

## Recent Publications

*Kalashnikov Culture: Small Arms Proliferation and Irregular Warfare.* By Christopher Carr. Westport, Conn.: Praeger Security International, 2008. Pp. xiv, 185. \$75.00 (Hardcover). Reviewed by William Perdue.

Failed state: the category seems irrevocably defined by what it is not. These dangerous societies refuse to fit conveniently into the post-Cold War international order; they lack the functional governments we expect of a contemporary nation-state. None of this, of course, suggests what a failed state *is*. In this thought-provoking monograph, Christopher Carr, an assistant professor at the U.S. Air War College, endeavors to give a more satisfying account of these perilous corners of the world stage, showing that they possess their own cultural, political, and economic logic. Carr argues that the defining factor spurring the creation and persistence of failed states is the global proliferation of small arms. Small arms proliferation is so central to Carr's understanding of these societies that he dubs them "Kalashnikov cultures" after the Avtomat Kalashnikov of 1947, or AK-47, the world's most ubiquitous and iconic light weapon.

Carr sets out to describe Kalashnikov cultures' inner workings and significance, arguing that they share certain common elements and that containing and suppressing them through small arms control and disarmament should be high on the international agenda. After spending four chapters outlining what Kalashnikov cultures are and how they function, Carr examines a series of representative Kalashnikov cultures. The book closes with several chapters of policy recommendations.

Throughout the book Carr makes clear that the defining feature of a Kalashnikov culture is a particular relationship between the state's ability to provide security and the individual's power to inflict violence. In an environment of political instability where small arms find their way into the hands of the civilian population, those civilians may take the provision of security into their own hands as well. Before World War II, when military arms could only be manufactured by a highly skilled industrial base and could only be used effectively by a highly disciplined army, this kind of democratization of military-grade violence was technologically impossible. However, modern assault rifles like the AK-47 have given the individual, in Carr's words, "the firepower of a seventeenth-century battalion or a nineteenth-century infantry company" (p. 19). These weapons, moreover, can be produced by semi-skilled labor and require almost no training as to their use or maintenance.

The democratization of violence through small arms proliferation inevitably complicates existing problems of governance. In some cases, however, the process can actually threaten the primacy of the central governing authority, and it is at this point that Kalashnikov enculturation begins in earnest. As civilians realize that the state cannot protect them, they acquire more weapons of their own, and arms traffickers mobilize to take advantage of the commercial opportunity. Further proliferation breeds further

insecurity, and as the process feeds on itself, civilians eventually become dependent on small arms for their own safety. The weapons then take on deep significance as commodities and as cultural symbols of power, masculinity, modernity, and political independence, adding layers of complexity to any future attempt at disarmament. Chronic insecurity causes the state to recede further, creating wider openings for arms dealers, drug traffickers, organized crime syndicates, and criminal entrepreneurs who exploit natural resources that the state can no longer regulate. All of these actors soon acquire a stake in a violent status quo, which they will then fight to maintain. Once Kalashnikov enculturation begins, its self-sustaining logic can be extremely difficult to reverse.

Carr provides concrete historical evidence for his understanding of Kalashnikov cultures through a series of five chapter-length case studies. The strongest by far is his case study of Pakistan, which Carr describes as the “prototypical Kalashnikov culture” (p. 53). Indeed, Pakistani officials first coined the term “Kalashnikov culture” to refer to the destabilizing panoply of interconnected problems afflicting their country in the late 1980s. Over the course of the Soviet-American Afghan War, weapons from that conflict had steadily made their way into the hands of tribes who resided in western Pakistan but were only nominally under the control of its central government. These arms escalated the lethality of ongoing tribal blood feuds, and a huge influx of Afghani refugees further exacerbated the resultant instability. Tensions in southeastern Pakistan between the native population and those who settled there after the partition of the subcontinent in 1947, meanwhile, created a second source of instability. In response, arms from the tribal areas soon began to flow to the cities of Hyderabad and Karachi. Carr competently describes how small arms proliferation in Pakistan transformed a set of difficult but manageable political problems into a *mélange* of chronic insecurity, drug trafficking, organized crime, and political factionalism and fragmentation that continues to threaten the state to this day.

Carr’s remaining case studies complete the analytical heart of his argument, but they make for some of the book’s least arresting reading. The Pakistani example is followed by chapters about eastern Uganda, Liberia, and Yemen. The final chapter of the section analyzes Jamaica, Papua New Guinea, and Brazil all together. Each of these case studies is peppered with allusions and comparisons to still more Kalashnikov cultures, resulting in an overly ambitious array of source material for a short monograph. While Carr’s considerable research into each of these societies is apparent, he is not an expert on any of them. As a result, the case studies come off as fragmentary and incomplete, and readers who cannot rely on prior knowledge about these countries may find themselves frustrated by the lack of context. As a result, *Kalashnikov Culture* drags considerably while Carr repeatedly reinforces his key propositions with historical evidence that lacks sufficient depth to add much to his argument.

