

Fordham International Law Journal

Volume 12, Issue 4

1988

Article 7

Janis, An Introduction to International Law

Peter Lake*

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Abstract

Professor Janis has succeeded in offering a comprehensive and accessible treatise that undoubtedly will be used as a basic text in introductory courses on international law.

BOOK REVIEW

AN INTRODUCTION TO INTERNATIONAL LAW. By Mark W. Janis.* Boston: Little, Brown & Company, 1988. xvi + 299 pp. ISBN 0-316-45763-9. US\$15.95.

*Reviewed by Peter Lake***

In the tradition of the "classic" introductory treatise on international law—J.L. Brierly's *The Law of Nations*¹—Professor Janis has succeeded in offering a comprehensive and accessible treatise that undoubtedly will be used as a basic text in introductory courses on international law in U.S. law schools and as a reference for non-lawyers (p. xv).² Professor Janis has set out to reflect international law—an exercise in what Bentham called "expository jurisprudence" (p. 164),³ with an explicit focus upon the international practice of the United States (p. xv). This focus makes Professor Janis's effort particularly valuable and useful to U.S. legal education, for which Brierly's classic is less useful. The book is also more valuable because of the treatment of the vast changes in international law since Brierly's last edition in 1955. Professor Janis is too self-effacing⁴ in noting simply the "relative modernity" of the book in comparison to Brierly's efforts (p. xv). The author draws attention to, *inter alia*, the vast increase in private and commercial international law, the concomitant erosion of the traditional distinction between public and private international law, and emphasizes the growing importance of individuals as subjects of international law and the growing field of international human rights.

Professor Janis significantly modernizes his book in his ap-

* Professor of Law, University of Connecticut.

** Associate, Cahill Gordon & Reindel, New York, New York. A.B. 1981, Harvard College; J.D. 1984, Harvard Law School.

1. J.L. BRIERLY, *THE LAW OF NATIONS* (1928).

2. Brierly's work has been influential in many fields. For example, John Rawls has cited to and relied upon *The Law of Nations* in his sketch of an approach to questions of international justice. J. RAWLS, *A THEORY OF JUSTICE* 327 (1971).

3. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 293-94 (Burns & Hart eds. 1970) (1789).

4. This tendency is also evident from the fact that the book's index omits reference to works by Professor Janis cited therein.

proach to basic jurisprudential questions and historical/jurisprudential developments. The reader is introduced to the basic question of whether and to what extent international law is law and to "international law's most famous jurisprudential critic, John Austin," who regarded international "law" not as positive law, but as law enforced by moral sanctions only (p. 2). In the context of discussing this issue, Professor Janis even directs the reader to basic questions of semiotics and hermeneutics—demonstrating his awareness of various trends in modern international law jurisprudence (p. 3 n.12).⁵

Professor Janis also discusses international legal process (pp. 6-8), which introduces the reader to the international aspects of perhaps the most prominent variant of legal realism in the United States—the legal process school. Indeed, as in the tradition of that school, Professor Janis deals at great length with international legal institutions, procedures, and actions. Another example of Professor Janis's attention to historical jurisprudential issues is his treatment of the public/private distinction and Jeremy Bentham.⁶ Professor Janis mounts a solid and convincing attack on that distinction and Bentham's exposition of it with a combination of historical and jurisprudential arguments. This particular maneuver—the partial rejection of the public/private distinction as fundamental to international law—distinguishes the book and makes it a progressive and particularly modern introductory text.

At times, however, the focus on the international practice of the United States works against the modernity of the approach and leaves it vulnerable to attack in the coming decades as a "reflection" of international law. The book, with its international legal process orientation, shares a common orientation with Brierly—a basic Austinian fascination with a positive law sovereign coupled with a post-war realist emphasis on process and efficacy of process. There is a tendency to focus upon the most powerful sovereign or sovereigns in the international

5. For an example of such a modern work, see D. KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987) (discussing trends in international jurisprudence). See also Falk, Book Review, 28 VA. J. INT'L L. 1065 (1988) (reviewing favorably Kennedy's *INTERNATIONAL LEGAL STRUCTURES*).

6. For a more detailed treatment of Bentham's international law writings, see Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405 (1984).

system and to identify the content and process of international law with the norms and processes that are or have been put forward by that or those sovereigns. In some ways the book fortifies the image, so clear in Brierly, that international law is primarily the international law of and among developed countries, principally Europe and the United States, and the institutions, treaties, and norms that they have created.

Thus, in Chapter 1, we are given an account of the history of international law that is entirely a history of the development of law among European and Mediterranean nations. The various discussions of international institutions throughout the book focus largely on institutions formed by the initiative of the United States and/or European countries. The discussion of treaties focuses largely on treaties among and between developed countries and the impact of those treaties upon developed countries.

One area of concern where this is particularly notable is in Chapter 7, where Professor Janis treats the growth of the law of international human rights since World War II. Treatment of human rights law, focusing upon legal process and the efficacy of legal process, is broken into three parts: the Nuremberg trial and the resultant United Nations declarations and conventions, European Human Rights Law, and Inter-American Human Rights Law. As Professor Janis, echoing a Bentham-like position that rights without remedies are nonsense on stilts, states: "The central problem [of the law of international human rights] has become not so much finding a universal law of human rights (most agree that one now exists), but enforcing that law. . . . The larger and more troubling question is what can be done in terms of international legal process" (p. 177). It is in this vein that Professor Janis gives particular attention to the European Court of Human Rights, with binding legal authority, and particularly to the *Sunday Times* case,⁷ which he regards as one of the "important landmarks in the development of international law" (p. 192).⁸

7. Judgment of 26 April, 1979, Eur. Ct. H.R. (ser. B), No. 30.

8. Professor Janis notes that decisions such as *Sunday Times* "show international law at its most potent, giving individuals effective international remedies even against their own states and even in close cases" (p. 192).

