unfair trial, an unsympathetic judge, and a predominant postwar mood characterized by xenophobia and the Red Scare. By contrast, the affair, as Temkin uses it, stands for the international controversy that developed around the two men between their conviction and their execution six years later. Temkin focuses exclusively on the affair, thus avoiding questions of whether Sacco and Vanzetti were innocent or whether they received a fair trial, and instead examining a climate of criticism and debate that only became more noxious as the two men's executions neared.

Chapter 1 examines the evolution of the international affair, out of what was originally described as "just a couple of wops in a jam." The original murder trial drew the ire of leftist groups in the United States and abroad, as well as the attention of a few Boston intellectuals and the American Civil Liberties Union, but it was nothing near the *cause célèbre* it would become in 1926 and 1927. Temkin notes that newspapers, for example, covered the early stages of the trial "in a spirit of fear" consistent with the Red Scare of the early 1920s, but by the time of Sacco and Vanzetti's execution this attitude would largely change. Shortly after the two men's final motion for a new trial was denied, the *Boston Herald* published an editorial calling for a reexamination of the case. Temkin notes that, "in another sign of the changing times," the editorialist won a Pulitzer Prize.

In explaining this transition, Temkin wisely modifies the traditional claim that the Red Scare was largely "over" by 1926 and that anti-Communist fervor had rapidly declined. Temkin's more nuanced account characterizes the era as "a transition period" in which those who rose to power on a wave of anti-Communism found themselves challenged by an in-

creasingly confident group of critics from the intellectual and political elite. This emboldened stance led to increasingly vocal criticism (such as Felix Frankfurter's famous study on the case) from influential figures in the United States, as well as from commentators abroad. H.G. Wells focused his attacks on the trial judge, Webster Thayer, writing, "What is the matter with Judge Thayer is not that he is anti-moral, but that he is . . . extremely obtuse mentally and morally. This mental and moral obtuseness seems to have extended . . . to a considerable body of opinion in the United States." This kind of cultural diagnosis from Europe's leading intellectuals sparked a backlash in the United States that, Temkin argues, ultimately doomed Sacco and Vanzetti.

Chapter 2 explores the domestic reaction to foreign interest in the case, arguing that worldwide protest, and cultural criticisms such as Wells', sealed the fate of Sacco and Vanzetti, even as it contributed to growing domestic support for the two men. Temkin marshals an impressive compilation of statements from intellectuals, politicians, and journalists, expressing the sentiment that a grant of clemency or even a new trial for Sacco-Vanzetti would constitute capitulation to "foreign interference." Most chilling is then-Massachusetts Governor Fuller's statement that international pressure on behalf of Sacco and Vanzetti "proved that there was a conspiracy against the security of the United States" and that such criticism "only damaged the two men. Perhaps without such pressure from outside another solution would have been possible."

But it is not obvious from Temkin's investigation how one should view these sentiments. It could be argued that, in the 1920s, resistance to foreign interference was inevitably linked to attitudes about the influence of communism and other forms of radical leftism following World War I. This view finds support in many of the cited statements and editorials, which appear unable to distinguish between foreign critiques of an unfair and procedurally defective trial on the one hand and the plots of bomb-throwing anarchists and sinister communists on the other. Seen in this light, the intransigence displayed by those who supported Sacco and Vanzetti's execution represented the lingering influence of the Red Scare in American political life, and thus was something unique to that period.

Temkin, however, seems to prefer a broader reading of this reaction to international pressure, arguing that the affair

challenged Americans to “accept the reciprocal, even inevitable, consequence of American global supremacy: the interest and involvement of non-Americans, especially Europeans, in U.S. affairs.” Viewed in this context, the Sacco-Vanzetti affair was the first major flashpoint in an ongoing conflict that remains central to American politics. From Guantanamo to illegal immigration, from domestic surveillance to the *Medellin* decision, the international community has repeatedly claimed what Europeans then called a “right to criticize” U.S. policy, but Americans remain divided as to what heed they must give to international voices.

