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foster the practice of democratic dispute settlement, may help avoid not only wars, but disputes short of war. Accordingly, fashioning institutions to promote such skills may be more valuable than fashioning institutions to maximize the influence of majority preferences on political leaders. At the very least, such choices of institutional design would be better informed by a fine-grained understanding of incentive- and non-incentive-based mechanisms of war.

Whenever possible, international-regime design should be closely tethered to empirical research and, in particular, consideration of the mechanisms that influence state behavior. Although Moore's work pushes the discussion in that direction, he stops short of the necessary analysis. Considerable empirical evidence suggests that a broad range of cultural and material factors must be taken into account in understanding why states go to war. Uncovering the principal mechanisms and their potential interactions is critical to discerning the true nature of the war puzzle and fashioning international institutions to address major parts of it.

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BOOK REVIEWS

The United States and the Rule of Law in International Affairs. By John F. Murphy. Cambridge, New York: Cambridge University Press, 2004. Pp. ix, 367. Index. \$85, £55, cloth; \$31.99, £19.99, paper.

At the heart of John Murphy's new book, *The United States and the Rule of Law in International Affairs*, is his effort to understand an enduring contradiction in U.S. foreign policy—namely, that the “United States has had considerable difficulty in adhering to the rule of law in its conduct of foreign affairs. However, there also have been occasions when the United States has taken the lead in supporting the rule of law in resolving some of the major international issues” (p. 349).

Murphy himself has long worked in the trenches of public international law, giving valiant and valuable service as an attorney adviser in the Legal Adviser's Office, as a professor and scholar, and as a volunteer on countless projects. Perhaps his most important recent contribution was authorship of an ABA report on the International Criminal Court (ICC), which made a strong case for

the court and helped pave the way for the conclusion of the Treaty of Rome. Indeed, his disappointment with U.S. attempts to water down the Rome Statute during the negotiations and, more recently, with the Bush administration's ferocious attack on the ICC and everything connected with it—is palpable. He states, flatly but sadly: “For the moment, . . . the United States has rejected a revolutionary effort to enhance the rule of law in international affairs” (p. 318). Murphy is similarly unhappy with the U.S. withdrawal from the compulsory jurisdiction of the International Court of Justice (ICJ), and notes rumbling U.S. dissatisfaction with NAFTA and WTO tribunals in the wake of their decisions against the United States. Nevertheless, despite all these concerns about the combative U.S. stance toward centrally important international institutions, Murphy identifies a number of places where the United States has actually worked hard to advance the international rule of law.

That is the great strength of this book. Murphy depoliticizes the record, working his way through issues such as UN dues, the use of force, arms control and nonproliferation, the law of the sea, the ICJ, prosecution of international crimes, and human rights and international environmental law. He is not afraid to criticize, but neither is he hesitant to praise—a refreshingly balanced attitude in an increasingly polarized era. For instance, he declines to criticize the United States, from a legal perspective, for rejecting the many treaties that other countries support, such as the Landmines and Biological Diversity Treaties and the Kyoto Protocol. Such rejections are not, Murphy argues, “deviations from the rule of law” (p. 349). On the contrary, “In the voluntarist system that characterizes the international legal process, each state is entitled to decide whether becoming or remaining a party to a particular treaty is in its national interest” (*id.*). He is profoundly disappointed with the U.S. decision to reject the Treaty of Rome, as noted above, but his disappointment is grounded in personal policy preferences, not legal analysis. He does criticize the United States, however, for “tak[ing] steps that undermine the effectiveness of treaties that it has ratified” (p. 350)—most notably, by withholding UN dues and insisting on reservations to human rights treaties, including the International Covenant on Civil and Political Rights, that deliberately block their domestic effect.

Murphy delivers a similarly evenhanded verdict on U.S. actions against international terrorism. He provides no cover for U.S. treatment of

detainees at Guantánamo Bay or for the doctrine of preemption. He also finds, however, that the United States tried to adhere to the rule of law in working within the framework of the UN Charter as much as possible before going to war against Iraq. And he praises the United States for its leadership in developing antiterrorism conventions and describes it as "a model practitioner of the rule of law approach" (p. 352) in its fight against the Taliban in Afghanistan—first asking the Taliban to move against Al Qaeda members in their midst and then informing the Security Council that it was exercising its right of self-defense under Article 51.

Murphy's analysis of the reasons behind this inconsistent pattern of behavior is rather thinner than his account of the behavior itself. He points to the traditional trio of "triumphalism, exceptionalism, and provincialism" (p. 7)—factors that are undeniably at work but that shed no light on the microfoundations of U.S. decisions to take specific positions in individual cases. Such explanations are perhaps a job more for political scientists than international lawyers, but here Murphy promises more than he delivers.

Overall, however, at least for this reader, *The United States and the Rule of Law in International Affairs* throws two questions into sharp relief. First is the extent to which the United States' often proclaimed commitment to the rule of law—even greater today in the administration's "war for freedom"—will force it to come back to the international law fold through what one might call the "politics of hypocrisy." A great deal of the virulent and growing anti-Americanism in Europe, Asia, and the Muslim world is linked not only to specific U.S. policies, but also to what at first appears to be a deeper critique of U.S. values. On closer examination, however, this critique is aimed not at the values themselves, but at the failure of the United States to live up to them. Particularly in Europe, the United States' failure to ratify the Treaty of Rome and subsequent attacks on the ICC appear as the absolute antithesis of the rule of law—an apparent claim that the rest of the world should live by one set of rules and the United States by another.

