

BOOK ANNOTATIONS

ASLUND, ANDERS AND MICHAEL McFAUL, EDs., *REVOLUTION IN ORANGE: THE ORIGINS OF UKRAINE'S DEMOCRATIC BREAKTHROUGH* (Washington, D.C.: Carnegie Endowment for International Peace, 2006).

BRUNET, EDWARD, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT AND STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (New York, New York: Cambridge University Press, 2006).

CASTELLINO, JOSHUA AND ELVIRA DOMINQUEZ REDONDO, *MINORITY RIGHTS IN ASIA* (New York, New York: Oxford University Press, 2006).

DRUMBL, MARK A., *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (New York, New York: Cambridge University Press, 2007).

GOODWIN, MICHELE, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (New York, New York: Cambridge University Press, 2006).

LODGE, GEORGE AND CRAIG WILSON, *A CORPORATE SOLUTION TO GLOBAL POVERTY: HOW MULTINATIONALS CAN HELP THE POOR AND INVIGORATE THEIR OWN LEGITIMACY* (Princeton, New Jersey: Princeton University Press, 2006).

TERRY, JAMES P., *THE REGULATION OF INTERNATIONAL COERCION: LEGAL AUTHORITIES AND POLITICAL CONSTRAINTS* (Newport, Rhode Island: Naval War College Press, 2005).

Revolution in Orange: The Origins of Ukraine's Democratic Breakthrough. Edited by Anders Aslund and Michael McFaul. Washington, D.C.: Carnegie Endowment for International Peace, 2006. Pp. vii, 216. \$16.95 (paperback).

REVIEWED BY ISAAC CHENG

Descriptive rather than theoretical, *Revolution in Orange* provides a *Rashomon*-like story, braiding together multiple accounts of the popular uprising that brought President Viktor Yushchenko to power at the end of 2004. The book's mission is to recount and explain the events of 2004 rather than to present a single master theory. The driving premise is that changes in the media, public consciousness, national economic structure, and external foreign affairs all played unique roles in the Orange Revolution. To describe these different elements, Anders Aslund, an economist, and Michael McFaul, a political scientist, invited insiders from each of the relevant fields to give their accounts of the Orange Revolution. For example, the Editor-in-Chief of the Internet newspaper *Ukrainska pravda*, often cited as one of the most independent sources of Ukrainian election information, writes on repression and independence in the media.

The basic story told is as follows: In 2000, after a period of hyperinflation and political corruption, one of President Leonid Kuchma's critics was killed, and public opinion exploded in a short-lived series of "Ukraine without Kuchma!" protests. In the following parliamentary elections, Kuchma's party lost control to the opposition coalition. In 2004, with continued backing from Russia and from some of the major Ukrainian business leaders but with his reputation in decline, Kuchma handpicked a presidential candidate, Viktor Yanukovich, to run against the reformist Yushchenko. In the first runoff election, neither candidate received the simple majority necessary to win. In the second runoff in November, in the midst of international attention and largely pro-Yushchenko demonstrations, Yanukovich won by three percent, but faced allegations of election irregularities. A rerun of the election was held in December, and Yushchenko won with fifty-two percent of the vote. After the courts confirmed the results, Yanukovich conceded defeat.

The book elaborates upon this baseline chronology in logical sequence. The first two sections provide a historical backdrop to the events of 2004. These detail the political events from 1991, when Ukraine gained its independence, through Leonid Kravchuk's and Leonid Kutchma's administrations, and up to to the rise of the 2004 presidential candidates. Aslund, who was in Kyiv during the Revolution, describes the political involvement of oligarchs—the main economic players of Ukraine—and notes how these powerful players started to compete against one another after economic restructuring introduced by Yushchenko in his prior role as head of the national bank removed rent-seeking mechanisms in 2000. This increased competition both boosted economic performance and gave rise to businessmen willing to fund opposition parties.

After this political and economic account of the period leading up to the Orange Revolution, other authors join in with tales of the media revolution, the role of Western organizations, the role of Russia, the growth of civil society, the role of youth activists, and the view from the street. Vignettes give a powerful sense of the excitement of the times. In the media piece, the author describes how, after years of media suppression, the censorship machine started to break down. In a telling anecdote, a sign-language interpreter on the state television channel signaled to her audience: “The official results from the Central Election commission have been falsified. Do not trust them. Yushchenko is our president. I'm really sorry that I had to translate lies before. I will not do this again. I'm not sure if I will see you again.” Another author notes how orange became the emblematic color of Yushchenko's “Our Ukraine” party, and how the Maidan, the large public square in the heart of Kyiv, filled with over a million protestors, many dressed in orange, even as the trees in Kyiv took on their autumnal colors.

Despite the colorful details, the authors generally keep an objective tone, framing their experiences in analytical terms and within the larger media/political/activist context. One of the most interesting theories set out in the book speculates that, although the development of civil society in Ukraine was a stepping stone for the revolution, it was ultimately civil society's inability to affect the government that gave rise to the

mass demonstrations, as people's desire for change and for unsullied elections overflowed the capacity of civil society.

McFaul wraps up *Revolution in Orange* with a comparison to other revolutions in the former Soviet sphere, including the Serbian revolution that removed Slobodan Milosevic, the Rose revolution in Georgia, and the less peaceful Tulip revolution in Kyrgyzstan. As events in recent years have shown, democracy-building remains a hot topic, and McFaul lays out the formula for successful change: an unpopular old leader, a strong opposition party, an independent media, latent protest mechanisms, and divisions between the intelligence community, the police, and the military.

As authors of one of the first English-language books on the Orange Revolution, Aslund and McFaul rightly focus on historical recounting rather than theoretical analysis. The book is a perfect introduction to the Orange Revolution—it even includes a pullout with a picture gallery of prominent oligarchs and political figures and a timeline of the events of 2004. Moreover, it is valuable for providing an initial impressionistic analysis of the Revolution. But *Revolutions in Orange* does have some weak points. The authors describe Western organizations' perception of Yushchenko as a democratic, internationally-oriented politician and the Ukrainian people's corresponding view of Yushchenko as an educated banker and of Yanukovich as an uneducated ex-criminal. However, Yanukovich enjoyed significant popularity in eastern Ukraine in the 2004 elections. He is currently prime minister of Ukraine and has joined Yushchenko in the majority coalition without significant compromise. These events—admittedly beyond the scope of the book—indicate that Yanukovich's constituency and candidacy cannot be simply dismissed as a failure. One wonders whether an account more sympathetic to eastern Ukraine might have given more balance, and hence provided the book with more predictive ability.