Chapter 3 looks at the Sacco-Vanzetti affair from the other side of the Atlantic, focusing on the French response and placing it in the context of a broader European reaction. Temkin demonstrates that the transatlantic Sacco-Vanzetti affair grew, at least in part, out of fears that the United States, now the world’s dominant economic, political, and cultural power, “was frighteningly out of touch with the moral compass of the rest of the world, threatened extinction of the European way of life, and seemed impervious to any foreign influence, yet at the same time seemed determined to export its way of life across the ocean.” This fear intertwined with a sense of “betrayal” by many liberal intellectuals, who had hoped that an increasingly powerful America would stand as a beacon of tolerance, freedom, and justice. The chapter supports these conclusions with extensive examinations and analysis of the publications and private correspondence of leading European, and particularly French, intellectuals. Temkin also deftly explores factors peculiar to the historical moment of the 1920s, such as tensions between rival groups of communists, syndicalists, and anarchists on the radical left, which rendered these groups unable to send a unified message in protesting the plight of Sacco and Vanzetti.

It is unfortunate that Temkin does not give more attention to the “stubborn question” of the transatlantic affair: why, of all American injustices, did the European community latch onto Sacco and Vanzetti? Why not the countless lynchings of black Americans, or the 1925 Sweet murder trial? Temkin briefly offers two answers to this question. Most obviously, Sacco and Vanzetti were European. Moreover, they challenged America’s dominant social and political order, and Europeans of all political allegiances who feared the rising in-

fluence of the United States could certainly identify with them to some extent. But Temkin, citing Professor Frank Costigliola, offers the more interesting conclusion that the Sacco-Vanzetti affair gained symbolic significance in the context of the global struggle between revolutionary leftism and liberal capitalism. "If even the powerful United States could not strike a moderate pose between reaction and revolution," Temkin quotes Costigliola as writing, "how could European democracies hope to do so?" If correct, this interpretation would invite a useful comparative study of the Sacco-Vanzetti affair and the modern cultural tensions between liberal capitalism and radical Islam. However, it is unclear from this book whether this conclusion accurately reflects the dominant mood among Sacco and Vanzetti's contemporaries in Europe, and Temkin seems to leave the question open for further study.

Chapters 4 and 5 consider aspects of the affair that have less direct relevance to its international scope. In chapter 4, Temkin investigates the story of the Lowell Commission, a group of experts established by Governor Fuller to reexamine the Sacco-Vanzetti case. The commission, led by Abbot Lawrence Lowell, the president of Harvard, represented the last, best hope for the two men, since a fair review of their trial could clear the way for executive clemency, a pardon, or other action. Instead, the commission rubber-stamped the verdict, proceedings, and sentence in a sloppy, poorly reasoned report. Temkin suggests that the commission's conclusions may have been driven more by a desire to "return to normalcy" and close the affair, rather than by questions of truth or fairness. In fact, the report had the opposite effect, pushing liberal intellectuals further to the left, sparking protests at home and abroad, and damaging America's image worldwide. Chapter 5 discusses the resurrection of the Sacco-Vanzetti affair in the 1960s, following efforts by conservative intellectuals to show that the two men were guilty. Temkin argues that these later struggles over the "myth" of Sacco-Vanzetti only solidify the affair's place in American and European history.

Temkin pulled together a tremendous amount of sources for this work, but *The Sacco-Vanzetti Affair* would have benefited from a more controlled, methodical structure. The plight of Sacco and Vanzetti motivated a variety of commentators, historians, and interest groups, each with their own interpreta-

tions of the case and its significance. Moreover, these disparate reactions took place in a complex political and cultural climate that saw the rise of Soviet Russia, the growth of both American power abroad and isolationism at home, and the shifting positions and influence within the United States of both the liberal intellectual elite and the radical left. In addressing the international dimensions of this affair, Temkin clearly understands that he is telling a complex, nuanced story; but his organizational structure, which often jumps between early reactions to the case in 1920 to reflections and protests after the executions, makes it difficult to pin down his conclusions. This may be less of a problem for those intimately familiar with the politics and culture of the period, but for others it becomes difficult to assimilate the intricate web of domestic and international relationships.

This work is unique in its focus on the international aspects of the affair, but the conclusions that Temkin reaches, read simply, will seem quite obvious. If one learns a single lesson from the past nine years of American international relations, it is that the United States exhibits remarkable inflexibility when confronted with “foreign interference,” and that its leaders will cite the need to “stand tough” against international criticism at the risk of repeating past mistakes or entrenching injustice. Instead, the greatest value of *The Sacco-Vanzetti Affair* may be found in the details. In gathering a wealth of comments and criticisms from a variety of sources, Temkin reveals that the events surrounding Sacco and Vanzetti formed an early part of an ongoing dialogue regarding U.S. global dominance and domestic policy.

Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution. By Florian Wettstein. Stanford, California: Stanford Business Books, 2009. Pp. ix, 397. \$65.00 (hardcover).