Carr, nevertheless, marshals enough evidence in aggregate to make his recommendations convincing. Kalashnikov cultures may have their own logic, but they are not benign. Apart from their extreme violence, they distort and

disrupt local economies, ravage the natural environment, provide safe havens for international criminals and terrorists, and can spread and destabilize entire regions. Initial international efforts to curb small arms proliferation (which resulted in the U.N. Conference on the Illicit Trade in Small Arms and Light Weapons in the summer of 2001) attempted unsuccessfully to generate an international convention similar to the convention on landmines. After ably documenting the faulty assumptions that led to this failure, Carr evaluates some of the regional, national, and local initiatives that have followed and finds a decidedly mixed record. Some weapons buyback programs and disarmament campaigns, like an arms-for-development-projects program in Albania, were able to make improvements; others, like a new gun control law in Brazil, seem not to have had much effect at all. Still others, like the Ugandan army's incursions into its troubled eastern province of Karamoja, only made things worse. Carr advocates several eminently sensible proposals, like standardizing the documents states use to authenticate arms transfers and requiring manufacturers to place identifying marks on every weapon they make, but he concludes that there is no "magic bullet" (p. 145).

In the end, Carr's claim boils down to a common-sense contention that the international community will be able to contain and address the issues presented by failed states only when it recognizes that small arms are not a small problem. The connection between arms proliferation and destabilizing violence is in some ways quite intuitive, but Carr's contribution is important nonetheless. His outline of the basic dynamics of how Kalashnikov cultures function pushes the conversation about these dangerous societies forward, and his use of cross-cultural analysis, if imperfectly executed here, should serve as a methodological guide for future inquiries. By focusing so intently on the role small arms proliferation plays in these societies, Carr illuminates a way to think proactively about how to prevent the emergence of Kalashnikov cultures rather than reacting to the problems they create. The U.S. military currently finds itself conducting wars in two Kalashnikov cultures—Afghanistan and Iraq. Carr's book is an invitation to look beyond these immediate conflicts and consider what forces create these dangerous environments, what factors sustain their brand of violence, and what steps can prevent them from coming into being in the first place. *Kalashnikov Culture* raises far more questions than it answers, but it answers just enough to provide a platform for further study.

*Tort Liability for Human Rights Abuses*. By George P. Fletcher. Portland, Or.: Hart Publishing, 2008. Pp. 214. \$35.00 (Paperback). Reviewed by Alex Iftimie.

Despite growing debate and litigation involving the Alien Tort Claims Act (ATCA), surprisingly few books address the topic. Even fewer attempt to contextualize current ATCA claims within the historical foundations of tort law dating back to eighteenth-century European law. George Fletcher's *Tort Liability for Human Rights Abuses* fills this niche admirably, offering an

arresting and unique analysis of the theory and the history underlying modern human rights tort claims.

Fletcher begins his concise story with a discussion of the basic elements underlying ATCA litigation, including the peculiarities of the law that allow foreigners to sue other foreigners for violations of the law of nations that occur outside the United States. He addresses the development of universal jurisdiction for crimes against humanity, and the incorporation of customary international law into U.S. common law.

Critically, Fletcher provides a broad overview of the progression of ATCA litigation since the Act was resurrected in the 1980 *Filartiga* decision. He traces the case law from *Filartiga* (which recognized liability under ATCA for state-sponsored violations of international human rights) through *Karadzic* (which imposed liability on private individuals for genocide, war crimes, and crimes against humanity) and up to recent cases such as *Khulumani* (which extend liability to corporate facilitators of human rights abuses). Fletcher predicts that these latter cases, against corporations who fund and provide essential services for mass atrocities, represent the future of ATCA litigation, leaving the principal wrongdoers to be prosecuted by the International Criminal Court (ICC) and other tribunals. For those familiar with recent ATCA litigation, this prediction is neither new nor bold. The book provides, however, meaningful analysis of how we have arrived at this point, including a practical appendix summarizing the most important ATCA cases to date.

Fletcher discusses at length the unique position of human rights claims under ATCA—a body of law that stands at the intersection of tort and criminal law principles. In merging portions of the two fields, Fletcher develops his own “paradigm of aggression” to differentiate plaintiffs’ claims, arguing that the successful ones are likely to involve victims who are the passive objects of domination by an aggressor.

Fletcher’s book complements other recent works on ATCA litigation. Jeffery Davis’s *Justice Across Borders*—also published last year—examines how ATCA litigation plays out in U.S. courts, anchoring that analysis with illuminating interviews with former Justice and State Department officials involved in such litigation. Beth Stephens et al. published the second edition of *International Human Rights Litigation in U.S. Courts*, which provides human rights litigators and activists with a manual for handling ATCA and Torture Victim Protection Act claims in U.S. courts. While Davis and Stephens provide a detailed foundation for the mechanics of ATCA litigation, Fletcher fills in the historical and theoretical foundations that undergird these lawsuits.