This brings us to the other fault of the book: In order to meet the 2006 publication date, the editors explicitly decided to forgo describing the formation of Yushchenko's new government and other equally turbulent events of 2006. Ukraine faces significant change and a dynamic political environment as Ukraine and Russia continue to struggle over oil and issues of political dependency and Yanukovich replaces Yulia Tymoshenko as Prime Minister and joins forces with

Yushchenko in the majority coalition. *Revolution in Orange* missed these points. This continued uncertainty, however, may create a place for an encore by Anders and McFaul.

Arbitration Law in America: A Critical Assessment. Edward Brunet, Richard E. Speidel, Jean R. Sternlight and Stephen J. Ware. New York, New York: Cambridge University Press, 2006. Pp. xix, 394. \$100.00 (hardcover).

REVIEWED BY ALEXIS BLANE

Arbitration law in the United States is composed of an often-confusing set of overlapping legal regimes: state, federal, and international. In their "Critical Assessment," the authors have constructed a normative critique of the current system that culminates in the presentation of model statutes formulated to preserve many of the policy goals and procedural protections of the current system while filling the demonstrated gaps. The four authors have each chosen a portion of current law and devoted a chapter to highlighting its areas of greatest value and its major problems. These accounts are followed by a chapter in which the authors respond to one another's proposals, critiquing the suggestions made by their colleagues in earlier chapters and having both their own proposals and their critiques assessed in turn. Finally, the book contains model legislation, essentially versions of the Federal Arbitration Act (FAA) that reflect each author's appraisal of the most important policy rationales and goals of American arbitration law.

Brunet contributes the first chapter, "The Core Values of Arbitration." Evaluating the rationales that have been employed to urge parties to select arbitration and governments to uphold the process, he concludes that party autonomy grounds all arbitration. In doing so, he presents evidence that the oft-cited justifications of efficiency and finality are both less frequently realized and less important to the selection of arbitration than the ability arbitration affords parties to shape their own dispute resolution mechanisms and to keep the proceedings of those mechanisms private. Since autonomy and privacy emerge as the "core values" of arbitration, these two points are central to his formulation of an "optimal arbitration system." Yet, while it is tempting to read Brunet's assessment

as the organizing principle for the entire volume, each author does his or her own assessment of the importance of these “core values” in the individual chapters that follow. Brunet’s first chapter thus serves as much to present the possible factors present in each individual analysis as to strike a single definite balance.

The second chapter contains an overview of “Common Legal Issues in American Arbitration Law.” Rather than provide a general description of American arbitration law, Speidel focuses on the areas in which problems most frequently appear for both practitioners and theorists in order to ground the normative propositions contained in subsequent chapters. In his assessment of Chapter 1 of the FAA, which governs domestic U.S. arbitration, he highlights fraught areas, many of which result from statutory silence. U.S. courts have struggled with issues such as the relationship between an arbitrator’s jurisdiction to determine jurisdiction and the separability of arbitration agreements from the “container” contract. Speidel also addresses Chapter 2 of the FAA, which implements the New York Convention’s provisions concerning the recognition and enforcement of foreign arbitral awards, pointing out that the Convention and the FAA provide little guidance for courts as to their appropriate role in the supervision of arbitral proceedings before an award is rendered.

Brunet tackles the thorny issue of the place of state law in American arbitration in the following chapter. The FAA was passed by Congress pursuant to its powers under the Commerce Clause. Despite this, Congress claims that it has not occupied the field in arbitration and indeed uses state principles of contract law to define certain aspects of the federalized arbitration system. As a “species of contract law,” Brunet argues that arbitration law should in fact give more deference to state law. Specifically, he urges that the Supreme Court adopt an interpretation of preemption in the field of arbitration that does not automatically thwart state efforts to protect parties to arbitration agreements by striking all state laws that “single out” arbitration by treating it less favorably than litigation in comparable circumstances. Rather, he proposes a standard that would preempt only those state provisions that present a “substantial obstacle” to the accomplishment of federal pro-arbitration policies.

Moving from state law to the federal law that governs domestic arbitration, Ware takes a critical look at Chapter 1 of the FAA, the first federal arbitration statute in the United States and one that has changed little since its passage in 1925. In a reading of the statute grounded in a contractual approach to arbitration, he proposes three general reforms: judicial determination of the contractual basis for arbitration; narrowing the exceptions to enforcement of arbitration agreements; and limitation of the powers of arbitrators. In many respects, his argument is for increased judicial supervision of arbitration proceedings. He urges increased post hoc judicial review of the conduct of arbitral proceedings, including vacatur of awards for error of law when the law in question is “mandatory” and could not have been contracted around *ex post*. Among his most controversial positions is a push for the elimination of the doctrine of separability, which permits consideration of the validity of the arbitration agreement separately from the underlying contract. Ware argues that the doctrine of separability does not permit optimal judicial monitoring to ensure that only those parties who contract for arbitration are subjected to the jurisdiction of arbitral tribunals.

Sternlight’s chapter on consumer arbitration also proposes revisions to domestic law. Pointing out that the United States is almost alone in permitting binding pre-dispute arbitration clauses in the consumer context, she highlights some of the most troubling features of such provisions and recounts their history, including the role of the Supreme Court in instituting a regime commonly believed to be unfair because it deprives consumers of some of the protections of litigation. She then points to areas in which judicial reinterpretation might be possible, arguing, as Brunet does, that a less preemptive reading of federal law might permit states to be more protective of consumers. She also proposes several defenses to the current regime, concluding that challenges to enforcement are most likely to succeed when they focus on common-law arguments, such as those drawn from contract law. The chapter concludes with a normative recommendation that mandatory commercial arbitration be banned by federal law because it incentivizes companies to structure processes biased against consumers and blocks public access to the level of information available in litigation. Sternlight argues that these

detriments are not accompanied by substantial recompense for either the public or consumers through market-based savings or more efficient resolution of disputes.