Professor Janis regards international human rights law as much less developed outside of Western Europe:

It would be an attractive prospect to contemplate European human rights law as a model for other regions of the world. The real vision, however, is otherwise. Outside of Western Europe, though the declared international laws of human rights are many, there has been only a little luck in establishing effective international human rights legal machinery (p. 192).

Thus, the book's only consideration of regional human rights law outside of Western Europe is of Inter-American human rights law, which, sharing similar features with its European counterpart (pp. 192-97),⁹ Professor Janis regards as "[t]he most developed form of international human rights law other than European human rights law . . ." (p. 192).

The emphasis on Anglo-American and European human rights carries with it a particular emphasis on civil and political rights as quintessential human rights. Thus, although Professor Janis never defines human rights nor attempts an enumeration of them, it is clear that they are, in the large part, familiar "bill of rights" types of rights. Thus, as Professor Janis points out, the Universal Declaration of Human Rights,¹⁰ arising out of fundamental concerns with respect to the Nuremberg trial (p. 176), sets forth many rights, for example, to "life, liberty and the security of person," to "equal protection of the law," to fair trials, to "own property," and to "freedom of thought, conscience and religion" (pp. 176-77). The European Human Rights Convention and its subsequently adopted protocols¹¹ list the following among the substantial rights:

the 'right to life,' the right not to 'be subjected to torture or to inhuman or degrading treatment or punishment,' the 'right to liberty and security of person,' the 'right to a fair

9. See Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989) (comparing judicial review and evidentiary matters of Inter-American Court of Human Rights with International Court of Justice, and European Court of Human Rights, and European Court of Justice); see also Note, *The American Convention on Human Rights: Toward Uniform Interpretation of Human Rights Law*, 6 FORDHAM INT'L L.J. 610 (1983) (exploring sources of law available to Inter-American Court and the Inter-American Commission on Human Rights).

10. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

11. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221.

and public hearing' in civil and criminal adjudications, the right to be free from the application of *ex post facto* laws, the right to respect for 'private and family life,' the 'right to freedom of thought, conscience and religion,' the right 'to freedom of expression,' the 'right to freedom and peaceful assembly,' the 'right to marry and to found a family,' and, for all but three of the Convention's parties (Liechtenstein, Spain, and Switzerland), the right to the 'peaceful enjoyment' of 'possessions' and the 'right to education' (p. 181).¹²

Although the book gives substantial attention, in volume and detail, to international human rights, it does not introduce the reader to *competing* conceptions of human rights—such as rights to development—that many countries regard as *fundamental* human rights. The reader is not introduced to hotly debated questions of which rights are truly fundamental human rights, which rights have priority, and to the problems associated with treating Anglo-American civil liberties as the first order human rights. At the more fundamental level, crucial to the emerging vision of individuals as subjects of international law and to questions of state sovereignty, the mounting force of cultural-relativist attacks, led by Elvin Hatch,¹³ on universal rights is not addressed. A more modern introduction to international law, particularly the law of international human rights, would reflect the fact that much of the world views the fundamental freedoms as particular creations of the Enlightenment and as culture-specific to Western culture—particularly Anglo-American dominated culture. For nations with different priorities and different levels of economic and social development, the enunciation of *these* freedoms may be in derogation of rights that have higher priority. The imposition of these rights would appear to be part of a larger problem of imperialism and colonialism of the Anglo-European powers. Indeed, there is support even within the Anglo-American tradition for the proposition that many civil and political rights regarded as fundamental human rights are priority rights only when a certain level of economic and social development has taken place.¹⁴

12. *Id.* arts. 2-12.

13. See E. HATCH, *CULTURE AND MORALITY* (1983) (positing various approaches to universal rights).

14. See J. RAWLS, *supra* note 2. This assumption is implicit in Rawls's division of

Such problems are not sterile or academic. In fact, the major stumbling block to workable universal human rights may be that our conceptions of human rights are not properly packaged for export. Major advances in international human rights in the next decade are possible if this problem is recognized and addressed. Unfortunately, at least with respect to international human rights, Professor Janis has posited that most agree that a universal law of human rights exists and, therefore, concludes that the central problem of international human rights is enforcement. That posit is faulty; there is substantial disagreement over which human rights are truly human rights, even among those who agree in principle to universality. The author's position accurately reflects a U.S. perspective on international law. However, this underscores the problem with "reflecting" international law from a U.S. perspective, which Professor Janis does (as Brierly did from a British perspective) with great accuracy.

social primary goods and is made explicit elsewhere. *See, e.g., id.* at 60-63, 150-52, 542-43.

FORDHAM
INTERNATIONAL
LAW JOURNAL

INDEX
VOLUME 12

FORDHAM INTERNATIONAL LAW JOURNAL

VOLUME 12

SUMMER 1989

NUMBER 4

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