

Book Reviews



Yuval Shany

Questions of Jurisdiction and Admissibility before International Courts. Cambridge: Cambridge University Press, 2015, pp. 186. £ 69.99. ISBN 9781107038790.

International lawyers have always tended to struggle with questions about the reality and effectiveness of international law. Almost every conceivable approach has been tried – from openly acknowledging and accepting that international law is not, or at least not yet, ‘real’ law, to simply trying to forget about the entire question and deal with international law as is, or rather, as positively found in the ‘sources’ of international law. The most recent tendency in international legal scholarship has been either to seek refuge from academic escapism that does not even attempt to approach international law as law but rather as a field of cultural studies, or to gravitate towards an emphatically realist approach – that is, to forget about philosophy and first principles and focus on what we have, however imperfect.

Yuval Shany’s book belongs to the latter category. Quite appropriately for a book that is based on the author’s Hersch Lauterpacht Memorial Lectures at the University of Cambridge in 2012, Professor Shany adopts an emphatically ‘functional’ approach to international law.¹ According to Professor Shany, international courts can be understood ‘as policy instruments in the hands of two principal sets of constituencies: (1) their mandate providers – that is, states and international organizations that establish international courts, fund and support their operation, and who may ultimately decide to shut down and dissolve them; and (2) the parties to any specific dispute, who may choose to submit their differences to adjudication before an international court’ (pp. 7–8). In other words, according to Professor Shany, the establishment of an international court ‘implies a transfer of legal power from states and other international actors to international courts’ (p. 22). In this context, jurisdiction and admissibility – the main themes of the book – can be understood ‘as a form of

1 cf. Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933).

delegated authority' and 'the most important consequence of the application by international courts of the rules on jurisdiction and admissibility governing their legal powers is case selection' (pp. 1–2).

Assuming one agrees with these premises, Professor Shany introduces a conceptual framework that is difficult to disagree with. Relying on Gerald Fitzmaurice, he endorses the conceptual distinction between 'jurisdiction' and 'competence' of international courts, a distinction which he re-dubs as a distinction between 'foundational' and 'specific' jurisdiction (pp. 22 et seq.). He convincingly argues that this distinction can be understood as one between the court's *potential* jurisdiction under its constitutive instrument and its *actual* jurisdiction in any particular case, which in turn depends on the specific act of referral (p. 23). The court's 'foundational jurisdiction' is a reflection of the delegation of the power to an international court of a decision-making power that the States themselves may but do not necessarily individually possess, but which they nevertheless agree to delegate to an international court, whereas the court's specific jurisdiction (or 'competence', in Fitzmaurice's terms) is based on the consent of the State, which 'establishes the acceptance by the [parties] of the power of an international court to adjudicate a specific dispute' (p. 34).

If jurisdiction is about the power to adjudicate a dispute, the rules of admissibility pertain to 'the terms permitting an international court to decline to exercise its legal powers' (p. 47). Admissibility is thus more about propriety and expediency (and therefore, by implication, about legitimacy and effectiveness) than about the lack of legal powers – although decisions on the interpretation of jurisdictional provisions, in particular when driven by a 'goal attainment perspective', may lead to effectively the same result, albeit covertly (pp. 54–57). While the author then engages in a lengthy analysis of international courts' and tribunals' jurisdictional and admissibility decisions based on this distinction, it ultimately remains unclear how precisely, and on what basis, a distinction between a decision dismissing a claim for lack of jurisdiction and a decision dismissing a claim as inadmissible should or could be drawn. Similarly, Professor Shany's distinction between jurisdictional decisions as 'category-based case selection' and admissibility decisions as "specific case selection" tends to blur the distinction between specific jurisdiction (or competence) and admissibility – by definition, both are about "specific case selection". As a result, the distinction between jurisdiction and admissibility remains conceptually less than clear.

