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### High Seas Governance: Gaps and Challenges

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Taken as a whole, there is no recent book that so skillfully and systematically interlaces national religious and secular law in the Islamic context with important choices states make in the international legal system. Powell is one of the few Western scholars who demonstrates that the label “Islamic law” is about as simplistic as “Western law.” This book successfully connects the legal and especially the constitutional variation within Islamic law states with international law in a satisfying way. It is a significant contribution to understanding the uneven participation of states in the international legal system.

BETH A. SIMMONS  
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*High Seas Governance: Gaps and Challenges.*

Edited by Robert C. Beckman, Millicent McCreath, J. Ashley Roach, and Zhen Sun. Leiden/Boston: Brill Nijhoff, 2018. Pp. xvii, 318. Index. doi:10.1017/ajil.2020.56

This collection of essays emerged from a conference on the same topic that was convened in April 2017 by the Centre for International Law at the National University of Singapore. The book contains an introduction and conclusion by the editors, and eight chapters written by different authors. The editors are to be congratulated for assembling a set of interesting issues and accomplished authors to address them.<sup>1</sup>

<sup>1</sup> Nilüfer Oral, *Jurisdiction and Control Over Activities by Non-state Entities on the High Seas*; Karen N. Scott, *Mind the Gap: Marine Geoengineering and the Law of the Sea*; Youna Lyons, *Identifying Sensitive Marine Areas in the High Seas: A Review of the Scientific Criteria Adopted Under International Law*; Aldo Chirco, *The Use of IMO Instruments for Marine Conservation on the High Seas*; Robin Warner, *Conservation and Management of Marine Living Resources Beyond National Jurisdiction: Filling the Gaps*; Günther Handl, *High Seas Governance Gaps: International Accountability for Nuclear Pollution*; Nicholas Gaskell, *Liability and Compensation Regimes: Pollution of the High Seas*; Erik Røsæg, *Marine Pollution Preparedness, Response and Cooperation in the Arctic High Seas*. The

The introduction aptly cites at the outset Ambassador Tommy Koh’s description of the UN Convention on the Law of the Sea (UNCLOS) as a constitution for the oceans (p. 1).<sup>2</sup> That does not mean that this, or any, constitutive instrument could or should provide express answers to every legal question that might arise. The editors observe that UNCLOS “is intended to regulate all uses of the sea” (*id.*). The way it does so is illustrated by the chapters that follow. One finds citations to substantive provisions of UNCLOS (including its implementation agreements), decisions and advisory opinions rendered under its dispute settlement provisions, and actions of the International Seabed Authority established by UNCLOS. There are also citations to the rich corpus of treaties, regulations, and guidelines promulgated by or under the auspices of competent international and regional organizations established by other instruments to which UNCLOS entrusts much of its detailed implementation; some of those measures are in turn incorporated by reference into UNCLOS.

The introduction proceeds to refer to “gaps and loopholes in the legal regime established in UNCLOS, particularly the legal regime governing the high seas” (*id.*), and the conclusion to “gaps and loopholes in the governance of the high seas, especially with respect to the preservation and protection of the marine environment” (p. 300). To what end? The editors refer to the decision of the UN General Assembly “to convene an intergovernmental conference . . . to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea” on

the conservation and sustainable use of marine biological diversity of areas beyond

introduction comments on the problem of plastic debris in the oceans (pp. 3–4).

<sup>2</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3 [hereinafter UNCLOS]; see *A Constitution for the Oceans*, Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea (Dec. 1982), available at [https://www.un.org/Depts/los/convention\\_agreements/texts/koh\\_english.pdf](https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf).

national jurisdiction [BBNJ], in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology. (P. 2)<sup>3</sup>

Specifying the high seas as the object of the inquiry in this context warrants a caveat. Unlike the 1958 Convention on the High Seas, UNCLOS deliberately does not contain a geographic definition of the high seas as such.<sup>4</sup> One can draw a bright line at the two-hundred-mile limit of the exclusive economic zone (EEZ) with respect to coastal state sovereign rights over living resources in the water column.<sup>5</sup> But the freedom of navigation referred to in Article 87 of UNCLOS applies on both sides of that line.<sup>6</sup> So too the regime of the continental shelf where the continental margin extends further.<sup>7</sup>

<sup>3</sup> GA Res. 72/249, paras. 1–2 (Jan. 19, 2018). See Symposium, *Governing High Seas Biodiversity*, 112 AJIL UNBOUND 118 (2018).