In light of the Supreme Court’s decision in *Sosa*, Fletcher’s contribution is particularly valuable for continuing ATCA litigation. In the Court’s plurality opinion, Justice Souter held that future ATCA claims will have to be based on “definable, universal, and obligatory norms” similar to those present in the “ambient law” of 1789 when ATCA was enacted. To meet this standard, future plaintiffs will need to compare present claims under the law of nations with their “historical antecedents.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Fletcher’s work provides much of that background. He

engages in expansive discussions of German and French tort law, outlining the historical debates from which the modern legal questions arose. Fletcher is most persuasive when explaining the finer points of Blackstone's *Commentaries* and engaging in a comparative law analysis of international and U.S. law. The book serves as a reference for practitioners looking for a connection between their client's claims and violations of the law of nations in 1789.

Fletcher's work, despite its considerable contribution, has several glaring shortcomings. First, it is exceedingly retrospective. Fletcher offers little discussion of the future of ATCA litigation and generally seems more concerned with rehashing old debates in tort law than with applying his paradigms to future litigation. While Fletcher asserts repeatedly that cases against corporate defenders are the future of ATCA litigation—even ending the book by noting that “this will be the way we correct evil in the twenty-first century” (p. 175)—he leaves the reader yearning for more. Fletcher avoids questions as to what kinds of claims will be actionable under ATCA, stating only “no one knows for sure. The field awaits proper theoretical refinement . . . .” (p. 130). Given his impressive historical analysis and expertise in the field, Fletcher is well situated to provide the answer.

Second, the book promises more than it delivers. The back cover and publisher's note suggest that Fletcher will examine new controversies in the field, including Agent Orange litigation, liability for terrorism, litigation against corporations that assist the U.S. military in committing war crimes, and compensation through the ICC. These topics are noted only in passing. In fact, Agent Orange litigation is referenced only in the appendix where Fletcher summarizes two cases against Dow Chemical, a manufacturer of Agent Orange.

Lastly, Fletcher often strays far from his discussion of human rights tort claims and ATCA, getting lost in esoteric discussions of tort theory. For instance, over the course of chapters two and three, human rights and the ATCA are mentioned in only two paragraphs. Fletcher instead re-illustrates tort textbook hypotheticals and engages in a protracted comparison of the efficiency, corrective justice, and reciprocity theories underlying tort claims. *Tort Liability for Human Rights Abuses* too often reads like an amalgamation of tort and criminal law theory with little relation to either ATCA or human rights abuses.

Nonetheless, the book is a must-read for anyone wishing to understand the broader historical foundations of modern human rights tort claims. Fletcher deserves credit for bringing his expansive knowledge of international criminal law and torts to an evolving human rights field.

*Military Occupations in the Age of Self-determination: The History Neocons Neglected.* By James Gannon. Westport, Conn.: Praeger Security International, 2008. Pp. xi, 202. \$54.95 (Hardcover). Reviewed by Joshua Alexander Geltzer.

In his new book, *Military Occupations in the Age of Self-determination*, James Gannon promises to bring to light the history allegedly neglected by America's so-called "neocons." The narrative that Gannon provides of the floundering, frustrating, and frequently futile experiences of earlier occupying powers in their efforts to counter insurgencies is well told and of considerable relevance to America's current dilemmas in Afghanistan and Iraq. There is a problem, however: by Gannon's own account, this history was not really *neglected* by American policymakers in their decision to go to war in Iraq. In fact, it is far from certain that even as sobering a history as the one provided by Gannon would influence *any* potential occupier, for the crucial reason that states rarely, if ever, consciously and deliberately choose to fight an insurgency. Much more often, international powers suddenly and unwillingly find themselves in the midst of an insurgency, and the question becomes: "What now?" Therefore, the history of previous struggles to counter insurgencies is rarely truly neglected by a great power like the United States; instead, such history is thought utterly irrelevant given a great power's intention to avoid having to face an insurgency entirely.

Gannon's basic argument is that in confronting an insurgency in Iraq, "from the start, the historical odds have been heavily against an American victory" (p. 160). History, Gannon avows, reveals that occupying forces conducting counterinsurgency operations rarely achieve any sort of victory. He culls evidence for this claim from a smattering of case studies involving what Gannon deems "five great powers since 1945" (p. 3). Surveying the British experience in Palestine, the French quandary in Algeria, the American difficulties in Vietnam, the Israeli situations in Lebanon and in the Palestinian territories, and the Soviet adventure in Afghanistan, Gannon concludes that with the exception of Israel in the Palestinian territories, none of these occupying powers could credibly claim any sustained success in attempting to counter an insurgency. The decades that Gannon spent as a journalist at NBC News serve him well as he narrates the incidents crisply and succinctly, concisely underscoring key incidents, evocatively characterizing influential individuals, and making a compelling claim for the general potential for history to inform the work of policymakers.