REVIEWED BY SYLWIA WEWIORA

In the wake of the global economic crisis, the downfall of once-mighty corporations has taken most of the blame for the ensuing recessions in states around the world. It is no wonder that the unfettered neoliberal policies that dominated domestic and global markets for decades now find themselves under

attack. Though the concept of corporate social responsibility (“CSR”) is nothing new, it has become particularly salient in this anti-corporate atmosphere. However, both the neoliberal notion that “the business of business is business” and classic statist conceptions of international law have limited how far debates about CSR can go. Florian Wettstein’s *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* attempts to use traditional notions of international law and market policy to remedy CSR’s state of incongruence. In doing so, Wettstein’s clear purpose is to hold multinational corporations (“MNCs”) responsible for the various instances in which their corporate practices have violated human rights, particularly the right that Wettstein terms the “right to development.” Though Wettstein’s analysis adds a relevant and important method of explaining why modern debates and discourse on global justice must include MNCs, it suffers from some practical shortcomings that require closer examination.

Wettstein’s human rights are not defined by legal instruments, but rather they flow from individuals’ fundamental statuses as human beings. Relying on philosophical arguments, particularly those of Amartya Sen, Wettstein establishes a general set of human rights as moral rights owed to all by all because to do otherwise would be to deny one’s humanity. Wettstein’s moralist prism invites readers to consider the importance of positive rights and obligations and recalls the notion that human rights are not merely a matter of non-violation but also of protection. Wettstein’s language evokes debates between formal equality and substantive equality; although opportunities may be available in a superficial sense, if individuals cannot actually take advantage of such opportunities this cannot constitute fulfillment of human rights obligations. By re-framing economic development in terms of individuals’ *real* access to opportunities and not just the official existence of such opportunities, Wettstein provides an interesting and persuasive counterpoint to the neoliberal axiom that “trickle down economics” should be the primary solution to quality-of-life and economic development issues.

Using this language of formal and structural equality, Wettstein focuses on the structural dominance of MNCs, highlighting the rapid development of a global economy that endows MNCs not only with domestic corporate status, but with

the capacity to participate in global markets devoid of adequate regulation and oversight. The proliferation of MNCs, prompted in large part by neoliberal economic policies, has resulted in oligopolistic concentration of market power and effective usurpation of control, so that, as Wettstein stresses, it is not market demands guiding MNCs but, rather, MNCs guiding market demands. What troubles Wettstein is the inability to apply human rights obligations to the CSR debate: the statist model of international law holds that states are the primary if not the only relevant actors in international law. Moreover, the statist model holds that international legal norms are applicable only to states. In order to counter this entrenched and perhaps antiquated principle, Wettstein borrows from the growing literature on the centrality of international organizations ("IOs") as key actors in international law to demonstrate the hazards of relying on a model that ignores relevant non-state actors.

Wettstein's argument that debates about global justice and global law must begin focusing on MNCs is compelling, not least because of the current economic climate. Unlike the IO argument, however, which relies on the point that states establish and by some measure control IOs, the MNC argument requires a more expansive interpretation of the reach of international law in order to justify the inclusion of private entities. Wettstein founds his argument upon a fundamental re-orientation of who can engage in political activities, particularly those colloquially associated with states. By divorcing politics from states, and by defining politics in the most abstract sense as a public communicative process, especially as concerns the distribution of public goods and services, Wettstein makes it possible to understand that even private entities such as MNCs can engage in political activities as quasi-governmental institutions. Wettstein ably supplements his argument with empirical evidence, most notably regarding the contracting-out of public services such as health care and education to corporations.

After establishing that MNCs are as integral a force in individuals' lives as their governments, the next logical step for Wettstein is to apply obligations and expectations that may normally be assigned to states to MNCs. Here, the central argument, at least in part, seems to lose some force, particularly as the question of how to identify obligations is parsed out into

issues of causality and capabilities. The former, Wettstein argues, is an inadequate method by which to assign obligations, while the latter is preferable not only because it is, as a general matter, easier to apply but also because a focus on capabilities satisfies the moralist definition of human rights: if one is able to right a wrong, then one is obligated by a common sense of morality and human dignity to do so. By focusing on capabilities, however, Wettstein overlooks the benefits of using a causality-based rationale to establish obligations.