<sup>4</sup> UNCLOS, *supra* note 2, Article 86 applies the provisions of Part VII (High Seas) “to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” It then refers to Article 58, which applies the non-fisheries provisions of Part VII to the EEZ as well: in its first paragraph, “the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms,” and in its second paragraph, “Articles 88 to 115 . . . in so far as they are not incompatible with” Part V (EEZ). The reasons for this approach include ensuring that the provision concerning the high seas in Article 12 of the Convention on International Civil Aviation continues to apply to all areas beyond the territorial sea.

<sup>5</sup> Living resources pay no heed, however. See UNCLOS, *supra* note 2, Arts. 63(2), 64, 66–67, 116; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, TIAS 01-1211, 2167 UNTS 3.

<sup>6</sup> UNCLOS, *supra* note 2, Arts. 58(1), 86–87.

<sup>7</sup> *Id.* Art. 76. “[T]he legal regime of the continental shelf has always coexisted with another legal regime in the same area. Initially that other regime was that of

There is not only a multiplicity of functional regimes in the law of the sea but a multiplicity of international and regional organizations with responsibilities for different types of activities. Such functional allocation of responsibilities is hardly unique to international institutions. But it can pose challenges in implementing environmental objectives directed to particular outcomes, such as the duty to take “measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”<sup>8</sup> More than one chapter of the book helpfully explores how coordinated responses have emerged and can be encouraged.

In addition, the multiplicity of independent states can pose challenges for those who, with good reason, seek more closely coordinated action to confront common problems. These challenges are not unique to the high seas. Ask anyone trying to make progress in addressing climate change.

What then are the “gaps”? Do they relate to the legal regime established in UNCLOS regarding the high seas or to the governance of the high seas with respect to the preservation and protection of the marine environment? What should we do about them? With what priority? The authors of the essays in this book know their topics well. For them, these are not simple questions. These questions may not even be the most pressing ones.

UNCLOS is not static. It is one of the few widely ratified treaties that both provides for arbitration or adjudication of disputes at the request of either party and sets forth not only detailed environmental provisions, but basic environmental norms in unqualified form, beginning with: “States have the obligation to protect and preserve the marine environment.”<sup>9</sup> Its express and

the high seas and the other States concerned were those exercising high seas freedoms.” *Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangl./Myan.), Case No. 16, Judgment, 2012 ITLOS Rep. 4, para. 475 (Mar. 14).

<sup>8</sup> UNCLOS, *supra* note 2, Art. 194, para. 5.

<sup>9</sup> *Id.* Art. 192.

implied incorporation by reference of environmental standards adopted by or through the competent international organization is not limited to those already in existence. To put it simply, the image of the high seas as an anarchic playground does not comport with the text. The challenge is largely one of implementation and enforcement.

The preamble of UNCLOS affirms “that matters not regulated by this Convention continue to be governed by the rules and principles of general international law” and Article 293 specifies that a court or tribunal with jurisdiction under the Convention “shall apply this Convention and other rules of international law not incompatible with this Convention.” One classic example is the international law of state responsibility, about which most treaties have little if anything to say.<sup>10</sup>

Günther Handl<sup>11</sup> explains his dissatisfaction with some aspects of that law, its articulation, and existing instruments bearing on private and public accountability for nuclear pollution of the high seas. He thoughtfully concentrates on the theoretical and practical merits of his argument for improving the liability regime with respect to questions such as environmental damage, standing, and lawful but hazardous activities (pp. 19–228). Guided by one of the editors (p. 195 n. 2), he styles this “a governance gap, such as it is” characterized by “a fragmented and still largely untested system of responsibility and liability as applied to the high seas as an international commons” (pp. 195–96).

