Book reviews

JUDGING THE WORLD COURT, by Thomas M. Franck. A Twentieth Century Fund Paper published by Priority Press Publications, New York 1986, vii + 112; Price US$8.50; Reviewed by Richard N. Kiwanuka.*

The decision of the International Court of Justice in both phases of the case concerning *Military and Paramilitary Activities in and Against Nicaragua*[1] is a strong contender for the award of the "most controversial case in the history of the Court". The case was filed at a time when it was least inauspicious for the Court to be confronted with a task as undesirable as that was. Unilateralism was once more on the ascendency; the United Nations and its institutions were beleaguered and international law was under fire from several quarters. Much of the uncertainty facing the U.N. was caused by the Organisation itself. However, another significant cause was the declining confidence and support from key-members (and erstwhile staunch supporters), such as the United States.

Thomas Franck, Professor of Law at New York University School of Law, sifts through the fall-out from the *Nicaragua* v *United States* case, evaluates the current situation and provides suggestions for the future. *Judging the World Court* is a delightful book that achieves so much while making minimal demands on our time and knowledge. It is addressed to an American audience but the observations made would be invaluable to anyone seeking to understand the background to the Reagan Administration's attitude to the World Court.

The book starts with a brief discussion of the role of international law in a world of states. Using domestic examples, the author sets out the similarities and differences between the two legal systems. The lack of a central law enforcement agency in international law is emphasized. This makes decisions of the International Court of Justice hard to enforce as that would almost always depend on the cooperation of the state against which judgment has been entered. He touches on the nomination and election procedures of judges and correctly notes the inherent political nature of the process. This a factor shared in common with many domestic legal systems.

Chapter 2 is survey of American involvement in international third-party settlement of disputes. It is clear that this has been a struggle between multilateralists and unilateralists. For quite some time unilateralists held sway. The United States was not a member of the League of Nations nor did it join the Permanent Court of International

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1 *Nicaragua v United States of America*, ICJ Reports 1984, p.392 (Jurisdiction and Admissibility); I.C.J. Reports 1986, p.14 (Merits).

Justice. The reasons given, for example by Senator Trammel of Florida during a Senate debate in 1935, have been heard again in more recent times. He said:

> I am not willing to vote to have the United States enter this Court and go into a trial before judges representing nations which, generally speaking, are unsympathetic to America.[2]

When the United Nations came into being, in 1945, multilateralists were having a louder voice in Congress. The United States joined the U.N. and was therefore a party to the Statute of the International Court of Justice. In addition, it submitted to compulsory jurisdiction of the Court as provided under optional clause 36(2) of the I.C.J. Statute. Professor Franck is careful to stress that the success of multilateralism in this field was largely illusory because of the effect of the Vandenberg amendment and the Connally reservation. The former excluded

> from the World Court's compulsory jurisdiction those disputes that might arise under a multilateral treaty to which the United States is a party unless all the affected parties to the treaty were also parties to the litigation, or unless the United States specifically agreed to be sued despite the absence of some of these potential parties.[3]

The latter excluded "from the World Court's compulsory jurisdiction all 'domestic' matters *as determined by the United States of America*".[4] The effect of the two riders was to belie any assertion that the United States was strongly committed to the principle of international adjudication. In view of the circumstances, the October 1985 U.S. notice of termination of acceptance of the I.C.J.'s compulsory jurisdiction was not surprising. However, this move did not mean that the U.S. severed all ties with the Court. In chapter 3, the author argues that the U.S. is still a firm believer in third-party settlement of disputes, provided it is a willing participant in the proceedings. Further, it is a party to numerous bilateral and multilateral agreements providing for settlement of disputes by the International Court of Justice. This is an important point since the bulk of cases the Court has considered have not been filed under article 36(2) of its Statute.

In chapter 4, the author considers the case against the Court. According to him, there are three principal accusations: (1) judicial bias; (2) overreach of jurisdiction into political matters; and (3) institutional incapacity to make determinations of fact in some situations. In the first instance, the problem relates to the unease of many American politicians with the national origin of some of the judges. It is felt that the balance has swung away from a Court with a majority of judges sympathetic to U.S. interests. This charge is substantially rejected by the author. With the weight of evidence behind him, he convincingly argues that cases involving US interests, such as the *Hostages Case*,[5] have not been decided according to political bloc affiliations. Moreover, American judges on the Court have voted with the majority on most occasions. He

2 T.M. Franck *Judging the World Court* (1986), 19-20.
3 Ibid. 22.
4 Idem.
5 *United States of America* v *Iran*, I.C.J. Reports 1980, p.3.

leaves open the possibility of an ideologically polarised issue, such as expropriation, being influenced by the nationality of judges. As to the second accusation, it is conceded that the Court may not the best forum for this kind of dispute. However, that does not necessarily mean that it could not entertain it. There is hardly an international dispute that is not ultimately political. Moreover, legal principles are not ousted from political disputes even though it is sometimes risky for a court to get involved. The last charge is disposed of with a reminder of previous cases where the Court has successfully dealt with complicated factual and technical issues.