On its own, at least under this administration, the charge of hypocrisy has been pushed aside by the renewed claims of sovereignty made by a group of "sovereigntists," led by John Bolton and Jeremy Rabkin, who see international institutions, and the law they enforce, as nothing but large sticks that small countries can use to beat the United States. As long as the United States

thought that it could get its own way in the world without these institutions, global public opinion could be safely ignored. In the second Bush administration, however—when the need to get other countries to go along with U.S. policies has become paramount—all high administration officials are once again touting the virtues of working with allies and through institutions. But if the United States is to achieve its policy objectives, it cannot continue to ignore the views of foreign publics—at least in the democracies—on the glaring disconnect between the United States' commitment to the rule of law at the domestic level and its open contempt for much of international law.

The second issue—really a set of issues—raised by Murphy's book concerns the extraordinary evolution of the European Union, which explicitly and insistently comprises rule of law states domestically, as part of the definition of a liberal democracy in the EU's accession criteria. Like the United States over much of its history, the EU is defining itself on the international stage as a champion of "effective multilateralism," a notion that is taken to include a strong commitment to international law and institutions. Thus it is clear that, for the moment at least, these states find no inconsistency in embracing both the domestic, and the international, rule of law.

This love affair with international law may not last, however. At present, European publics appear to take pride in their governments' adherence to international law (at least as long they perceive the United States as the primary lawbreaker)—which gives European elites bragging rights over their multilateralist American colleagues. Nevertheless, the EU faces a perceived democracy deficit and growing discontent in the ranks. As of this writing, it is not at all clear, for example, that the new EU constitution will survive a French referendum. A large part of the reason—in addition to fear of Turkish accession and anti-immigration sentiment generally—is the perception that EU law, much of which implements international law, is penetrating domestically to regulate the tiniest details of the everyday lives of EU citizens. This resistance illuminates the political difficulties that, over the long term, are likely to lead the citizens of any rule of law state to rise up and reclaim their democratic right of representation in the lawmaking process.

There is a final, sad paradox here. The public outcry abroad about the apparent U.S. disregard for the international rule of law—a response driven by far less balanced and careful assessments

of the U.S. record than Murphy offers here—ultimately strengthens the hand of individuals and groups within the United States who insist that both the substance and the enforcement of international legal obligation are irretrievably politicized against the United States. It is not only U.S. behavior that feeds this dynamic, but also the shrill denunciations of all things American by critics around the world, who are often more concerned with fashion than truth. In this context, where the geopolitical stakes are increasingly high, John Murphy has made a considerable contribution. He has given us a sober analysis of U.S. behavior that criticizes but also gives credit where credit is due, backed up by a well-respected international lawyer who has devoted his life to the ideals of the international rule of law.

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The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations. By Mohamed Sameh M. Amr. The Hague, New York: Kluwer Law International, 2003. Pp. xxiii, 447. Index. \$173.

The passage of time between the publication of *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* by Mohamed Amr, an Egyptian diplomat and senior lecturer in public international law at Cairo University, and this writing has witnessed a number of developments affecting the role of the International Court of Justice (ICJ) within the United Nations and underscoring the importance of the subject matter of the book under review.

First, the Court, per its president, issued two separate orders on September 10, 2003, recording the discontinuance of the *Lockerbie* cases brought by Libya against the United Kingdom and the United States, respectively.¹ The termination of those cases removed the possibility that the Court (or one or more of its judges) would pronounce on the question (discussed in chapter 5 of Amr's book) of the Court's role as a kind of "constitutional court" empowered to review the legality of actions of the political branches of

the organization of which the Court is the principal judicial organ. A dozen years ago, in the aftermath of the provisional measures stage of the *Lockerbie* cases, some commentators had already expressed the view that the Court had "carefully, and quietly, marked its role as the ultimate arbiter of institutional legitimacy."² In hindsight, that assessment may have been too optimistic and premature.³

Second, the importance of the Court's role in interpreting the purposes and principles of the United Nations (discussed in chapter 4) was highlighted both in the *Oil Platforms* judgment⁴ of November 6, 2003, and in the Court's most recent advisory opinion, which concerned Israel's West Bank barrier, of July 9, 2004 (too late, of course, to be included in Amr's volume).⁵ Those rulings have profoundly affected our understanding of fundamental rules of international law—in particular, the right to self-defense—as interpreted by the Court.⁶

Third, the central question of the concurrent jurisdiction of the various organs of the United Nations—especially of the ICJ and the Security Council (also discussed in chapter 4)—featured prominently in the *Wall* case. In that case, involving a veritable *ménage à trois* of principal UN organs, Israel argued "that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion [of the ICJ] on the legal consequences of the wall in the Occupied Palestinian

² Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?* 86 AJIL 519, 523 (1992).

³ For a more thought-provoking analysis of the early stages of the *Lockerbie* cases, especially the "constitutional" questions potentially presented by them, than is offered in Amr's book, see Krzysztof Skubiszewski, *The International Court of Justice and the Security Council, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 606, 615–19 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (with references to additional literature at 623 n.82).

⁴ *Oil Platforms* (Iran v. U.S.) (Int'l Ct. Justice Nov. 6, 2003), 42 ILM 1334 (2003). For this reviewer's case report, see 98 AJIL 550 (2004).

⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Int'l Ct. Justice July 9, 2004), 43 ILM 1009 (2004). The present reviewer served as counsel to Palestine in the *Wall* case.

⁶ *Oil Platforms*, paras. 50–78; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 138–39.

¹ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK) (Libya v. U.S.), Order (Int'l Ct. Justice Sept. 10, 2003). The basic documents, decisions, pleadings, and other materials concerning the International Court of Justice are available at the Court's Web site, <<http://www.icj-cij.org>>.