The longest essay in the collection, by Youna Lyons,<sup>12</sup> is a comprehensive comparative review of the criteria adopted under different instruments for identifying sensitive marine areas requiring additional protection (pp. 57–125). The essay is a significant resource for those charged with drafting new instruments or

applying existing ones in a coherent manner, an objective highlighted by the November 2019 Revised Draft Text of an Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Draft).<sup>13</sup> But it has little if anything to do with “gaps” in the UNCLOS high seas regime as such.

The same may be said of the second longest essay, Aldo Chircop’s<sup>14</sup> magisterial review of the use of International Maritime Organization (IMO) instruments for marine conservation on the high seas (pp. 126–78), and the third longest, Nicholas Gaskell’s<sup>15</sup> sure-handed review of liability and compensation regimes with respect to pollution of the high seas, with welcome attention to matters such as insurance and ratification of relevant IMO instruments (pp. 229–72). To this one might add Erik Røsæg’s<sup>16</sup> enlightening account of the daunting challenges involved in organizing marine pollution preparedness, response, and cooperation in the Arctic (pp. 273–99).

The BBNJ Draft does not contain detailed provisions on liability. It appears to refer to responsibility in the sense of a primary obligation rather than a consequence of breach. One is left to wonder whether the thoroughness and professionalism of the book’s essays on liability and IMO’s work may have influenced the drafters to conclude that those issues were better handled in a more specialized venue.

In the book’s first substantive chapter, Nilüfer Oral<sup>17</sup> points out that the freedoms of the high

<sup>10</sup> UNCLOS is not completely silent on liability. See *id.* Arts. 28(2), 106, 113, 139(2), 174(4), 187(c), 232, 235, 263, 304; Ann. III, Arts. 4(4), 11(3), 22; Ann. IV, Arts. 2–3; Ann. IX, Art. 6.

<sup>11</sup> Eberhard Deutsch Professor of Public International Law, Tulane University School of Law.

<sup>12</sup> Senior research fellow, Ocean Law and Policy Programme, National University of Singapore Centre for International Law.

<sup>13</sup> Revised Draft Text of an Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, Arts. 1(3), 14–21, Ann. I, Nov. 18, 2019, UN Doc. A/CONF.232/2020/3 (hereinafter BBNJ Draft), at <https://undocs.org/en/a/conf.232/2020/3>.

<sup>14</sup> Professor, Dalhousie University Schulich School of Law.

<sup>15</sup> Professor, University of Queensland TC Beirne School of Law.

<sup>16</sup> Professor, University of Oslo.

<sup>17</sup> Dr. Oral was recently appointed Director of the Centre for International Law of the National

seas are conferred on states but that many activities on the high seas are conducted by private persons (p. 10).<sup>18</sup> Under which state's authority? UNCLOS provides specific answers with respect to ships and aircraft, namely the flag state or state of registry. That presumably covers a wide range of activities that may be conducted by ships or aircraft, such as fishing, marine scientific research, or the laying of submarine cables and pipelines.

Yet at some point the connection between an activity and a flag state may be too tenuous. UNCLOS is quite clear that states, in the exercise of high seas freedoms, have concomitant obligations to pay due regard to the rights of other states and to protect and preserve the marine environment. But once one moves beyond the flag state or state of registry, the text may be less specific as to which state bears the responsibility to exercise due diligence to secure respect for those obligations by private actors.<sup>19</sup>

UNCLOS Article 209, in addressing the "Area" of the seabed and subsoil beyond national jurisdiction, nicely catalogues the possibilities: "States shall adopt laws and regulations to

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<sup>18</sup> UNCLOS is not exclusively state-centric. It contains extensive protections for individuals. *See, e.g.*, UNCLOS, *supra* note 2, Arts. 73, 97–99, 105, 225–26, 228, 230–32, 235(2), 263; Ann. III, Art. 22. And against pirates. *Id.* Art. 105. With respect to deep seabed mining, it provides for conferring rights and duties directly on the private miner, including "the exclusive right to explore for and exploit the specified categories of resources in the area covered by" the miner's contract with the International Seabed Authority. *Id.*, Ann. III, Art. 3, paras. 4–5.