It is perhaps not surprising that Professor Shany's broad theoretical framework is in the end a more compelling aspect of the book than his proposed

approach to practical legal issues arising in the context of concrete judicial or arbitral decision-making – Professor Shany is clearly more interested in setting out a functional theoretical framework than in addressing the conceptual niceties of judicial and arbitral decision-making. This is reflected in the author's deliberate choice not to employ the traditional categories of *ratione temporis*, *ratione personae* and *ratione materiae* when analyzing the jurisdiction of international courts, but to refer back to his basic distinction between delegation and consent as the ultimate source of authority of international courts – although, to be fair, Professor Shany does acknowledge that his proposed typology 'does not fully obviate the need to engage in some hair splitting between different aspects of what are essentially intertwined jurisdictional issues' (p. 165). Indeed, 'hair-splitting' is precisely what may often be required in the context of concrete judicial and arbitral decision-making.

On a theoretical level, professor Shany's approach is based on an unapologetically realist view: international courts are creations of States (and of other international actors) and thus exercise authority that has been delegated to them; international courts have no original or independent powers apart from those delegated to them. Such a realist approach in turn implies that international courts are well advised to keep in mind, when exercising the authority delegated to them and when 'selecting' the cases they decide to deal with, that they do not exceed the boundaries of their strictly delegated authority – lest they run the risk that their creators may eventually turn against them, or even 'shut down and dissolve them' (p. 7). In this emphatically realist vision, international courts are seen less as embodiments of a legal or political ideal – an independent international jurisdiction that has become standing and permanent and as such capable of ensuring consistent and continuous delivery of justice at the international level – than as policy instruments in the hands of realist statesmen, as instruments that represent and embody the policy choices made by their creators, and that need not necessarily be standing nor comprehensively cover all aspects of the international life. The system of international law is not, and need not be, a legal system of a gapless regulatory coverage, or a comprehensive system of checks and balances: for a realist, it is not a problem if there are substantial gaps in international regulation, or if there is an international court for trade, but not one for human rights, or vice versa. Such systemic gaps are merely a fact of life; a consequence of the policy choices made by the States.

However, while the realist approach is able to account for the structural weaknesses and the regulatory gaps of international law without having to concede that they amount to systemic flaws, it tends to beg the underlying and

more fundamental, if not philosophical, question of the reality of the international 'realm' itself – the 'plane' on which, or the 'international jurisdiction' within which, international courts are designed to operate.² In attempting to justify, or at least to account for, the regulatory gaps of the system and its structural weaknesses, international legal realism tends to forget that the international realm itself is not really a real realm, or a realm existing in any realist sense, or in any real place. It is a fiction, or an imaginary place which, as such, tends to undermine the very realism of international legal realism as a legal theory that purports to be based on hard facts – on what is really real, as a matter of fact and not only as a matter of idea or ideal. If this is indeed the case – if international law and international courts indeed lack any real basis or foundation to begin with – why should a legal realist take international law and international courts seriously at all? Should a legal realist, to be consistent with one's realism, not forget not only about international law, but also about international courts, and focus on domestic law instead? Is it not the case that, realistically speaking, international law may have no real effect on the ground as it is not effectively enforceable, and that the judgments of international courts will remain equally ineffective unless they are voluntarily complied with? In other words, is there not something fundamentally unrealistic about being realistic about international law and international courts in the first place? How can one be realistic about a court, and a jurisdiction, that is fundamentally unreal in the sense it does not exist in reality, or in any real place, but only in an imaginary international realm?

In being a legal realist only up to a point, Professor Shany reveals himself as a disguised legal idealist; as a thoroughly modern legal scholar who believes that international courts, even if they merely exercise powers delegated to them by the States, and even if their establishment merely serves, and thus is dependent on, the policy choices of States, nonetheless deserve to be established and maintained – at least insofar as they continue to serve the policy purposes that justified their creation in the first place, and insofar as they continue to respect the limits of the jurisdictional powers within which they were created and intended to operate. In other words, according to this realist but implicitly idealist view, the price that international courts must pay for their relative unreality is a heightened sensibility, if not keen awareness, of their precarious being – a Heideggerian form of *Dasein* that implies being present in time only, but not in any particular place. As beings that only exist in time

2 All of these terms are being used, including the 'international realm', which is the one chosen by Professor Shany; see p 1 ('[T]he underlying subject of this book is the legal power that international courts can exercise in the international realm.').

but not in any particular place, international courts must continuously pay attention to the political will of their creators, and their jurisdictional limits, and avoid overstepping them, as their dissolution is notoriously easy – as international courts are not rooted in any (local) social contract that would support their legitimacy independently of the will of their creators, they can be torn down simply by tearing up the paper on which they were created. This concern – or this *Sorge* – for the *Dasein* of international courts is a thoroughly idealist concern – a concern disguised in the form of a realist outlook.