Speidel addresses the New York Convention and Chapter 2 of the FAA in his carefully observed chapter on international commercial arbitration. Acknowledging the growing importance of international commercial arbitration but concerned that the approach of U.S. courts and law to the subject is “sadly deficient,” the chapter serves to buttress his redraft of FAA Chapter 2. Particular scrutiny is given to the gaps in U.S. law covering judicial supervision of arbitral proceedings before the rendering of an award. While eschewing more radical contemporary proposals of “a-national” arbitration, Speidel advocates a “de-localized” regime that would weaken the role of national law and definitively displace both state law and Chapter 1 of the FAA in international commercial arbitration in order to produce a more uniform system that better effectuates the goals of the New York Convention and federal policies on arbitration.

Perhaps the most illuminating portion of the book is the final chapter, in which the authors present their critiques of and responses to each other’s arguments. The authors acknowledge the conflicts between some of the propositions made in the book: Speidel, for instance, points out that Ware’s proposition to do away with separability is contrary to common practice and understanding in international commercial arbitration. The policy goals driving the authors’ normative proposals and underlying the substance of the entire volume are clearly highlighted in these authorial exchanges.

In drawing out the ideological commitments of each author and making clear the internal tensions of their propositions, this final piece constitutes the most significant contribution of the book. Though the first chapter seems to present a uniform lens through which to read the essays, it is clear that each author has unique methodological and normative commitments. Ware’s broad critique of Chapter 1 of the FAA lies somewhat uneasily alongside Speidel’s extremely detailed rewrite of Chapter 2 in a later chapter. And neither bears much resemblance to Sternlight’s work, with its narrow substantive focus but sweeping normative proposition. While all of the authors are critically engaged with the practice of arbitration, some of their normative proposals are so radical that they

seem to have little value except as jumping-off points for discussion. The underlying reasoning and analysis is in many cases more useful than the proposals themselves.

This book does not function as a handbook or guide to the current state of the doctrine. However, for those in the field who are thinking critically about the current structure of U.S. arbitration law, the authors have done a fine job of assessing areas that require further study and presenting policy-based normative propositions that can and should spark critical debate.

Minority Rights in Asia. Joshua Castellino and Elvira Dominguez Redondo. New York, New York: Oxford University Press, 2006. Pp. xxii, 286. \$105.00 (hardcover).

REVIEWED BY SOO-YEUN LIM

Although Asia is home to about sixty percent of the world's population, the issue of minority rights in this region has not been as extensively analyzed as in areas such as Europe or the Americas. *Minority Rights in Asia* seeks to fill this gap in the minority rights literature and deal with general issues of human rights in Asia. The book carefully analyzes four states with distinct minority rights concerns—India, China, Malaysia, and Singapore—recognizing the differences between these Asian nations and refraining from broad generalizations.

Castellino and Dominguez Redondo first seek to examine whether there are “Asian Values” that conflict with modern universal human rights systems and that have consequently stifled the dialogue on minority rights in Asia. They trace the development of the “Asian Values” argument, noting its popularity among authoritarian regimes seeking to justify repressive techniques as necessary for the continuation of economic growth in Asia. The “Asian Values” justification focuses on the primacy of communal welfare and social order above individual rights. Many scholars have argued that “Asian Values” have been used not solely to promote economic growth, but moreover to deny universal human rights to citizens. Thus, authoritarian regimes have used this rhetoric to excuse rights violations while simultaneously shielding these violations from the scrutiny of the international eye.

After criticizing the "Asian Values" concept, Castellino and Dominguez Redondo conclude that this construct is actually in limited use. It has not been widely adopted in Asian states to rebut the universality of human rights, and in fact pertains to very few Asian regimes.

Minority Rights concludes generally that Asian states reflect overall trends in the global community in protecting minorities and are engaged with the United Nations (UN) human rights machinery to different extents. However, each Asian state has a unique legal and social system presenting different issues for minority rights. For example, many Middle Eastern and East Asian countries claim to be homogenous and do not address the existence of minorities. Given this disparity between the various Asian states, the book lays out four case studies of minority rights issues in India, China, Malaysia, and Singapore.

India is chosen as a case study because of its great diversity. India's population of over a billion people includes 6 main ethnic groups, 52 major tribes, 6 major religions, and 6,400 castes and sub-castes. In terms of linguistic diversity, India contains 18 major languages and 1,600 minor languages and dialects. In light of this great diversity, there have been continuous attempts to protect minority rights in India, largely through a highly activist Supreme Court. Protection of minority rights is guaranteed in the Indian constitution and the Supreme Court has interpreted the law so as to enshrine the right to equality for all. Such efforts serve to put the issue of minority rights at the forefront of the Indian social agenda. However, litigation is slow due to an insufficient number of judges and a high caseload. Moreover, the actual litigation of minority rights issues is a drop in the bucket compared to the importance of the problem.

China, on the other hand, has been singled out due its long-term inattention to human rights and a political structure that offers serious challenges to building a legal regime to protect minorities. China has fifty-six nationalities, but the Han are the overwhelming majority and the other fifty-five are all considered minorities. The reform process for adopting universal human rights principles to protect these minorities has been gradual following the Chinese accession to the WTO. However, China's minority rights provisions can only be made truly effective through greater engagement with human rights

issues, a more concerted focus on implementation mechanisms, and a decrease in aggressive cultural relativism. Castellino and Dominguez Redondo argue that the most critical need is for the creation of a political environment that will enable the judiciary, not just the legislature, to interpret the law in individual cases. Currently, one of the greatest obstacles to the protection of minority rights in China is a lack of training, knowledge, and understanding of the relevant laws among administrative cadres. Since these groups have not proved useful, the role of the judiciary must be expanded beyond its current scope in order to implement protective laws more effectively.

Malaysia and Singapore share an opposition toward human rights doctrines and employ a rhetoric of "Asian Values" to distinguish local human rights requirements from those outlined in universal models. These two states are composed of similar populations in different proportions, and the issue of minority rights played an important role in their division into separate nations. Malaysia presents an interesting case study, given that a minority, the ethnic Chinese, plays an important role in the ruling regime and the majority (ethnic Malays) forms a less financially powerful middle class. Malaysia's constitution clearly sets out the ethnic privileges of Malays and, though this may seem warranted due to the economically subordinate position of the Malays within their own state, it is problematic from a human rights perspective insofar as there are privileges that continue to be available only to the Malays. For example, the right to serve in the army is restrictive with respect to the non-Malay ethnicities, as such populations are not considered sufficiently loyal to the state to be admitted into the military. Regardless, though the system is skewed to favor Malays, there has been little dissent due to the relative security and prosperity of minority groups. Nonetheless, there remains the potential for violation of minority rights in Malaysia, and an increase in public interest litigation and careful monitoring of the legal system are important in maintaining stability in the human rights record of the national government.