This omission works to the book's detriment; Wettstein fails to address convincing arguments against a capabilities-based approach. In Chapter 9 of the book, Wettstein outlines the types of obligations that are applicable to MNCs through corporate complicity and classifies violations thereof as indirect. To make up for the semantic decision to classify complicity as an indirect violation, Wettstein is forced to rely on a capabilities-based approach to rationalize why MNCs should, for example, engage in the protection of human rights against violations by governments with which they coordinate on business projects. This assertion seems to be entirely rational on its face, but it fails to take into account the possible negative implications of expanding the capabilities-based approach to impose obligations on MNCs in situations to which they themselves do not have a direct connection. Though Wettstein asserts that general human dignity obligates everyone to everyone, and that this is enough to compel MNCs with no direct link to violations of human rights to get involved, it is perhaps too abstract an argument to prove that this is indeed the case. The attendant negative consequence, which Wettstein does not address, is that, by orienting obligations to capabilities, the impetus for MNCs to grow and evolve is tempered by the fact that growth will expose them to more accountability for human rights violations, so that the result may be an economic "race to the bottom."

On the other hand, this may very well be Wettstein's goal in a book that unabashedly derides the omnipotent role of MNCs in both the public and private spheres. Nevertheless, Wettstein admits that if MNCs simply pull out of violating states or sever business contracts with human rights violators, that can prove harmful to the livelihood of individuals. Such a scenario, which can also be used for negative purposes as an "exit threat" by MNCs seeking better business conditions

within states, reinforces the prominence of structural complicity, which seems to be the strongest of Wettstein's arguments for why mandatory CSR and human rights obligations must apply to MNCs. By blindly amassing as much power, both private and public, as possible, MNCs have put themselves in a position where at least part of the blame for global society's ills can be placed on their shoulders. As a result, the obligation to fix those ills must also rest with them, and fixing the system to eradicate the control, and therefore the obligations, of MNCs becomes increasingly desirable. By focusing on structure, Wettstein continues to argue that the focus is on capabilities, but causality, in such a broad sense, seems to act as a sufficient link between MNCs and human rights violations.

Ultimately, *Multinational Corporations and Global Justice* raises just as many questions as it answers, if not more. The two most salient questions complement each other. First, in arguing for the inclusion of MNCs in public dialogue about the alleviation of human rights violations, Wettstein puts forth a scenario that appears to bolster and indeed legitimize the power and de facto authority of MNCs in the global arena. To his credit, Wettstein recognizes this issue, but he does not afford it enough room or insight; instead, Wettstein's irrefutable presumption seems to be that the emergence of a global regulatory scheme will keep MNCs in check. However, due to the entrenchment of MNC control over the global sphere, this regulatory scheme will necessarily have to come about with some MNC support, which leads to the next question: What is encouraging MNCs to recognize and address these obligations? Wettstein emphasizes inherent morality as the impetus, but this explanation, particularly in light of the fact that no enforcement mechanism is contemplated, is tenuous at best. The switch to a system that obligates MNCs while at the same time diminishing their power relies, paradoxically, on the whims of the very subjects it seeks to restrain. Even if certain altruistic MNCs take up the cause, other problems, some of which, such as the issue of free riders, are mentioned fleetingly, will arise. Here, then, a consideration of the role that IOs such as the World Trade Organization, which Wettstein dismisses as a corporate puppet, and current legal human rights instruments, which Wettstein portrays as not wholly complementary to the moral view of human rights, might have provided valuable insight into how this fabled regulatory

scheme could be established in a decidedly anti-regulatory global sphere.

Overall, *Multinational Corporations and Global Justice* serves as a necessary integration of the merging theories of CSR and global justice. By retreating from the statist model, Wettstein ably makes the case for including MNCs when talking about the vindication of global human rights. By presenting human rights as moral rights that are not reliant upon legal instruments, MNCs are faced with a humanist though abstract reason for adhering to human rights norms. Going forward, Wettstein hopes, these two insights will re-orient the global sphere from one obsessed with corporate self-interest to one of coordinative development.

Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001. By Myra Williamson. Farnham, England: Ashgate Publishing Ltd., 2009. Pp. xi, 277. \$114.95 (hardcover).

REVIEWED BY GRAHAM FREDERICK DUMAS

Myra Williamson's *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* comes at a time when the conflict in Afghanistan is returning to the fore of U.S. foreign policy and as the fight against terrorism continues to expand. Yet many of the legal questions surrounding this conflict were simply glossed over at the time of the invasion and have not yet been satisfactorily resolved. Basing her argument mainly on legal history, Williamson asserts that the use of force against Afghanistan could not be legally considered self-defense according to the U.N. Charter because there was no armed attack for the purposes of Article 51, because the Security Council did not authorize unilateral force in Resolution 1368, and because Al Qaeda's actions could not be attributed to the Taliban. Similarly, the author argues that the invasion of Afghanistan was not legal under customary international law because it was neither necessary nor proportionate, and there was no immediate threat of attack in the weeks following September 11.