If international legal realism is idealism in disguise, and if international legal idealism can be underwritten only if one also agrees to underwrite the reality of the international realm, which is perhaps too tall an order even for an international legal idealist, at least of the latter-day type currently roaming in the international realm, where does this leave international legal scholarship, theoretically speaking? On reflection, it would seem to leave it somewhere in between the two, idealism and realism, that is, neither here nor there. As suggested elsewhere,³ the conceptual error shared by both idealism and realism arguably lies in their metaphorical – and hence potentially metaphysical – conceptualization of the international realm as a ‘place’ in the first place.⁴ The realm of the ‘international’ is not really a place, or a position on a map, whether real or imaginary; it is in reality *motion* – it tracks continuous *movement* about a place, but is not itself a place, or a position, that can be pinned down as something present.⁵ More specifically, the international realm refers

3 See Veijo Heiskanen, ‘The Artifact of International Jurisdiction: Concept, History and Reality’ (November 2016) TDM (forthcoming).

4 ‘Error’ in the etymological sense of ‘going astray’; see <www.etymonline.com> accessed 1 December 2016: ‘Latin *errorem* (nominative *error*) ‘a wandering, straying, a going astray; meandering; doubt, uncertainty; ...’

5 Or less dramatically, but perhaps technically (and mechanically) more accurately, the distinction between the national (or the local) and the international is merely a conceptual distinction between the statics of the State and the dynamics around it, rather than a distinction between two different places, a real one (the State) and an imaginary one (the international realm). Just as an imaginary number tracks rotation around an imaginary axis, the international ‘realm’ or ‘plane’ could be defined as an imaginary axis that stands vertically on the border between two States. The rotation from the plane (or territory) of State A to the plane (or territory) of State B stands for the ‘international’ movement (ie, across the border).

There is nothing metaphysical about this account, just as there is nothing metaphysical about imaginary numbers: the fact that the international plane cannot be imagined as a place is merely the conceptual equivalent of Heisenberg’s uncertainty principle (or more accurately, inaccuracy principle, as the issue is not merely the relationship between momentum, or motion, and position, but the concept of motion itself): there is literally both a conceptual and quantitative blind spot in our thinking whenever we focus on motion rather

to the continuous movement of people, goods, services and capital, whether by means of transportation (carriage of people and goods) or by means of communication (carriage of services and capital), across the border, from one country to another, around the globe, in a continuous rotating motion.⁶ The international realm, or the international 'plane' or 'sphere', is thus simply a concept that seeks to capture this continuing movement of people, goods, services and capital around the globe; that is, a live presentation tracking the movement of the international life rather than a photographic description of the *Stilleben* of the static State.⁷ Studying what is going on in the international realm thus means tracking the traces left by this international life, or these moving targets, or these living things – that is, reading the imprint, or the coinage, they leave behind when moving around.⁸

than a place (or position) – motion can be neither definitely qualified, or conceptualized, nor precisely quantified or enumerated (as it is by definition continuous and as such conceptually, ie, qualitatively, indefinite and quantitatively infinite, ie, $i = \infty$) and therefore cannot be precisely placed on a map; we can only know that it is somewhere around here (or there). Consequently, just as an imaginary number cannot be precisely enumerated, or expressed in the form of a precise number, an imaginary category such as the 'international realm' cannot be fully captured in the form of a definite or exhaustive concept – although one can reasonably well demonstrate what it implies in practice, by providing concrete examples, for instance. For the same reason, whenever an equation contains an imaginary number, it is bound to express a probability rather than a mathematical certainty in terms of time and place (eg Schrödinger's wave function) – there is a conceptual limit on our ability to predict where precisely (ie, at which precise place) a moving target will land. This mathematical difficulty translates into a similar logical impossibility to conceptually capture the precise geographic location of the international realm – although there are tools, both conceptual and quantitative, that allow one to track the movement of people, goods, services and capital around the globe reasonably well and thus to estimate reasonably reliably the relative 'internationality,' or degree of globalization, of various locations around the globe. In other words, it is possible, at least in theory, to develop an 'index of globalization' that measures the extent to which, or the degree to which, any particular location on the globe is affected by the dynamics of globalization.