Yet Gannon's own final, central account of the American experience in Iraq calls into question whether such history was, as he argues, neglected by American decisionmakers as they moved toward war in Iraq. He asserts, "The Bush Administration's idea for Iraq was a quick war, a smooth turnover from dictatorship to democracy, and a fast exit" (p. 143). While other accounts have suggested that certain American decisionmakers had a different vision, by Gannon's own reckoning the United States never intended to be a sustained occupier, or certainly to conduct counterinsurgency operations. On that basis, the history presented by Gannon was not so much neglected by American decisionmakers as deemed irrelevant to their plans because, according to

Gannon, they wanted to get in and get out without ever halting long enough for an insurgency to develop.

Moreover, Gannon's harshest words for the Bush administration have little to do with issues of occupation and counterinsurgency. Some of Gannon's fiercest barbs emerge from his claim that the Bush administration exaggerated the threat that Iraq posed to America. He writes that "this book seeks to make the very practical point, that the Iraq invasion was a risky, even reckless endeavor against a foe that posed no imminent threat to the United States" (p. 160). Yet, this emphasis on the overestimation of the Iraqi threat is distinct from the issue of the historical odds being stacked against an occupier's success in countering an insurgency. In other words, what Gannon underscores as most fundamentally flawed about the Bush administration's approach to Iraq bears little relation to the historical lessons with which the book is primarily concerned.

In fact, recognition of a fundamental aspect of counterinsurgency reveals that Gannon's thesis is, in a sense, tautological. He writes that "the great power almost always loses when a credible insurgency rises up to challenge it" (p. 10). This notion—that a great power generally loses when a credible insurgency arises—misses the crucial point that the emergence of a credible insurgency is itself a symptom of the great power already having, at least initially, lost. So, to the extent that the Bush administration envisioned quickly rolling into and out of Iraq, the emergence of a credible insurgency to thwart a fast and easy transition to democracy *already* revealed the failure of America's initial plan. Moreover, to the extent that fighting the insurgency in Iraq has proven a greater risk to U.S. national security than that previously posed by Saddam Hussein's regime, the two risks were never weighed by the Bush administration because coping with the former was never deemed necessary for confronting the latter. However good or bad America's reasons were for going to war in Iraq, and however good or bad America's initial plan was for doing so, once American forces were still in Iraq and found themselves facing an insurgency, "Plan A," so to speak, had already failed.

Fighting an insurgency was never part of Plan A—just as it was never a part of the original plans of Britain in Palestine, France in Algeria, Israel in Lebanon, and so on. Rather, in a manner similar to those and other occupiers who ultimately confronted insurgencies, the United States woke up one day in Iraq and realized that an insurgency was upon it. The central question had never been, "Can we defeat an insurgency if we invade Iraq?" To the contrary, as is almost always the case, the key question, once an insurgency arose, was: "What now?" Had Gannon presented the argument that, in going to war in Iraq, American decisionmakers should have expected, based on lessons from history, that an insurgency would arise, that might have provided a compelling critique indeed. But that is not his thesis.

Despite the book's questionable premises, Gannon presents important and interesting case studies that reveal historical commonalities well worth sustained reflection. Emerging starkly and repeatedly is the tendency of occupying forces to commit the very instigations that generate credible insurgencies. In Palestine, "the British pursued policies that infuriated the

resistance organizations,” harassing Jewish immigrants, and even going so far as to send some to detention camps in Cyprus, thereby stoking the very seeds of resentment that would eventually expel Britain (p. 40). American policies of relocation and imprisonment in Vietnam drove many Vietnamese “into the arms of the Vietcong,” empowering insurgent forces at the expense of the occupier (p. 76). Similarly, the more harshly Israel responded to Hezbollah’s acts of resistance in Lebanon, “the more it strengthened Hezbollah’s standing with the Lebanese people” (p. 97). Time after time, insurgencies gained widespread traction only when the occupying forces stoked discontent that could be directed back at those very forces.

Moreover, as that dynamic escalated, the occupier tended to respond on the basis of anger rather than calculated strategy, engendering still more counterproductive animosity. Gannon captures this tendency well: “The British lashed out half-blind with rage” in Palestine, as did many subsequent occupiers, including the successors to the very Israeli leaders who had so effectively provoked the British (p. 39). Indeed, that strategy of provocation on the part of insurgents is another theme of Gannon’s case studies, which show how insurgents intentionally induce occupying forces to respond out of anger rather than out of strategy, and thus produce sympathy and even support for those who would challenge the occupiers.