In contrast with Malaysia, Singapore's independence leader, Lee Kuan Yew, espoused an egalitarian approach and insisted that equality and nondiscrimination be the governing principles for the new nation. Singapore has seventy-four eth-

nic groups that were largely regrouped into four ethnic categories to foster homogeneity and mutual distinction: Chinese, Malay, Indians, and others (mostly Eurasians). Faced with such diversity, Lee Kuan Yew supported a meritocratic system premised on blindness to ethnicity. As a result, Singaporean society has a relatively low level of ethnic tension despite strong consciousness of ethnicity. The Singaporean government has also recognized that meritocracy also cannot rid a system of inequity if various communities begin the "competition" with different levels of financial and educational endowment. Thus, the government initiated proactive schemes for the furtherance of minority rights, including programs designed to increase political representation of ethnic minorities and to intermix the ethnic communities through a housing system. Castellino and Dominguez Redondo note that this policy contributed to the emergence of a "supra-ethnic identity." However, this supra-ethnic identity is in turn giving way to concerns about inter-group loyalty and severe competition within the ethnic groups, both of which are on the agenda for the government to resolve.

Although *Minority Rights in Asia* does not provide a thorough treatment of minority rights issues in Asia as a whole, its detailed case studies avoid overgeneralization and present useful analysis of four countries that are facing different problems in providing protection for minority rights and are in different stages of formulating proper remedies. Castellino and Dominguez Redondo paint a broad and relevant picture of the topic, clearly illustrating that minority rights is as important a human rights issue in Asia as in regions where it has been much more extensively documented and analyzed.

Atrocity, Punishment, and International Law. Mark A. Drumbl.
New York, New York: Cambridge University Press, 2007.
Pp. xv, 320. \$80.00 (hardcover) \$29.99 (paperback).

REVIEWED BY STEPHANIE A. BARBOUR

In *Atrocity, Punishment, and International Law*, Mark A. Drumbl delivers the first major study of punishment for mass atrocity and offers a conceptual rethinking of how international law responds to extraordinary international crime.

Whereas leading treatises on international criminal law have devoted little space to punishment and sentencing, this volume is a rich empirical account of how and why the international crimes of genocide, crimes against humanity, and war crimes are penalized. Drumbl, a law professor at Washington and Lee University School of Law with a decade of experience in the subject of international criminal tribunals, examines whether existing methods of sentencing for international crimes correspond to the extraordinary and collective nature of criminality during mass atrocity and actually attain the stated objectives of punishment, namely retribution, deterrence, and expressivism. His account leads him to the conclusion that the current modalities of prosecution and incarceration fail to achieve any of these goals. *Atrocity, Punishment, and International Law* does not rest there, however, but moves the dialogue from diagnosis to remedy, examining how international law can transcend the ordinary criminal paradigm.

The book's eight chapters draw upon an astounding breadth and depth of literature not only from international criminal law theory and practice but also from the realms of sociology, philosophy, and political theory. The opening chapter launches the book's main arguments, which are developed fully in later chapters. Next, a chapter on "Conformity and Deviance" examines the distinctions between a perpetrator of mass atrocity and a perpetrator of ordinary crime. Drumbl describes the climate of collective normalized violence in which international crimes often occur, arguing that the decision to commit atrocity is not deviant in such an atmosphere but instead conforms to prevailing social conditions. This insight illustrates why the traditional Western liberal legalist model of criminal law seems ill-suited to situations of extraordinary mass crime. Drumbl therefore contends that this model should not be automatically and unthinkingly adopted in response to extraordinary international crime and suggests instead that there is a need to consider alternative models of accountability. A core concern of the book, thus, is that the typical liberal legalist trial model fails to take into account what Drumbl describes as the "complicit and acquiescent masses": people who, if not formally guilty, nonetheless bear responsibility when atrocity reaches truly epidemic levels.

In the following chapters, *Atrocity* moves into a study of the modalities of punishment and sentencing in international,

national, and local criminal tribunals. Chapter three focuses on punishment in three international tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the East Timor Special Panels—and in itself constitutes a valuable empirical study of sentencing in those institutions. Drumbl finds that, overall, sentencing practices at the international level are confusing, disparate, and have not advanced much since the post World War II international military tribunals. This sentencing pattern looks set to continue at the International Criminal Court, although there is some evidence to suggest that a more sophisticated approach employing aggravating and mitigating factors is now emerging. Given these drawbacks, Drumbl concludes that there is a marked shortfall between the avowed goals of punishment and the actual punishment practices of international criminal tribunals.

Chapter four turns the discussion to punishment at the national level, presenting an exhaustive study of sentencing in hundreds of cases from domestic tribunals sharing contacts with the former Yugoslavia, Rwanda, and the Holocaust. Drumbl finds a greater diversity in modalities of punishment at the national and local levels, as these courts tend to reach beyond incarceration to embrace a wider array of punishments, including lustration, capital punishment, compensation, and community service. This chapter provides a thoughtful examination of the penological purposes expressed in these domestic processes, finding that they tend to parrot the goals of retribution and deterrence as justifications for punishment. Drumbl also makes the somewhat disturbing observation that dominant international norms of accountability seem to be squeezing out local approaches that depart from international methods and modalities of punishment and sentencing, especially those that are extra-legal in nature such as the restorative justice paradigms found in neotraditional accountability mechanisms. He points in particular to the raising of minimum sentences, lowering of maximum sentences, and embedding of duties to prosecute at the national level. A discussion of the adaptation of the Gacaca courts of Rwanda to include the Western punishment modality of incarceration is perhaps the best illustration of this shift.