In chapter 5, the author surveys the pros and cons of international judicial settlement taking into account states' legal, political and practical considerations. The Court is one of several alternatives and its appropriateness depends on circumstances of a particular dispute. As a comment on the current challenge to international law, Professor Franck notes the retrogressive nature of the Khruschev, Brezhnev, and Reagan doctrines and their indefensibility in current international law. However, urging congruence between political and legal strategy, Franck suggests that the U.S. Government should have immunised itself against legal proceedings before embarking on such a foreign policy. The trouble with this kind of advice is that it might be followed, and not by the United States Government alone. If all countries remember to take it up, the international system of judicial settlement of disputes will be emasculated.

The final chapter contains a series of recommendations. However, to appreciate them, the reader should be reminded that the targeted audience was basically American. The recommendations are based on what would be best for the U.S. in the current international climate. It would be important to keep in mind the proposition that whatever is good for one country should be permissible for another since formal international law (and the U.N. system in particular) is predicated upon the notion of sovereign equality of states. Professor Franck recommends that the U.S. should show a commitment to judicial settlement of disputes subject to a number of qualifications that would safeguard American interests. These include: preserving the military option and therefore removing from I.C.J. jurisdiction all questions involving the use of force; increased use of chamber decisions; frequently requesting an elucidation of norms as opposed to a determination of issues; and insistence on symmetry and continuity of obligation.

The international legal system is at a crossroads in more ways than one. Developments in the Soviet Union under Gorbachev and the imminent change of guard in Washington make me feel that we are about to witness new and important changes in international law and relations. A full understanding of the current difficulties facing the World Court and of future (almost inevitable) changes would greatly be enhanced by a reading of Thomas Franck's *Judging the World Court*. A non-American reader may find some of the assertions and recommendations difficult to accept, but that is to be expected. It does not diminish the value of this useful contribution to international legal literature.

THE LAW OF THE LAND, by Henry Reynolds. Penguin Books, Australia, Ringwood, Victoria, 1987. XXI + 225 pp (including Notes, Bibliography and Index) Reviewed by R P Boast. *

Henry Reynolds is Professor of History at James Cook University, Townsville, Queensland, and is the author of a number of books on the history of race relations in Australia. His latest book, *The Law of the Land*, should be of great interest to legal scholars as well as to historians. It is a book which sets out to explore the current assumptions about the legal relationship between the Crown and the Australian Aborigines. In so doing, Reynolds exposes much current wisdom as a complete myth. The implications for Australia are profound, and should also prompt some reflection in New Zealand.

The usual explanation of the legal foundation and legitimacy of the Australian state received its most recent and authoritative exposition in Blackburn J's judgment in *Milirrpum* v *Nabalco Pty Ltd* [1971] 17 FLR 141, usually known as the *Gove Land Rights* case. This traditional explanation of Australian legal legitimacy runs something like this. In international law, Australia was a *terra nullius*, unoccupied territory. Although it did have inhabitants, the Aboriginals were too scattered and isolated, and their lifestyle too nomadic for it to be said that they had any rights of possession. It followed that Australia was a colony of settlement, as opposed to a colony acquired by conquest or cession. This entailed the further consequence that the "aboriginal rights" of the native inhabitants, which survive until extinguished by the Crown in colonies of conquest or cession, have no legal existence. The aboriginal rights doctrine has, therefore, no place in Australian law - as contrasted with New Zealand: see *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680.

Professor Reynolds attacks this conceptual structure head on. His arguments are devastating.

His first major contention is that the notion that the Australian Aborigines did not "possess" the soil of Australia for the purposes of international law is utterly erroneous. It is well-recognised today by anthropologists that Australian Aborigines have extremely complex and sophisticated concepts of property and ownership. There is abundant historical evidence to indicate that Australian Aborigines were outraged by what was happening to them, and had a clear sense of their property rights being violated. What is more, this was well-recognised in the early nineteenth century by the British Government. It is very questionable whether Australia ever was a *terra nullius* in the sense that the term was understood in the late eighteenth and early nineteenth centuries.