In vigorously asserting the illegality of the invasion of Afghanistan, Williamson raises a number of interesting points and provokes a great deal of thought, especially with respect to

the many weaker links in the argument for the invasion's lawfulness. As she notes, the International Court of Justice (ICJ) has held on numerous occasions that Article 51 applies only to armed attacks by states, and the link between Al Qaeda and the Taliban is indeed tenuous, especially under a classical interpretation of the law. Particularly insightful is the study of the *opinio juris* of various NATO members with respect to that organization's declaration that an armed attack occurred; the author suggests that what appeared to be a unanimous declaration that September 11 was sufficient to trigger the inherent right of self-defense was in fact anything but. Despite these effective points, *Terrorism, War and International Law* is a disappointing and ultimately unsuccessful effort which leaves out more than it includes, treats as fact several highly contentious claims necessary to support the main thesis, and often fails to address the post-Afghanistan era's most pressing legal questions.

While *Terrorism, War and International Law* endeavors to tackle in depth an admirably wide range of problematic issues without overwhelming the reader, it often feels abbreviated; indeed, the laconic discussion in its 277 pages belies the promise of comprehensiveness offered by its overly grand title. The section on Afghanistan, on which the book might be expected to focus, is particularly frustrating in its brevity, while Williamson spends a great deal of time at the beginning of the book defining terrorism, articulating the history of armed conflict, and parsing trends in terrorist attacks. This information is, of course, useful, but its presentation is rather disorganized and, although it is tacked onto the main thesis towards the end of the book, the strength of its connection with the rest of the material is less than adequately demonstrated.

Williamson's analysis of international custom on the use of force is often stilted and inflexible, and the author is unwilling to adapt such norms to incorporate post-September 11 practice, or even to consider the not insubstantial arguments for doing so. She simply assumes without adequate explanation that individual attacks perpetrated by the same organization as part of the same campaign should be considered legally discrete acts, thus prohibiting as illegally preemptive all self-defense measures after the first attack is concluded. Yet the campaign waged by Al Qaeda against U.S. interests could reasonably be analogized to traditional armed conflicts consisting

of multiple attacks, in which the prohibition on preemptive self-defense essentially vanishes with the first strike. This argument is at least strong enough to warrant consideration and discussion in this book, especially in light of its significance for the potential development of international law; its omission is a glaring fault that cannot be ignored.

While Williamson's interpretation is not wrong *per se*, she fails to deliver a compelling policy rationale in support of it. She argues that the U.N. Security Council should be responsible for military counter-terrorist operations, leaving only police actions to individual states—certainly not an unworthy goal. But the author gives little thought to the potential impact of this restrictive reading, which would make the use of force in self-defense against terrorist threats illegal. Although enabling states to claim self-defense in September 11-type situations would undoubtedly expand the law on the use of force, it would also bring such military action into the penumbra of recognized humanitarian law. This would serve to undermine many of the arguments based on the irregularity of such conflicts that have been advanced for denying combatants their rights under the Geneva Conventions. Further, Williamson fails to appreciate the position that, even if such legal restrictions on state action did exist, governments face overwhelming internal political pressure to resort to force against large-scale terrorist threats. Given this perhaps irresistible tendency, human rights may be served better by recognizing the legality of self-defense in such situations and then holding states to a higher standard in ensuing conflicts for the treatment of civilians and combatants alike.

Williamson is often content to take materials supporting her argument at face value, whereas she applies more careful analysis to distinguish those that might lend more support to opposing viewpoints. The author provides significant detail to support the argument that NATO's invocation of Article V cannot be taken as unanimous *opinio juris* that the September 11 attacks were sufficient to allow self-defense measures. Yet she makes almost no mention of the Taliban's close relationship with Al Qaeda when discussing the question of attribution. This is an extremely important issue for the present-day content of the law, as the nature of the ties between a host state and a terrorist organization may play a major role in determining the responsibility of that state in the event of a

large-scale attack. Even if one disagrees with this highly contentious point, post-Afghanistan state practice is significant enough to warrant its discussion; it should not simply be ignored. Williamson's selective interpretation of Security Council resolutions is also highly suspect. Resolution 573, which condemned as illegal a 1985 attack by the Israeli Air Force on Yasser Arafat's headquarters in Tunis in response to the murder of three Israeli citizens in Cyprus, is cited rather uncritically on the grounds that it was decided by a vote of fourteen to zero, with the US abstaining. In contrast, Resolution 1368, which condemned the September 11 attacks on the United States, is subjected to close scrutiny in order to attack the argument that it authorized unilateral military action. More detailed parsing of the language and *opinio juris* for resolutions supporting this book's thesis would have gone a long way toward making it more convincing.