The following chapters take up deeper critiques of the punishment practices the book identifies. In a chapter on “Le-

gal Mimicry,” Drumbl suggests that the goals of retribution and deterrence are being injected into local legal cultures to which they are neither indigenous nor innate, of which Gacaca is a prime example. He is troubled by the prospect that this transplant of legal norms could lead to an externalization of justice, whereby the means of punishment for atrocity crimes is intelligible to faraway audiences but alien to local populations and the actual victims. He points also to democratic deficits in the make-up of international tribunals, which are not then accountable to their domestic constituencies. He discusses the referral of cases from international tribunals to the national level and the complementarity regime set up by the Rome Statute, arguing that these practices serve as means of inducing national courts seeking jurisdiction to conform to penological models mimicking those of international criminal law by pressuring them to conform to international standards from fair trial procedures to non-availability of the death penalty. In Drumbl’s view, the pressures created by international tribunals have led to the under-use of alternative models of accountability. In light of all this, Drumbl stresses the need to nurture the well-being of societies whose conflicts international criminal tribunals seek to address, calling for better attunement to national and local models of justice.

Chapter six, described as the heart of the book, takes up a “Quest for Purpose.” In this section, Drumbl analyzes whether extant approaches to punishment attain the stated goals of international criminal justice—retribution, deterrence, and expressivism. With regard to the goal of retribution, he argues that its credibility as a penological goal of international criminal law is weakened by evidence that suggests that available punishments do not match the enhanced gravity of the crimes. A close examination of the use of plea-bargaining in international tribunals further illustrates the falsity of the retributive goal. Drumbl is also unconvinced that international tribunals lead to deterrence, as this seems to assume a level of rationality in perpetrators that he regards as “particularly ill-fitting for those who perpetrate atrocity,” given the nature of collectivized violence. Drumbl is most optimistic about the expressivist goal of trials, but identifies four aspects of criminal process and sanction that can undercut truth-telling ability: the emergence of selective truths, ill-conceived management strategies, the use of plea bargains, and interrupted performances result-

ing from the death of defendants and, as the author puts it, the tendency of wily defendants to “dither, piddle, and delay.”

The book’s seventh chapter, “From Law to Justice,” moves the dialogue forward by arguing that adopting *pluralistic* procedures and institutions could remedy the problems of democratic deficit and the externalization of justice and ameliorate the difficulties experienced in attaining the stated penological goals of prosecution. First, Drumbl suggests a change in the division of labor in favor of greater inclusiveness of “in situ sociolegal institutions.” To this end, he proposes a shift away from the model of complementarity and primacy of international institutions toward one of *qualified deference* to national or local justice when certain conditions are met. Second, he proposes embracing the power of law to respond to mass atrocity in ways that promote restoration, reconciliation, and reparation. This would involve moving beyond the criminal paradigm and incorporating accountability models grounded in the law of contract, tort, and restitution, as well as extra-legal approaches like restorative justice. With this proposal, Drumbl aims to create a model of accountability able to capture the broad-based complicity inherent in mass atrocity in a way that the liberal legalist trial model simply cannot.

These proposals are a formidable challenge to the existing methods for responding to the most serious violations of human rights. Rather than proposing wholesale replacement of a framework that the author acknowledges was hard won, however, the closing chapter of the book offers a series of adjustments designed to advance international criminal law to a “law of atrocity.” These suggestions are sure to trigger rich debate, as the book’s powerful critique of existing approaches to sanctioning atrocity underscores the urgent need to rethink the use of ordinary liberal criminal law models as a means of achieving accountability for extraordinary crime.

Drumbl’s work will become essential reading for all those interested in the subject of accountability for international crimes. *Atrocity, Punishment, and International Law* is an authoritative guide to the punitive practices of international and domestic tribunals and a rich source of theory, insights, and inspiration in shaping the law’s response to mass atrocity.

Black Markets: The Supply and Demand of Body Parts. Michele Goodwin. New York, New York: Cambridge University Press, 2006. Pp. xvi, 294. \$30.00 (hardcover).

REVIEWED BY SONJA ANDERSEN

Each year, thousands of Americans die from treatable diseases, languishing on transplant waitlists because the demand for organs far exceeds the supply. In her bold new book, Michele Goodwin, Professor of Law at DePaul University College of Law, recognizes this unfortunate truth and comes to the immediate conclusion that the altruistic procurement system in place in the United States today is inadequate to meet the growing demand for viable organs for transplantation. This reality has led to the creation of a black market dealing in organs and an increase in the purchase of organs abroad in a practice that has come to be known as “transplant tourism” or “organ tourism.” Although she acknowledges that there is no perfect solution to an issue that raises concerns about bioethics, religion, and discrimination in the health care system, Goodwin proposes a hybrid system allowing for altruism and commoditization to exist together. She advocates the creation of a market in cadaveric organs to supplement the deficient supply created by the current system of altruistic procurement.

Goodwin begins with a numbers-oriented analysis of the current system of reliance on altruistic donations for organs. An examination of the waitlists for hearts, livers, and kidneys demonstrates a growing demand for these organs and confronts the reality that many die while waiting for years on transplant lists—and even more die who are never given the chance to have their names put on these waitlists. She then examines the legal limits of altruism, reviewing the jurisprudence on compelled donations and the requirement of parental consent for minor children to make living donations. Goodwin notes the rejection in American common law of a general duty to aid or rescue and describes how this framework is superimposed on decisions confronting the issue of compelled donations. The bottom line, as she concludes, is that altruism cannot be compelled.

Targeting her focus on donations to family members, Goodwin questions the altruistic nature of living donations.

Since these donations often take place in the family context, they can be dramatically influenced by coercion, pressure, and the practice of reproductive altruism, which involves the decision to have a child in the hopes of saving a living sibling in need of a transplant. Likewise, she explores the racial discrimination present in the current matching system used to place and rank those on the waiting lists for kidneys. This system, designed to find the best genetic fit between the patient and the donated organ, operates in a way that makes it more difficult for African Americans to receive a kidney transplant because they are considered “highly sensitized” to organs from non-Blacks, meaning there is a greater risk that the body will reject the transplanted organ. This matching process, combined with low rates of donations among Blacks, has led to a longer wait on the transplant lists for African Americans when compared to other races.