Reynolds is expecially useful and illuminating in his analysis of changing official views in Britain. He relates this to the Evangelical and Abolition movements in early nineteenth-century England. A key figure was Thomas Fowell Buxton, parliamentary leader of the anti-slavery cause after the death of Wilberforce. Buxton became a dedicated believer in the property rights of aboriginal peoples in the various colonies. He was

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particularly concerned with events in Australia. His views became increasingly influential, both in Britain, especially after the accession of the Whigs to power in 1830, and in Australia itself. In 1835 the Melbourne Whig administration took office. The colonial secretary was Charles Grant (Lord Glenelg), and the Permanent Head of the Colonial Office was James Stephen. They were both heirs to the powerful Evangelical anti-slavery tradition, and were firm believers in the property rights of native peoples. The British government was especially concerned with the rights of native peoples in Australia and South Africa, and was determined to prevent a repetition of the appalling near-extermination of the Tasmanian Aborigines.

Reynolds shows convincingly that the new settlement colony of South Australia was authorised by the British Government on the assumption that the Australian aborigines had title to their land, and that their land rights were to be protected. He shows, too, how the intentions of the British government were frustrated by local settlers and politicians. Humanitarian leaders in England were mortified to learn that the Aborigines of South Australia fared little better than those of the older convict colonies of New South Wales and Van Diemen's Land. Nevertheless the British government persevered. Aboriginal rights remained government policy. Governors of South Australia, such as George Gawler, made serious efforts to 'reserve' Aboriginal lands in accordance with the accepted legal concepts of the Aboriginal rights doctrine. Such reserves were not acts of beneficence, but were 'an acknowledgement of prior ownership, of the perpetuation of native title after settlement, of the need for compensation'[1]. This was consistent with imperial policy in North America, South Africa, and New Zealand: Australia was not perceived as being in any different kind of category; the rights of its native inhabitants were not to be distinguished from those of other colonies.

There is, in short, no justification for believing that the British government took a different view of the property rights of the Aborigines, as opposed to the Maoris or the North American Indians.

To be sure, the goals of the British government were not in the end achieved, in the face of settler opposition. The colonists then evolved a self-serving and distorted view of the law, which was neither legally sound nor in accordance with earlier practice. The "first land rights movement" faded into history[2]:

> During the second half of the nineteenth century the Australian colonists forgot about the first land rights movement. It is not hard to see why. Land rights scared individual property-holders; they still do today. They appear to stand in the way of major industries; of pastoralism in the nineteenth century, of mining now. They also present a moral challenge in an area of acute national sensitivity. Even today we find it difficult to come to terms with Buxton's dictum that the indigenous people of any land have an incontrovertible right, a plain and sacred right, to their own soil. Nor are we confortable with Earl Grey's assertion of 1850 that in assuming Aboriginal land the Australian settlers had incurred a moral

1 Henry Reynolds *The Law of the Land* 134.
2 Ibid. 155.

obligation of the most sacred kind". The embarrassing fact is that many contemporary Australians will not concede to the Aborigines as much as the evangelical aristocrats and pious bourgeoisie reformers of the 1830s and 1840s.

For the New Zealand reader, perhaps the most useful aspect of Professor Reynolds' book is its clear focus on the ideology of the British government in the 1830s and 1840s. The influence of Fowell Buxton, of Stephen, Grey and Glenelg similarly manifests itself in the decision to conclude a treaty with the inhabitants of New Zealand. The book concludes with some general reflections which also have some relevance to New Zealand. It is difficult to disagree with Reynolds' point that although the Aboriginal land rights movement now has the support of the Australian left, "it is not necessary or intrinsically a left wing issue"[3] :

> As Vattel realized over two hundred years ago, to support the actions of the settlers without criticism is to sanction the violent, the revolutionary expropriation of property by the state. Aboriginal land rights can only be denied by applying quite different standards to Aboriginal land ownership than would be applied to anyone else, despite the fact that the Aborigines were British subjects from the start and amenable to the same laws as the rest of the country.

Professor Reynolds writes well. The often complex legal arguments are explained clearly, with useful summaries at the end of each chapter. The book is, of course, polemical, in the best sense of the term. One can hope only that the debate which he has initiated in such a stimulating manner will continue - and that some practical consequences will flow from it.

3 Ibid. 165.