- 6 In other words, there are, conceptually, two categories of movement, depending on whether the means used for carriage move themselves (means of transportation for movement of people and goods) or whether they remain static (means of communication for movement of services and capital). Note that the reference to the movement of people, goods, services and capital is not limited to commercial movement, ie, it is not necessarily 'free'; it may also be involuntary, or even forced.
- 7 That is, 'live' in the sense of being current, or moving in a certain direction like a current of water or air, or electricity, rather than static, or in rest.
- 8 See <www.etymonline.com> accessed 1 December 2016: 'trace: "track made by passage of a person or thing," c. 1300, from Old French *trace* "mark, imprint, tracks." See also Jacques

From this more complex conceptual perspective – a perspective that focuses simultaneously on both the statics of the State and the dynamics of the movement of people, goods, services and capital around the globe – international law is neither more nor less real or ideal than domestic law. Whether one is more real or ideal than the other depends entirely on the historical context – the direction of the process of globalization (in the broad sense of the term, i.e. including reverse globalization or ‘localization’). The more dynamic the process of globalization (and thus the less static, or self-enclosed, the State becomes), the more ‘real’, that is, the more pervasive, international law becomes; and conversely, the slower the process of globalization (and the more ‘static,’ that is, the more self-enclosed, the State becomes), the less ‘real’ (and the more ‘ideal’ – and by implication more idealist) international law becomes. Or, in other and plainer words, the more pervasive and thus the more ‘real’ international law becomes (as a result of the dynamics of people, goods, services and capital moving around the globe, at an accelerating speed), the more mundane and thus the less ideal(ist) it becomes – and therefore the stronger the realist and statist case to rein in the movement of people, goods, services and capital around the globe. Globalization therefore tends to be always followed, by the conceptual (f)laws of motion, by a re-turn to the local, and vice versa, a statist (and static) era of relative rest and global slow motion tends to be followed by an accelerating revival of the internationalist movement, in a continuing reversal of roles, or a wheel of fortune that keeps moving at a constantly changing speed but without ever quite stopping on its marks or arriving at a final resting place.

For an observer of what is currently going on in the international life, this to-and-fro between the dynamics of globalization and the statics of the State is perhaps not a surprising observation; to the contrary: the neo-politics of the post-political rotates less around the axis between the left and the right than around the axis between the (alternately propulsive and repulsive) forces of globalization and the (more or less attractive) gravity of the stationary State.

Derrida, *Speech and Phenomena* (Northwestern University Press 1973) 156 (‘The trace is not a presence but is rather the simulacrum of a presence that dislocates, displaces, and refers beyond itself. The trace has, properly speaking, no place, for effacement belongs to the very structure of the trace.’).

This is not to suggest that the study of the international realm is merely a conceptual matter, or a matter of understanding the nature of the international life. On the contrary, the movement of people, goods, services and capital around the globe is measurable and quantifiable insofar as the imprint, or the coinage, they leave behind can be expressed in monetary terms – as it obviously can, as it is conceptually bound to leave a trail of coinage behind. See also n 5 above.

Professor Shany's book is a cautious contribution to this post-political debate by re-marking the conceptual boundary between the international and the national, and by re-calling, albeit implicitly, that this boundary is in reality not stable but shifting. Having become more pervasive and thus more real, international courts and tribunals are well advised not to forget about the sources of their powers, or the precariousness of their *Dasein* as beings entirely dependent on the political will of their creators.

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