<sup>19</sup> There is however some significant specificity. With respect to mining in the international seabed "Area," UNCLOS places supervisory obligations on the sponsoring state. *See* UNCLOS, *supra* note 2, Art. 139; Ann. III, Art. 4, para. 4; Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10, paras. 72–163 (Seabed Disputes Chamber Feb. 1). UNCLOS also contains references to a state of registry of an installation. UNCLOS, *supra* note 2, Arts. 109, 262. And it accords the coastal state "exclusive jurisdiction" over artificial islands and most installations and structures in the exclusive economic zone and on the continental shelf. *Id.* Arts. 60(2), 80.

prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be." Is this a flexible reference to alternatives consistent with the Convention and international law? Or is the lack of greater precision a "gap"? If gap it be, the BBNJ Draft yawns. It refers to activities under a state's jurisdiction or control, defined to mean activities "over which a State has effective control or exercises jurisdiction."<sup>20</sup>

General rules of international law regarding the jurisdiction of states do not stop at the water's edge. Neither the exclusive jurisdiction of the flag state over ships on the high seas nor the prohibition on claims of sovereignty over the high seas and the international seabed "Area" necessarily frees natural or juridical persons from the prescriptive competence of their state of nationality, for example.<sup>21</sup> Nor does it relieve a state of its duty to exercise its jurisdiction.

Dr. Oral, quite plausibly, focuses on the state of nationality of the actor in addressing this issue. Thus, for example, with respect to submarine pipelines, she concludes that "the state possessing jurisdiction and control and thus having the responsibility to ensure that the pipeline does not pollute the marine environment would be the state of the nationality of the company that owns and operates the pipeline, not the flag state of the vessel that physically laid the pipeline, unless the pollution was caused by an act or omission during the laying of the pipeline" (pp. 17–18).<sup>22</sup> This seems consistent both with the text

<sup>20</sup> BBNJ Draft, *supra* note 13, Art. 1(2).

<sup>21</sup> *E.g.*, UNCLOS, *supra* note 2, Art. 97, para. 1.

<sup>22</sup> In the context of a readable essay of limited length, the author prudently resists the temptation to delve more deeply into the complexities of corporate organization and inquire whether the requisite link here should be formal, i.e. the place of incorporation or *siege social* of the specific entity engaged in the activity in question. The approach of UNCLOS with respect to ships and aircraft is largely formal—flag states and states of registry. But its approach with respect to sponsoring deep seabed mining is qualified. Each mining applicant "shall be sponsored by the State Party of which it is a national . . . unless the applicant is

of the Convention and with the traditions of international law, without prejudice, of course, to the rights of the coastal state.<sup>23</sup>

What of geoengineering? In her forward-looking essay, Karen Scott<sup>24</sup> asserts that “geoengineering is an activity that lay[s] beyond the imaginations of the original negotiators of the 1982 United Nations Convention on the Law of the Sea” (p. 34). To the extent that the term “geoengineering” is understood to refer specifically to “the deliberate large-scale manipulation of environmental systems for the purpose of mitigating climate change” (p. 38), she might well be right.<sup>25</sup> Be that as it may, “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”<sup>26</sup>

The provisions of UNCLOS regulating marine scientific research unquestionably apply to empirical testing of hypotheses not yet imagined by anyone. The provision according the coastal state the exclusive right to authorize and regulate drilling on the continental shelf “for all purposes” speaks for itself.<sup>27</sup> The provisions on ocean dumping were designed to regulate and constrain attempts to use the oceans as a receptacle for

effectively controlled by another State Party or its nationals, in which event both States Parties shall sponsor the application.” *Id.*, Ann. III, Art. 4, para. 3.

<sup>23</sup> UNCLOS Article 79 confers a right on the coastal state to take reasonable measures for the prevention, reduction, and control of pollution from pipelines on its continental shelf and to consent to the delineation of their course. It also contains a savings clause regarding “the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.”

<sup>24</sup> Professor, University of Canterbury School of Law.

<sup>25</sup> UNCLOS drafters were aware of simultaneous work regarding weather modification. See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 UST 333, 1108 UNTS 151.

<sup>26</sup> *Bostock v. Clayton Cty.*, 590 U.S. \_\_\_\_ (Slip. Op. at 2) (2020).