Additionally, Williamson ignores counterarguments to the ICJ's *Nicaragua* decision and its 2004 *Construction of a Wall* advisory opinion. She relies heavily on *Nicaragua* and *Wall* to argue that, because the Court held that Article 51 applies only to armed attacks by states, the self-defense claim espoused by the United States was illegal and could not justify the invasion of Afghanistan. There is, however, no discussion of the terms of Article 51, which are not explicitly restricted to state action. Nor is any mention made of the separate opinions by several judges in *Wall* and *Armed Activities on the Territory of the Congo*, which question the premise that Article 51 applies solely to state actions. As in domestic law, separate ICJ opinions are often the source of developing law, and opinions diverging so severely from the established norm cannot simply be ignored; to do so borders on intellectual dishonesty.

Most frustrating of all is Williamson's failure to ask the many difficult questions raised by the tension between traditional, state-centric international law and contemporary reality. What obligation do states owe one another to take measures against known terrorists operating on their territory, and what actions may be taken against governments that, like the Taliban, ignore or even encourage terrorist organizations? The author cites the Articles of State Responsibility for the proposition that responsibility for attacks cannot be extended from terrorists to the government of the state where they are based. Yet post-Afghanistan state practice may indicate other-

wise, a fact that, if true, would alter significantly the patterns of responsibility established by the Articles. Such momentous pressures on existing international law are worthy of careful discussion in any treatment of this subject matter, even if the author disagrees with them entirely.

Likewise, if *Nicaragua* and *Wall* constitute the state of the law for all armed conflicts, and if to trigger Article 51 it is indeed required that armed attacks be perpetrated by states alone, this would leave a sizeable gap in the inherent right of states to defend themselves: states may not resort to force in self-defense against external terrorist threats, while domestic police powers are clearly insufficient to neutralize threats of the sort posed by Al Qaeda in Afghanistan prior to October 2001. This leaves the Security Council as the sole guarantor of domestic security in such situations and thus requires states to cede a tremendous and unprecedented amount of sovereignty on a matter that has traditionally rested squarely in the control of states themselves. So great is this cession of sovereignty that it may even contravene the right of self-determination on the part of established states, turning an essentially settled question into a massive controversy. Thus, post-September 11 state practice raises serious questions as to the viability of Article 51 in managing the use of force with respect to terrorist threats.

It is precisely questions like these that are central to any scholarly discussion of international law, terrorism, and the use of force, as they represent the cutting edge on the subject. Williamson, however, chooses to ignore these problems, insisting instead on a highly formalistic interpretation of the law without persuasively articulating her reasons. This is unfortunate, as much of the legal and political narrative has been captured by those in favor of an expansive reading of the law, leading to a rather lopsided debate. A more careful and reasoned analysis would have been extremely helpful in mapping the legal boundaries of the use of force. Instead, this book is yet another in a long line that will be accepted or rejected according to political persuasion. Above all else, it is for this reason that *Terrorism, War and International Law* falls far short of its mark.

Against the Death Penalty: International Initiatives and Implications.

Edited by Jon Yorke. Surrey, United Kingdom: Ashgate Publishing Company, 2008. Pp. xviii, 314. \$134.95 (hardcover).

BY ALEXANDRA MCCOWN

In November 2003, a jury delivered the death sentence to John Allen Muhammad, one of the two men behind the Washington, D.C.-area sniper attacks in 2002. The execution took place in 2009, almost six years to the day after his sentencing. If Muhammad had carried out the same crimes in Europe, he would not have been subject to capital punishment. In still other parts of the world, like the Caribbean, he may have received the death penalty, but ultimately his sentence would have been commuted since he remained on death row longer than five years. What accounts for regional differences in issuing (or not issuing) capital sanctions for heinous crimes such as the sniper attacks? Further, if Muhammad had received a sentence of life in prison without the possibility of parole (LWOP) in the United States or any other country, would that really have been preferable to a death sentence? Can shorter sentences effectively punish the perpetrator and protect society from future crime while simultaneously respecting criminals' human rights?