Another important theme is that a turning point often emerges when the occupier, having recognized the existence of a credible, entrenched insurgency, begins to rethink its own interests and to see them as more in line with withdrawal than with continued occupation. The French experience in Algeria epitomized this reversal, with the French populace first responding to news of violence by demanding “tougher measures,” but then shifting towards “negative feelings about the war [that] more than nullified the French victory on the ground” (p. 54). Once a populace or government concludes that withdrawal is preferable to continued occupation, even tactical advances cannot salvage an effort at counterinsurgency. In other words, the venture hinges on what answer the occupier gives to the question of “what now?” Does the occupier choose continued occupation, accepting all of the burdens and challenges of trying to counter an insurgency, or does the occupier figure out how best to pack up and go home at the earliest possible moment?

Indeed, lurking at the end of the book is what might be Gannon’s real, if underarticulated, thesis: “By adhering to a goal of military victory, Bush not only deceives himself, he defies the odds of history, which are unfavorable for occupiers” (p. 165). *This* claim might be Gannon’s main point—not that American decisionmakers ignored history in going to war in Iraq, but that they did so in persisting in Iraq even after a credible insurgency arose. How history will judge America’s efforts at counterinsurgency in Iraq remains to be seen. What must be acknowledged immediately, however, is that the alternative to continued American involvement in Iraq is not merely to respect locals’ “right to be burdened with their own problems,” as it was for France vis-à-vis the Algerians (p. 57). Various foreign hands have reached deep inside Iraq, grasping and tugging at its political soul. For America, the question remains how best to help Iraqis to fend off those foreign reaches and allow Iraq to take

its rightful place in today's "Age of Self-Determination." In the face of an unanticipated but enduring insurgency, that priority must guide today's Plan B.

*Optimal Protection of International Law: Navigating Between European Absolutism and American Voluntarism.* By Joost Pauwelyn. Cambridge: Cambridge University Press, 2008. Pp. xxx, 238. \$80.00 (Hardcover). Reviewed by Jayme Herschkopf.

In *Optimal Protection of International Law*, Joost Pauwelyn strives for no less than an all-encompassing model by which to consider and prescribe international law today, navigating between unrealistic ideals on one side and overreliance on efficiency on the other. The author's personal and professional backgrounds position him well for such a wide-ranging study. In addition to his pan-continental education, Pauwelyn has worked in the legal affairs division of the World Trade Organization and taught at Duke University School of Law for five years. He brings his plethora of perspectives to bear in this book, and in doing so self-consciously aims to bridge American and European approaches to international law.

Pauwelyn begins his discussion by defining two extremes on the spectrum of views regarding the purpose of international law. On one side is the "absolutist" perspective he identifies with European scholars, who say that in all cases, the stronger international law can be made, the better. On the other side is economic voluntarism, corresponding with American thought, where efficiency is sought above all else, and the ideal international legal system is one that allows for the greatest freedom of action. While admitting these poles are caricaturish "ideal-types," Pauwelyn stresses their pervasiveness in legal scholarship (p. 18). He offers a brief consideration of why these contrasting approaches to international law have developed, and what the ramifications are within each system, but he leaves those arguments largely to other sources. He sets to one side all so-called "metaquestions" of *why* international law has arrived at its current status, and focuses instead on *how* we can consider that status and improve upon it.

The simplicity of Pauwelyn's argument belies its innovation: he proposes applying to international law the domestic three-pronged structure of entitlements that Guido Calabresi and Douglas Melamed elaborated in their 1972 *Harvard Law Review* article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*. An entitlement, according to the article, is a more appropriate way of referring to a legal right, in that the designation highlights that there can be different types of entitlements. Each distinct right, now called an entitlement, in turn corresponds to a different level of legal protection, and, Pauwelyn adds, a different level of backup reinforcement should that rule be disobeyed. Because there are multiple categories of entitlements, one set can be identified as less vital by assigning a lower level of protection without endangering the inalienability of more valued entitlements.

Pauwelyn argues that “by default, entitlements under international law ought to be protected by a property rule” (p. 102). That is, entitlements should be transferable only by consent of both parties. If for whatever reason it is determined that an entitlement should not be transferrable, even with the consent of both parties, that entitlement becomes inalienable. Pauwelyn matches inalienable entitlements to *jus cogens* and the “European absolutist” view that “once allocated, international entitlements cannot be modified or traded” (p. 16). If, on the other hand, it is determined that an entitlement can be transferred even against the wishes of the current holder, that entitlement is protected only by a liability rule, corresponding to the “American voluntarist” opinion that “allocation of international entitlements is a mere pledge which states can renege on, based on a simple cost-benefit analysis” (p. 17). Liability entitlements allow for a so-called “efficient breach,” and are acceptable so long as the loser of the entitlement is compensated.

The book focuses on the second step of Pauwelyn’s argument, namely, the process of ascribing different types of protection once the entitlements have been identified as worthy of preserving. It is here, Pauwelyn argues, that there is room for the greatest innovation. He points out that both extremes, inalienable entitlements and those protected by liability rules, are predicated on “market intervention by the state or some higher authority” (p. 7). This not only requires greater oversight—a distinct difficulty in international law, which often lacks central authoritative bodies—but also greater expense. Therefore, whenever lawmakers suggest moving certain entitlements from the property category to one of the others, that move must be justified with reference to a number of factors and concerns.