Goodwin then moves on to a discussion of various potential methods of increasing the organ supply to meet rising demand. She focuses on two methods: presumed consent and the commoditization of body parts. In her discussion of presumed consent, Goodwin relies on a theory of social contract to justify the nonconsensual appropriation of body parts by the state. This theory, supported by proponents of a policy of presumed consent, points to the tremendous benefit to be gained in lives saved by an increase in the supply of transplantable organs and argues that the cost is comparably low since the harvested organs are all cadaveric. A number of problems with this approach are highlighted: First, a practice of “presumed consent” relying on public ignorance would fly in the face of long-standing principles of fiduciary trust and informed consent in medicine. In addition, religious groups that place a special value on the body are opposed to the notion of compulsory organ harvesting. Cultural concerns exist as well, since a large percentage of harvesting would inevitably be done from minority youths whose overexposure to violence leads to a disproportionate number of deaths and thus makes their organs the most available for nonconsensual harvesting. Acceptance of a presumed consent model also requires one to assume state ownership of bodies, a notion that is contentious at best.

Goodwin then discusses the possibility of a limited cadaveric market that incentivizes organ donation, arguing that

such a market presents a solution to the organ shortage while offering greater transparency and adherence to the notion of body autonomy than does the concept of presumed consent. Although alienation of the human body presents some moral and ethical questions, Goodwin argues that the benefit—lives saved and improved for thousands of Americans—would be well worth the cost of introducing this practice in organ procurement. To support her conclusions, Goodwin draws a parallel to the widely accepted practice of donating sperm and ova for profit rather than altruistic motivations. Her proposal does not seek to eliminate the practice of altruistic donation, but merely to supplement it with a limited market that offers monetary incentives to encourage donations. In order to ensure that this market operates effectively, government involvement, including FDA monitoring of cadaveric organ procurement, would be required.

The final alternative is the “do nothing” approach, a tactic that would allow the underground black market systems already in operation to flourish. The downsides to this option are numerous, as health risks are raised for both buyers and sellers of organs and the unregulated market encourages exploitation of indigent populations in countries like China, India, and Brazil. In these countries, people desperate for money to ensure their own survival and that of their families are drawn into the black market for organs. They are induced to submit to live harvesting, usually with substandard medical conditions, to earn a trivial percentage of the price paid for the organ by the recipient. In a particularly troubling example of this practice, Goodwin recounts the story of Alberty Jose da Silva, a Brazilian who fled from his home country to South Africa to have a kidney and rib removed in return for \$6,000. While \$6000 may have seemed a fortune to da Silva, this payment seems strikingly low in comparison with the \$60,000 the recipient paid for the kidney. Moreover, although many such “donors” face risks of sickness and complications and the need for unaffordable additional medical care, da Silva’s story ends with a much more commonplace tragedy—he was robbed on the way home in Brazil and lost all the money he had received for his kidney.

Throughout the book, Goodwin is supremely aware of the impact of both the current system and her alternative proposals on the African American population. In the final section,

she addresses directly the worrisome comparison of African American participation in a compensation-based organ procurement program to the practice of slavery in North America. She dispels this theory by pointing out that Blacks would be direct beneficiaries of a cadaveric organ market system (insofar as more matching organs would presumably be available), that compensation would be provided, and that participation in such a system would be purely voluntary.

After considering all the options and alternatives and demonstrating that the current system of organ procurement is both inadequate because it cannot meet the growing demand for organs and dangerous because it fosters an environment ripe for an unregulated underground market in organs, Goodwin concludes that a hybrid model of altruistic procurement and a limited market in cadaveric organs is best designed to meet the rising demand for organs while raising the fewest troublesome ethical and moral issues. Her thorough analysis and daring proposal offer a great contribution to a pressing public health issue that can no longer be ignored.

A Corporate Solution to Global Poverty: How Multinationals Can Help the Poor and Invigorate Their Own Legitimacy. George Lodge and Craig Wilson. Princeton, New Jersey: Princeton University Press, 2006. Pp. xii, 198. \$27.95 (hardcover).

REVIEWED BY JOSHUA ROSENTHAL

Poverty is perhaps the most serious affliction facing the developing world today, with almost half of the world living on less than two dollars a day and the number of those living in poverty increasing each year. This is despite the considerable increase in foreign investment in recent decades, the proliferation of nongovernmental organizations (NGOs), and a network of international bodies assigned to address development and poverty issues. In fact, while the level of foreign direct investment (FDI) increased from \$58 to \$633 billion between 1985 and 2002, this investment has been unevenly spread throughout the world and neglects many of the poorest states. Nevertheless, many experts remain convinced that such foreign corporate investment provides positive effects in the developing world, including improved standards of living and

lowered prices for goods. A gap has thus emerged between expectations and actual results. In their recent work, *A Corporate Solution to Global Poverty*, George Lodge and Craig Wilson examine this gap and the vexing question of how so much investment can bring so little relief to the poorest of the poor. Focusing on the role of multinational corporations (MNCs), the authors search for a corporate solution to global poverty that could also help MNCs restore their long-lost legitimacy.

Central to the book's analysis is the thesis that corporations have lost legitimacy in the eyes of the global community as the generally accepted notion of corporate roles has changed. As MNCs continue to do business under an old, outdated ideology, a "legitimacy gap" has developed between practice and community expectations. Traditionally, and particularly in the American and British context, businesses were thought of as tools with one purpose: the protection of property rights. Their duties were solely to their shareholders, and these duties were to be carried out in a free market with little or no government interference. The authors briefly cite John Locke, Adam Smith, and Milton Friedman as forefathers (or at least effective poster boys) of this "individualistic" ideology.

In discussing the free market ideal, the authors note the hypocritical gulf between the individualist mantra and actual Western practice, in which companies such as pharmaceutical firms and defense contractors are closely related to the federal government. Old ideologies, as strong as they may be, can be shaken by crises, the authors explain; the civil rights and women's rights movements in the United States stand as powerful examples. For the purposes of Lodge and Wilson, the "crisis" is the joint failure of individualistic, property rights-based beliefs to live up to real world conditions and help to alleviate poverty, environmental harm, and economic disparity. According to Lodge and Wilson, a more "communitarian" ideology, one that has been entrenched throughout most of Europe, Africa, and Asia all along, could close this gap and help legitimize business. Under this new philosophic regime, businesses would focus on community needs, engage with an active, planning state, and embrace a consciousness of interdependence. Some MNCs have even begun to embrace this communitarian ideal; as several prominent CEOs recently wrote: "Business cannot succeed in societies that fail."