<sup>27</sup> See UNCLOS, *supra* note 2, Art. 81.

disposal of wastes and other matter.<sup>28</sup> The duty to have due regard for the rights of others to use the sea is a basic organizing principle of the law of the sea that appears in various forms throughout the Convention and has been applied by the International Tribunal for the Law of the Sea (ITLOS) in novel situations not specifically addressed in the Convention.<sup>29</sup> Quite apart from the Convention’s very broad definition of pollution,<sup>30</sup> the express obligation to protect and preserve the marine environment is not restricted to pollution and applies to all of the marine environment.<sup>31</sup>

It is therefore clear, as Scott acknowledges, that UNCLOS applies to geoengineering. Her chapter carefully reviews the impact of UNCLOS (pp. 42–48), as well as the specific limitations on ocean fertilization for geoengineering purposes in the 2013 amendments to the Protocol to the London Convention on ocean dumping. She notes that those amendments “created a pre-emptive regulatory regime that endorses and implements a highly precautionary approach to the management of geoengineering activities” but have yet to enter into force, and that the 1996 Protocol itself has fewer parties than the 1972 Convention (p. 50).<sup>32</sup> She goes on to observe that “there are risks in regulating

<sup>28</sup> The term “deliberate disposal of wastes or other matter” in the definition of “dumping” appears broad enough to include CO<sub>2</sub>. See *id.* Art. 1(1)(5)(a)(i); Report of the Twenty-Second Meeting of the Scientific Group, para. 11.15, IMO Doc. LC/SC 22/13 (June 10, 1999) (“fossil fuel derived CO<sub>2</sub> is an industrial waste”). While fossil fuel derived CO<sub>2</sub>, if not captured directly, will mingle with CO<sub>2</sub> of natural origin in the air, mitigation efforts are presumably directed to the quantity of fossil fuel derived CO<sub>2</sub>. The question of whether increasing the sea’s absorption of CO<sub>2</sub> is pollution by dumping is not necessarily limited to fertilization of the sea by dispersal of micro-nutrients such as iron (see p. 46).

<sup>29</sup> See Bernard H. Oxman, *The Principle of Due Regard*, in THE CONTRIBUTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA TO THE RULE OF LAW: 1996–2016, at 108 (ITLOS ed. 2017).

<sup>30</sup> See UNCLOS, *supra* note 2, Art. 1, para. 1(4).

<sup>31</sup> See *id.* Art. 192.

<sup>32</sup> There is accordingly doubt regarding the Protocol’s incorporation by reference under UNCLOS Article 210, paragraph 6 (p. 50).

—and implicitly approving—ocean fertilisation in isolation of geoengineering more generally and outside the broader issue of climate change” (p. 52). While favoring consideration of the matter in the BBNJ process (pp. 53–54), she notes that “climate change has not been identified as a priority issue for the negotiators, and the focus on developing rules around the status of marine genetic resources means that the road towards a binding instrument may be very long indeed” (p. 56).

We come then to Robin Warner’s<sup>33</sup> essay on the BBNJ negotiations, which focuses “on the gaps and deficiencies in the international law framework regulating” marine living resources in the area beyond national jurisdiction (p. 180). Adding the word “deficiencies” suggests possible dissatisfaction with what is there or with its implementation and enforcement.

The problem is high seas fishing, “one of the key drivers of biological diversity loss and ecological change in the open ocean beyond national boundaries” (p. 182). According to Warner:

There is no international rule-making structure for the high seas that can hold individual states accountable for their failure to act in the face of actions by their fishing vessels that have adverse impacts on the marine environment beyond national jurisdiction. . . . A more integrated and cross-sectoral governance structure is needed to adequately protect not only the interests of individual users but also of the international community.<sup>34</sup> (Pp. 183–84)

<sup>33</sup> Professor and Deputy Director, Australian National Centre for Ocean Resources and Security, University of Wollongong.

<sup>34</sup> The analysis might benefit from consideration of the role, in promoting such accountability, of the dispute settlement provisions of UNCLOS and its 1995 Implementation Agreement, and relevant cases thereunder. See Request for Advisory Opinion Submitted by the Sub-regional Fisheries Commission, Case No. 21, Advisory Opinion, 2015 ITLOS Rep. 4 (Apr. 2); The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award, paras. 950–93 (July 12, 2016) (footnote added).