Pauwelyn also emphasizes that the protection afforded to entitlements *ex ante* should be distinguished from the enforcement available when those entitlements have been denied *ex post*. He describes the paradox: the strongest protection, inalienability, may “benefit[] only from the weakest form of back-up enforcement” (p. 150), that is, a liability rule. He fights the notion of “reverse-engineering” (p. 146), wherein one would choose what level of protection to offer based on the remedies available once that protection has been breached, and stresses instead the surprising effectiveness of his alternative split structure, the potency of which is based largely on what he calls “community costs” (p. 157). A combination of community pressure, concern for reputation, and fear of emulation in the future will cause states to conform to a property rule of international law more than they would under domestic law, even when only a liability rule is available for enforcement if they do breach.

Pauwelyn himself identifies some potential problems with his argument. Many he refutes with detailed and systematic counterarguments, while he downplays others with constant reminders that “entitlements can be protected by hybrid regimes . . . [and] all three rules of protection come in different degrees” (p. 34); one of the book’s core messages is that “international law has reached a degree of maturity that gives it the luxury, indeed the obligation, of variable protection” (p. 200). Larger theoretical issues also remain. It is unclear, for example, whether we can even conceive of states as rational

actors in the first place—an objection that casts doubt on the validity of his model. Furthermore, states are not unitary actors, and so their representatives may not always act in the aggregate best interest of their constituents. Refreshingly, Pauwelyn does not try to offer superficial rationalizations or underplay the significance of such objections, but rather identifies them, analyzes them, and lets them stand. That intellectual candor is somewhat undermined, unfortunately, by his choice in the fourth chapter not to distinguish the jump from inalienability to property rule from that of property rule to liability rule when arguing for lower and higher levels of protection. The effect of this collapse, intentional or otherwise, is to make counterarguments weaker and harder to articulate than they might have been if the steps were considered separately.

The precision and elegance of the book's thesis sometimes makes it difficult to conceive of how it could be applied in practice. Many of the proposals are most easily read as constructing an ideal *ex ante* framework rather than being used to analyze and improve international law. Indeed, one of Pauwelyn's principal assumptions is that "the necessary tools are available to induce or even force states to comply" (p. 2), a highly contestable claim. Pauwelyn counters such objections by pointing to several scholars who argue that international law is in fact growing stronger. With more potential areas for alternative types of reinforcement, including, where appropriate, stronger ones, the range of instances in which his recommendations could realistically be applied would expand as well. In the book's preface, Anne-Marie Slaughter points out that one of the most appropriate fora for application of Pauwelyn's structure would be regime design, especially instances where an institution is being constructed (or reconstructed) from the most elementary of levels, and therefore is open to the greatest innovation.

Ultimately, Pauwelyn's combination of simplicity and flexibility make his thesis both idealistic and pragmatic. Stripped of encumbering theoretical questions and concerns, he is able to offer a precisely ordered image of how broadly to reconceive the international legal system. His pointed proposals then leave the reader cautiously optimistic about their potential implementation, and convinced that following his lead will create not only a clearer body of international law but also a more effective one.

*The Economic Structure of International Law.* By Joel P. Trachtman. Cambridge, Mass.: Harvard University Press, 2008. Pp. ix, 349. \$55.00 (Hardcover). Reviewed by Sharanya Sai Mohan.

In *The Economic Structure of International Law*, Joel Trachtman demonstrates that a thorough, well-argued evaluation of international law through the lens of law and economics does not have to attack the legitimacy and value of the legal system. His book provides a rational choice-based framework for international law that focuses on its potential rather than its limits. It uses social-scientific techniques to develop an understanding of how authority is allocated in international society and why states may want to modify or transfer that allocation.

Trachtman begins by arguing for the use of economic methodologies to understand the consequences of formulating international institutions and policies. These economic methods, the book contends, are “committed to liberalism” and shun the advocacy that shapes other legal scholarship on international law (p. 4). For the most part, the author stays true to this promise and avoids advocating for anything except the use of economic methods to understand this field. After establishing the utility of economic analysis in the field of international law, the rest of the book applies this analysis to the basic structural issues at the heart of international law, such as jurisdiction, international organization, norm formation, and dispute resolution.