A host of new actors have emerged out of this legitimacy gap to reshape the dynamics of globalization, and Lodge and Wilson go to great lengths to detail these key players. Nongovernmental organizations, for instance, have grown not only in number but in power and notoriety as well. Along with this power, NGOs can bring much needed legitimacy to corporations, intergovernmental bodies, and even municipal governments. The authors divide the relevant NGOs into several broad and overlapping categories. The “attackers,” for instance, use publicity, boycotts, and even statutes such as the Alien Tort Claims Act to align corporate behavior with a new agenda, frequently exceeding in their demands the legal obligations placed on MNCs. Some NGOs act as “watchdogs” with no formal mandate, overseeing the activities of MNCs. Still others, the “collaborators,” work with businesses to achieve their ends.

Throughout the eight chapters, the authors repeatedly note that the proliferation of NGOs and the corresponding proliferation of standards for good corporate behavior has left MNC managers confused as to exactly how they are expected to act. In 2001, for instance, there existed over 240 corporate guidelines for good practices. One might wonder whether the authors are overly generous when examining corporate decision-making when they argue that MNCs are “alive to” solutions put forth by civil society. However, a host of corporate responses have indeed emerged to deal with and respond to pressure from NGOs and from the public, perhaps the most famous of which is the Corporate Social Responsibility (CSR) movement. Within CSR, some MNCs adopt codes of conduct to shape corporate behavior and align their practices with community needs. SA8000, for instance, developed by the not-for-profit Social Accountability International, helps corporations implement better labor practices. In addition to any benevolent motivation, such codes can also reduce investment risks and improve a business’s reputation. Critics might argue that these voluntary, now quasi-legal, standards have done little to reduce poverty. Lodge and Wilson take a more optimistic view, insisting that any corporate willingness to reform can be harnessed for even greater good as well as make sound economic, bottom-line sense within the context of the basic corporate function of increasing shareholder value.

Despite the large and complex web of international development organizations, no single body has yet been accepted as the institution charged with using resources drawn from multinationals to reduce poverty. Indeed, much of the “international development architecture,” including bodies like the Asian Development Bank, the Organization for Economic Cooperation and Development, and the IMF, arose before MNCs had gained the strength and influence they currently wield. Returning to their central thesis, Lodge and Wilson argue that much of the distance between international development organizations and MNCs is due to a general mistrust of business caused by the corporate crisis of legitimacy mentioned above and a corresponding fear that joint development programs might undermine the NGOs’ own legitimacy. Some links have been made between the MNCs and poverty reduction: For example, the World Bank-initiated Business Partners for Development program sought to link businesses, governments, and NGOs to work on projects such as water sanitation and youth development. Likewise, the United Nations Development Programme (UNDP) and some related groups have begun to form a few productive partnerships with business in which MNCs provide the financial resources and the UNDP provides much-needed legitimacy. Despite these developments, though, the authors argue that a proper framework for such cooperation is still sorely lacking.

Chapters six and seven of the book focus on the “Emerging International Consensus” and “Options for Business Contributions.” Lodge and Wilson point to two primary rationales for multinational corporations’ involvement in poverty reduction: the inadequacy of government solutions in many states and the nature of the system in which poverty endures. After a brief but powerful critique of the open market-based policy of U.S. aid and World Bank loans, the authors set forth a formula for change involving the characteristics of authority, good communication with target communities, access to power to battle the status quo, and competence, arguing further that the previous principle of “do no harm” is being shifted to a “do more good” expectation when applied to MNCs.

Barriers to such change do exist, though, and socially responsible MNCs will not invest in states whose own “poor standards” do not live up to those of the corporation. Likewise, corporations will have to convince shareholders that policies

that are beneficial to target communities also make economic sense. This pursuit is drastically hampered by a total lack of impact assessments detailing corporate effect on host states and poverty in addition to an absence of a suitable investigative mechanism. Despite these impediments, however, the authors find a positive example of change in the experience of Shell: After troubling tax conflicts with Nigeria in the 1990s, Shell has adopted more sustainable policies and thus suffered fewer consumer boycotts.

Lodge and Wilson therefore propose the creation of a new institution housed in the United Nations and managed by a conglomeration of multinationals (thus diversifying corporate risk) which would work closely with civil society on sustainable, poverty-alleviating business projects. The World Development Corporation (WDC), their title for this institution, would particularly focus on those areas “left behind” by globalization and would abide by both the Millennium Development Goals and the United Nations’ Global Compact. As such, the WDC could provide the missing links chronicled throughout the book as well as add to the knowledge base of exactly how corporations can improve corporate governance and respond to the growing demands of the international community.

A Corporate Solution to Global Poverty often feels somewhat scattered, jumping from one subject to another without any clear research methodology. In addition, the authors risk undermining their own legitimacy with an over-reliance on anecdotal evidence, and the reader is often left wanting a more in-depth analysis with more detailed examples. Nevertheless, the authors’ expertise cannot be denied. As a manager for the International Finance Corporation and a former U.S. Assistant Secretary of Labor for International Affairs, respectively, Wilson and Lodge bring a powerful insider’s view to the issues of foreign investment and poverty reduction. Raising dilemmas ranging from the failures of the World Bank to the “legal” status of corporate codes of conduct, *A Corporate Solution to Global Poverty* provides a valuable—and exceedingly readable—primer on Corporate Social Responsibility as well as a compelling approach to the use of corporate wealth to benefit the world’s poorest.

The Regulation of International Coercion: Legal Authorities and Political Constraints. James P. Terry. Newport, Rhode Island: Naval War College Press, 2005. Pp. iii, 150. (paperback).

REVIEWED BY RAPHAEL PARKER

At the dawn of the twenty-first century, the United States faces more nontraditional security threats than ever before. Non-state actors acting for themselves, such as Al Qaeda, or as surrogates on behalf of sponsor states, as with Hezbollah, do not only target American soil. Rather, they target American interests, values, and ways of life. As the United States confronts these groups with force, it pushes into hitherto undeveloped areas of international law.

In *The Regulation of International Coercion*, James Terry examines the legal history of international coercion in order to better understand America's actions and options for addressing the threats of the twenty-first century. Drawing from this history, he distills certain principles which justify the current American actions in Afghanistan and Iraq.