In other words, as it stands the system of sectoral and regional fisheries management organizations (RFMOs) established pursuant to UNCLOS and its 1995 Implementation Agreement<sup>35</sup> is not equal to the task.<sup>36</sup> In the end, however, Warner grants that the implementation of improved conservation and sustainable use of marine living resources in the area beyond national jurisdiction

still rests predominantly with the member states of RFMOs. . . . Likewise the enforcement of these measures will depend on the resources, capacity and political will of RFMO member states and cooperating non-member states. Geographic and species gaps in RFMO coverage will only be remediated through political decisions on the part of relevant states to form the necessary regional organisations. (Pp. 193–94)

In this context, implementation of the contemplated BBNJ instrument

does have real potential to disseminate more broadly the scientific information necessary to make informed decisions on conservation and sustainable use of marine living resources in [the area beyond national jurisdiction] and to forge links between relevant global sectoral and regional organisations in achieving that objective. (P. 194)

The law of the sea is, and will remain, a work in progress. But there is no assurance that the current BBNJ negotiations will succeed in creating a widely ratified instrument. The existing draft addresses few of the issues identified in the

<sup>35</sup> See *supra* note 5.

<sup>36</sup> One of the shortcomings cited is, “Only those member states bound by an RFMO agreement are required to apply the conservation and management measures” (p. 186). It is not clear how this takes into account what we are told on the previous page: “Article 8(4) of the [1995 UNCLOS Implementation Agreement, *supra* note 5] provides that only those states that agree to implement conservation and management measures established by RFMOs with regard to highly migratory and straddling stocks shall have access to the fishery resources to which those measures apply” (p. 185).

book. It may not respond fully even to those. Prudence suggests that we frame our ambitions for the exercise in positive terms that reinforce the legitimacy, utility, and promise of the UNCLOS regime and the work of the valuable institutions that implement it.

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*The Crime of Aggression: The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents, and Autocrats.* By Noah Weisbord. Princeton, NJ: Princeton University Press, 2019. Pp ix, 257. Index. doi:10.1017/ajil.2020.57

At the same time that Justice Robert H. Jackson helped to construct the Nuremberg tribunal at the end of World War II, he also sought to end aggressive war altogether. As he noted in his famous opening statement at the tribunal, the prosecution aimed “to utilize international law to meet the greatest menace of our times—aggressive war.”<sup>1</sup> Nevertheless, although the Nuremberg court tried twenty-two Nazi leaders—and subsequent war crimes trials in Germany and Tokyo prosecuted other military figures—the crime of aggression Jackson had championed became something of an afterthought. Subsequent to these proceedings, scholars and commentators largely viewed the aggression charges as problematic, and many have described the prosecution of war crimes and crimes against humanity as the tribunal’s more enduring legacy.<sup>2</sup> Indeed, even during the heady post-Cold War period that produced the ad hoc international tribunals for Yugoslavia

and Rwanda and the remarkable agreement to establish the International Criminal Court (ICC), the crime of aggression was excluded from the purview of these bodies. Yet a small band of international lawyers, of whom Nuremberg prosecutor Benjamin Ferencz was one, never let go of the ideal of defining the international crime of aggression and including it within the jurisdiction of an international criminal court (pp. 58–59). That ideal became a reality in 2010 in Kampala, Uganda, when the Assembly of States Parties to the International Criminal Court agreed to a definition of the crime and a path forward for including it within the ICC’s jurisdiction.<sup>3</sup>

<sup>3</sup> The ICC defines the “crime of aggression” as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” Rome Statute of the International Criminal Court, Art. 8*bis*(1), July 18, 1998, UN Doc. A/CONF.183/9\*. The “act of aggression” is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force

<sup>1</sup> *Second Day, Wednesday, 11/21/1945, Part 04, in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, VOL. II, Proceedings: 11/14/1945–11/30/1945, 1947 IMT 98* (official text in the English language), available at <https://perma.cc/9KEM-8UBF>.

<sup>2</sup> See, e.g., DAVID LUBAN, *LEGAL MODERNISM* 336–62 (1994).