Arguing that jurisdiction in the international realm is akin to property, Trachtman views the initial establishment of jurisdiction, as well as the transfer of jurisdiction, as transactions. These transactions occur through the mechanisms of “custom, treaty, and organization,” each of which is treated in a separate chapter (p. 72). The third chapter focuses on game theory to demonstrate that multilateral, rational interactions between states can lead to standardized social norms that become customary international law. By tying the international legal order to rational choice, Trachtman avoids unpersuasive idealism and makes it easier for the reader skeptical of international law to accept his vision of how states form and comply with customary international legal norms. In the next chapter, Trachtman emphasizes that the binding nature of a treaty itself is dependent upon customary international law. After establishing this relationship, he goes on to analogize a treaty to a contract in the domestic context, using cooperative game theory to show that treaties come about much like contracts and offering remedies that discourage inefficient breaches. The chapters devoted to the discussion of the importance of custom and social norms in the formation of the structure of international law convincingly demonstrate that the foundation of international law is formed from “a fabric of rational acts” created by a complex network of human and state interaction (p. 72).

Having described these two methods of transacting authority, the book then examines international organizations as an alternative to transactions that become necessary because transactions are costly. It develops a model of an “institutional response to transaction costs” based on institutional economics and the theory of the firm (p. 151). Trachtman sees institution formation in the international sphere as similar to that in the domestic sphere; states rationally sacrifice some power to gain the greater benefits of being part of the institution. The difference, he argues, is only one of degree. Finally, Trachtman extends his industrial organization analysis to the role of adjudication in this international legal scheme that he has so carefully outlined. His chapter on international adjudication delves into the effects of various levels of judicial power, as well as levels of private access to the judicial process, upon the allocation of authority between international players. Honing in on comparative cost-benefit analysis as an effective device for determining an optimum level of private access, the chapter lists several normative considerations to be taken into account during that cost-benefit analysis. The arguments in this chapter are weakened because, unlike those in

other chapters, no formal economic model is used to substantiate them. However, the author does consider the role of private, nonstate actors such as NGOs and citizens within the international legal scheme.

Perhaps the most commendable aspect of the book is its breadth. It provides a solid overview of international law, covers a large number of economic methodologies, and manages to combine the two in a way that creates an original argument without being repetitive or confusing. One element notably absent from the book is the use of empirical methodologies. This omission is surprising because Trachtman acknowledges a need for empiricism in the field by setting out an agenda for future empirical researchers. Still, the book is rich with examples of where international law works and where it fails to induce compliance and align results with preferences. Perhaps the empirical investigation of his arguments would be enough for a separate book. It is surprising, however, that such a thorough examination of the structure of international law does not attempt an empirical examination.

Throughout the work, the author maintains a balanced outlook and a clear, strictly scientific voice that matches his rigorous adherence to social-scientific analysis. While acknowledging that all of the international law elements he discusses can be the subject of vigorous normative debates, and giving examples of other scholars' normative arguments, the author rarely engages in such debates himself. One side effect of this is that the book occasionally reads more like a textbook than a scholarly work. However, Trachtman's intention, as he spells out from the beginning, is to "map the international legal system" to start the process of developing a system that maximizes the preferences of a society, rather than to make prescriptive arguments about those preferences. On that score, the work delivers.

*International Law, Museums and the Return of Cultural Objects*. By Ana Filipa Vrdoljak. Cambridge: Cambridge University Press, 2008. Pp. xxxviii, 342. \$48.00 (Paperback). Reviewed by Scarlet Kim.

For decades, Incan artifacts from the lost city of Machu Picchu have evoked wonder among visitors to the Yale Peabody Museum. But rarely does wonder inspire curiosity about how these objects came to be in New Haven. High school students study the savageries of Spanish conquest of the Americas, but seldom consider the physical traces of a history of dispossession that remain. Demands for restitution of cultural objects by their communities of origin necessarily and rightfully force us to address this history. *International Law, Museums and the Return of Cultural Objects* evaluates this process of removal and return.

Ana Filipa Vrdoljak, a lecturer at the University of Western Australia, urges readers to recognize that violence informs the emergence of an international legal framework to protect cultural heritage. Her study begins with British claims to objects seized by French forces during the Revolutionary and Napoleonic Wars. Periods of warfare and genocide order

the rest of the book. Behind each major attempt to enshrine protections for cultural objects in international law lies large-scale devastation. Cultural restitution provisions in the 1919 Treaty of Versailles allowed for the return of cultural objects to those European states that sustained massive cultural damage during the First World War. These provisions lay the foundation for the codification of cultural heritage protection during armed conflict in several international treaties in the 1930s. Nazi Germany's requisition of Jewish cultural patrimony catalyzed international efforts to protect the cultural heritage of minority groups after the Second World War.

Forged from conflict, international approaches to cultural restitution bear the influence of victorious states. By exposing the normative assumptions that underlie these approaches, Vrdoljak reveals their inequities. The cultural restitution provisions in the 1919 Treaty of Versailles applied to France and Belgium. However, non-European communities ravaged by World War I did not fare as well. Communities formerly under German or Ottoman rule were denied the right to cultural restitution and were subject to the "trust" of an appointed mandating power. Vrdoljak argues that the distinction reflected an imperialist approach; formerly colonized states were considered too primitive to properly exercise control and care over their cultural heritage. In the interwar period, the International Museums Office (OIM) accommodated Anglo-American interests by privileging the restitution of cultural objects removed from museums as opposed to those removed from archaeological sites. The result was to protect the established collections of colonial powers while leaving "unknown" objects of formerly occupied communities vulnerable to looting. The OIM justified this distinction by appealing to Anglo-American free trade principles encouraging open access to unprotected archaeological sites.