These questions and others are addressed in *Against the Death Penalty: International Initiatives and Implications*, edited by Jon Yorke. As the title suggests, the book advocates the abolition of the death penalty worldwide. It provides discussion of the current state of abolitionist efforts at the international and regional levels. The twelve chapters of the book explore two recurring themes: first, the differing grounds for successful challenges to the death penalty and, second, the complicated relationship between public opinion and the continued use of the death penalty.

The anthology benefits from clear organization. The first chapter unequivocally states that the goal of the book is to contribute to the abolition of capital punishment worldwide. The following chapter nicely frames the international abolitionist movement for readers who are new to the subject. The subsequent eight chapters present case studies highlighting both the successes of and challenges to abolishing the death

penalty in six individual nations or regional blocs. The final two chapters focus on the various strategies abolitionists use worldwide and evaluate familiar alternatives to the death penalty, such as LWOP. These chapters challenge a reader's likely assumption that LWOP is a desirable alternative to the death penalty by examining how LWOP is not necessarily consistent with human rights principles.

The first theme of the book, successful challenges to the death penalty, comes up in all of the case studies. Lilian Chenwi's contribution on Africa explores developments that may, at some point, culminate in the elimination of capital punishment on the Continent. Among these developments, Chenwi analyzes cases challenging death penalty sentences brought before the African Commission, the monitoring and enforcement mechanism for the African Charter. The African Charter does not address the death penalty, but it does state that no human being can be arbitrarily deprived of the right to respect for his life and the integrity of his person. The Commission's jurisprudence on death penalty cases demonstrates that due process challenges have proven highly successful, yet the Commission has yet to hold that the death penalty is a *per se* violation of the right to life. A 1999 Commission resolution encouraged all African states to consider establishing a moratorium on and ultimately abolish the death penalty, but after ten years the Commission continues to rely narrowly on due process grounds to overturn death penalty sentences imposed by member states. The chapter on the Caribbean demonstrates parallels to Africa. Successful challenges to the death penalty in the Caribbean have been based on narrow due process grounds and not on grounds that the punishment violates human rights principles. China has taken an approach similar to Africa, the Caribbean, and the United States by placing increased restrictions on the use of capital punishment and strengthening due process safeguards. However, the punishment remains prevalent in the country and reforms are motivated more by a desire to strengthen the rule of law generally than an express wish to abolish the death penalty.

In the three chapters discussing the United States, the first theme—of challenges to the death penalty—takes center stage in Julian Killingley's discussion of furthering the abolitionist agenda. He advocates making Eighth Amendment challenges on behalf of certain classes of individuals such as

older or infirm individuals. Killingley recognizes the unfortunate reality that the death penalty will likely remain a valid constitutional sanction in the United States in the long term; making it necessary to construct innovative constitutional arguments to more strictly confine its use. Killingley suggests that if cases involving vulnerable groups of people are litigated it may help change public perception on the death penalty, which is one of the factors the Supreme Court relies upon in determining the “evolving standards of decency” that influence whether a punishment is cruel and unusual under the Eighth Amendment.

Killingley’s argument thus also highlights the second theme of the book: the complicated relationship between public opinion and the death penalty. Europe offers the only example where public opinion was essential to the abolishment of capital punishment. Jon Yorke convincingly argues that general public acceptance of the death penalty’s failure to offer any deterrent effect or extra societal protection was essential to abolition in the region and contributed to the belief that the death penalty was inherently immoral. His analysis acknowledges that there was not one readily identifiable reason for this change in public opinion, but he lays out several contributing factors. Yorke cautions, however, that the successes of European abolition should not be taken for granted because the winds of public opinion could easily change in light of the war on terror.

There are many places, however, where the winds of public opinion have not blown away the sovereign right to impose the death penalty in favor of finding the sanction immoral and/or ineffective. The chapters on Asia and the United States focus on the interplay between public opinion supporting the death penalty and specific countries’ policies regarding capital punishment. The chapter on China analyzes the nascent national dialogue on the use of the death penalty and suggests that China will eventually abolish capital punishment because of a commonly held belief that civilized nations do not use capital punishment. However, the sanction still enjoys wide support among the public. There is not even widespread support among lawyers and academics for abolition, and some scholars suggest it may take more than a century for capital punishment to be abolished. A different picture emerges in South Korea and Taiwan, whose presidents’ strong public sup-

port for abolition have significantly strengthened abolitionist movements. Unlike Africa, China, the Caribbean, and the United States, both countries exemplify how strong leadership and grassroots movements can prevent executions due to concerns about the human rights implications of the punishment, despite strong public support for the sanction. The chapter notes that neither country has abolished the death penalty *de jure*, but it conveys optimism that these two countries will be the first to do so in the East Asia region.