Bedrock international law states that coercive force between nations is generally forbidden. The primary exception is the right to self-defense. Set forth in article 51 of the United Nations (UN) Charter, this right is limited by the principles of necessity (that all other practicable options must have been exhausted) and proportionality (the force applied must be calibrated to the existing threat). These twin principles contain the permissible exercise of coercion, but both criteria are subject to the competing perspectives of relevant states and are thus based more frequently on political realities than on objective standards. For his part, Terry embraces a broad interpretation of the self-defense doctrine that is consistent with American political positions of much of the past century. In doing so, he articulates a basis for preemptive actions against hostile non-state actors and the nations that support them.

The author argues that, when the UN Charter banned the previously accepted rights of reprisal, retaliation, and retribution, it also enshrined a broad and "*inherent* right of self-defense." Terry describes several cases of preemptive attacks in order to develop this idea. During the Canadian insurrections of 1837-38, for instance, the British Army destroyed a private American vessel on American soil that was apparently going to

be used to aid in the rebellion. The British defended their use of preemptive force on the grounds that the destruction was an act of self-defense, as they knew the vessel would be used in attacks on their forces. While Secretary of State Daniel Webster declared that use of force for self-defense could only be justified in cases of demonstrated and overwhelming necessity with no time for deliberation, Terry notes that the modern State Department has criticized this approach and claims that it no longer makes sense in an era in which enemies and their weapons can be deployed with great rapidity and ease. More succinctly stated, the traditional requirement of exhausting all other options besides force when acting to ameliorate a growing threat does not appear to apply to the modern world.

As an example of the new paradigm, Terry discusses the United States' 1986 strikes against Libya. At the time, the United States had recently uncovered conclusive evidence that Libya directed terrorist attacks against American citizens in East Berlin. The U.S. government then intercepted a Libyan cable directing strikes against American diplomatic missions in ten African countries. Without time to exhaust all political and legal options, President Reagan ordered air strikes against Libyan military targets. This raid not only stopped Libyan aggression, but moreover established a deterrent threat to future action against U.S. interests.

Terry describes the preemptive strikes against Libya as pragmatic, ethical, and legal. Customary law, he states, has long recognized that there is no requirement for a state to absorb the first attack. Further, to force a state to tolerate terrorist violence on the grounds that peaceful means have not been exhausted is "absurd." Once an attack has occurred, whether directed against a state or its interests, the legal requirement for proportionality has been satisfied and a forceful response is justified.

In 1989, the United States invaded Panama on the grounds of anticipatory self-defense. The United States advanced four legal rationales for this right: that the article 51 authorization of force under the inherent right of self-defense includes anticipatory self-defense; that it is difficult to distinguish acts that constitute preparation for aggression from actual aggression; that the power of modern weaponry makes it unreasonable to ask a state to suffer the first blow before retaliating; and, finally, that a restriction against anticipatory self-

defense benefits aggressors. This broad reading of the article 51 exception to the use of force was limited by doctrines articulated by then-Secretary of Defense Caspar Weinberger and Senate Majority Leader George Mitchell providing self-imposed frameworks for the resort to force. Terry notes these doctrines and supports the permissive American reading of article 51, but opts not to explain either through the lens of international law.

In addition to discussing the use of force for self-defense, the author looks at justifications for the use of force during humanitarian interventions. The UN Charter allows the use of force when all members of the Security Council have approved it. This stringent requirement has generated tension between the Charter's values, which seek, at a minimum, a world order in which citizens are guaranteed their human rights, and the political reality of the Council. Oftentimes, a single Council member can veto a UN mission and thus prevent humanitarian intervention. Alternatively, a veto can render an armed intervention presumptively illegal.

Terry describes a few of these vexing cases, focusing most heavily on the American military intervention in Kosovo. After pressure from China and Russia, a vote on forceful intervention into Kosovo never reached the floor of the Security Council. In order to address the conceptual paradox of an intervention in accord with UN values but in contravention of its procedures, Terry presents a possible legal framework for establishing the legality of an unauthorized intervention. In such a framework, human tragedies of a sufficient magnitude constitute a threat to world peace and permit armed intervention under the right to self-defense. As an alternative, he also presents some ethical frameworks which determine the legitimacy of forceful intervention based on analysis of the interests at stake, the proportionality of response, alternative options, and whether the Security Council has failed to act because of internal disagreement or because of political use of the veto power.

Terry notes with approval the ultimate solution presented in the Kosovo intervention. While allied intervention was never authorized, the North Atlantic Council began the action and then challenged the Security Council to terminate it, which the Council never did. By requiring the ambivalent Council to terminate an action rather than asking it to permit

one, the holdup problem was sidestepped and the veto-bearing nations forced to garner a majority in order to stop the intervention. In this process, Terry sees an important step toward changing the law and reconciling UN values with present-day realities.

Terry applies the same step to explain the legal basis of the United States' 2003 invasion of Iraq. At that time, the Council had passed numerous resolutions demanding specific performance from the Iraqi regime, particularly Security Resolution 1441, which stated that the Security Council was "determined to seek full compliance with its decisions." At the same time, Council members refused to put an authorization of force up for a vote. The United States invaded despite the lack of authorization, and Terry regards Resolution 1483 (recognizing the US and UK as the "authority" in Iraq until the establishment of a democracy) as the subsequent ratification and approval of the invasion.

Terry completes *The Regulation of International Coercion* with a broad review of recent developments within NATO and in U.S. policy regarding intervention abroad. In the wake of American casualties in Somalia and a reversal in domestic support for international intervention missions, American officials have articulated new ground rules for when and how to intervene in other countries. Central to these developments is Presidential Decision Directive 25, which requires accountability in deciding when to intervene, which forces to include, and under what conditions. The survey of American interventions concludes with a look at computer network defense and possible responses to attacks on America's information systems. According to Terry, the country should establish military rules of procedure for determining which actions merit what responses and a protocol for identifying an unlawful entry into American computer systems as a crime, espionage, or an attack.

The Regulation of International Coercion is an interesting discussion of the legal justifications for America's forceful interventions from a perspective supportive of these actions. It presents reasoned historical and theoretical justifications for American military interventions both previous and anticipated. It does not, however, present or address the alternate perspectives or rationales that make the issue of military intervention so controversial. A more thorough presentation of the

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political, social, and historical contexts surrounding this timely issue would add greatly to the persuasive force of the author's project.