Ironically, the Anglo-American variant of capitalism has come under attack from some European states, such as France, that have directly benefited from such principles in the area of cultural restitution law. Broadly speaking, European critics of Anglo-American market capitalism argue that encouraging resource alienability can have dramatic social effects. Of course, these critics are referring primarily to the effects such transfers have on their own societies. Nevertheless, this argument holds particularly true for communities seeking restitution of cultural objects that have entered the global marketplace. According to Vrdoljak, the loss of cultural objects dilutes the collective memory of these communities, undermining their efforts to establish a robust cultural identity.

At the same time, these objects may have averted imminent destruction by virtue of their transfer from one community to another. Recently, the Chinese government claimed ownership of two Qing dynasty bronzes for sale at a Paris Christie's auction on the grounds that they were looted from the Summer Palace by Anglo-French forces during the Second Opium War in 1860. While drawing on past acts of violence to assert present claims to the bronzes, China ignored another piece of the narrative. Following the establishment of the Chinese Communist state, the government engaged in willful destruction of its own cultural heritage, particularly during the Cultural

Revolution in the mid-1960s. These acts do not justify Western looting, but they complicate the story. The bronzes not only survived but also became embedded within a new historical narrative involving the possessor nation.

Vrdoljak untangles these narrative strands by closely examining the process of cultural acquisition and restitution in Great Britain, the United States, and Australia. Focusing primarily on the collections of national museums in each state, Vrdoljak illustrates the importance of foreign cultural objects to the national identity of the possessor nation. In the case of nineteenth-century Great Britain, Vrdoljak draws a connection between the collection and display of objects and an evolving sense of imperial self. Her discussion includes the astute observation that the former India Museum in London did not simply display a collection of Indian cultural objects, but was also a record of how the British collected Indian cultural objects. Recognizing this relationship between cultural object and national imagination deepens our understanding of cultural restitution. Cultural restitution involves more than the return of an object; it forces a nation to redefine its conception of itself.

Vrdoljak's study suggests important tensions between the evolution of international cultural heritage law and the acquisition policies of states such as Great Britain. The experience of destruction during warfare compelled Great Britain to agitate for the international protection of cultural heritage. At the same time, this principle came into conflict with Great Britain's own collection policies with regard to the cultural objects of its colonial subjects. The structure of the book, however, hinders Vrdoljak from effectively fleshing out this irony. Rather than presenting a single coherent picture, Vrdoljak subdivides each chapter into two distinct modes of inquiry—a chronological summary of developments in international cultural heritage law followed by a British, American, or Australian case study. The transitions between the two lines of inquiry are choppy and leave the reader disoriented.

In contrast to the stark divisions in her chapters, Vrdoljak erroneously conflates claims raised by former colonial subjects against Great Britain with those by indigenous groups against the United States and Australia. She makes the troubling assumption that the same analytical framework should apply to the claims raised by each group. Thus, she measures each type of claim against protections afforded by international law, while giving short shrift to domestic legislation that attempts to address the protection of indigenous cultural heritage. She laments the fact that the cultural restitution rights of Native Americans are defined not by international law, but by U.S. regulations. Indigenous peoples themselves have pushed for the recognition of cultural rights within the international legal system. However, Vrdoljak's study could still benefit from a more substantive discussion of how these communities negotiate their identity and rights within their dominant states.

Vrdoljak's emphasis on international law to resolve cultural restitution claims reflects an unwarranted optimism in its potential. This position is puzzling given her valiant attempts to expose its underlying biases. Direct bilateral negotiations between the possessor state and community of origin are an alternative Vrdoljak largely dismisses. A bilateral framework could better facilitate the "moral restitution" Vrdoljak insists must accompany the return of

a cultural object, by forcing both sides to engage in a direct conversation about the historical circumstances behind the original dispossessory act. Unfortunately, Vrdoljak repudiates bilateralism as an Anglo-American negotiating preference that places former colonized states or indigenous groups at an inherent disadvantage.

The triumphant display of colonial trophies shaped the identities of the world's great imperial nations. Devastating violence and the dismantling of empire forced a retelling of the stories of these "acquisitions." *International Law, Museums, and the Return of Cultural Objects* may not provide an answer to the vexing question of how we properly return a cultural object that is not rightfully ours. But by opening our eyes to the complex and often ugly history behind the removal and return of cultural objects, Vrdoljak forces us to see that this process changes both collectors and collected.