The Caribbean offers insight into the unintended impact of the United Kingdom's colonial legacy on capital punishment. The Caribbean's death penalty jurisprudence is, in large part, determined by the Privy Council, a court that sits not in the Caribbean but in the United Kingdom. Analysis of the seminal case *Pratt & Morgan v. AG Jamaica*—which held that undue delay in carrying out an execution, if longer than five years, is tantamount to cruel and unusual punishment—demonstrates the Court's reluctance to declare capital punishment to be outright unconstitutional, relying instead on procedural restrictions. The case led to the commutation of several hundred people's sentences. Caribbean governments, however, have viewed these restrictions with suspicion because they emanate from the authority of a formerly colonial court. The death penalty remains in the statutory codes of many Caribbean states, and there is ample evidence that the Caribbean public and governments support the punishment. Ironically, the vestiges of colonialism have prevented the Court from addressing constitutional challenges to capital punishment—savings clauses, inserted into many Caribbean nations' constitutions upon independence, prevent challenges to laws in effect prior to independence—and opinions like *Pratt* are seen as neo-colonialist encroachments upon local constitutions despite the fact that capital punishment itself is a colonial-era measure.

Public opinion also figures prominently in the U.S. case-study. In her chapter, Jane Marriott argues that the “time served” argument advanced in the *Pratt* decision and other foreign opinions should not be the basis of a U.S. constitutional ban on the death penalty. She suggests that such a decision would lack legitimacy in the United States because it would be seen as based on foreign and not domestic norms, which is the same reason why the *Pratt* decision has not been received

warmly in the Caribbean. Marriott fails to acknowledge, however, that unlike in the Caribbean, the United States' colonial past is not really a consideration in current American jurisprudence. Given the Supreme Court's high degree of legitimacy in the United States, Marriott does not offer compelling reasons why an opinion that relied on foreign authority would not be afforded the same amount of respect as any other Supreme Court decision.

The last two chapters of the book, which comprise the final section of the book, examine various abolitionist strategies and challenge readers to reevaluate their assumptions about those strategies. The penultimate chapter argues that abolitionists need to refocus their strategy, shifting from an emphasis on emotions and morals to empirical data. The authors identify three main policy reasons supporting the continued existence of the death penalty: deterrence, retribution, and incapacitation. They then assess the strategies abolitionists currently use to further their agenda, including litigation, moratoriums, educating the public to diminish public support, and proposals for LWOP instead of executions. The authors convincingly argue that although these strategies have achieved some success, they also bear associated costs. For example, a litigation strategy may win a reprieve for an individual but make it harder for subsequent defendants to avoid the death penalty as legislatures pass laws in response to court-imposed restrictions. Finally the chapter discusses why LWOP, seen by so many as a solution to the problem of capital punishment, is not a morally acceptable alternative. The final chapter of the book examines the effects of life sentences on prisoners. Although they acknowledge that some prisoners may never be able to be released due to the risk they pose to society, the authors maintain that life in prison should be the exception rather than the rule. The conclusion echoes that of the previous chapter: generally life imprisonment is not an acceptable alternative to capital punishment because LWOP also infringes upon prisoners' human rights.

Overall the book successfully provides the reader with a solid understanding of the successes won, and the challenges remaining, in the campaign to eliminate the use of the death penalty worldwide. However, the reader comes away with just as many questions as answers. For example, if the death penalty had not been an option for the punishment of John Allen

Muhammad, what would have been an acceptable punishment for him? From a human rights perspective, LWOP is unlikely to be a satisfactory solution because of the impact of long-term imprisonment on prisoners. What alternatives are available that would both respect Muhammad's rights as a human being and also protect society from future harm? Several of the book's chapters offer evidence that suggests that the death penalty does not serve as a deterrent for future crime, and the final section of the book indicates that long-term sentences have significant deleterious effects on prisoners. However, the book does not propose viable alternative solutions; instead it merely offers the weak suggestion that each case should be reviewed individually to determine if a prisoner is a threat to society, with LWOP considered to be justifiable in those limited cases where a prisoner is in fact a threat to society. Compounding the problem, the book fails to propose criteria that prison systems can use to determine if a prisoner still poses a threat to society. These are a few of the questions readers may be left asking. Perhaps they are questions for a future book.

