Recent Publications


War-crime victims. Traumatized ex-combatants. Widows and orphans. A decimated economy. Lawlessness. These are but a few of the issues that confront post-conflict countries. To prevent the repetition of history, these countries, with the support of the international community, are tasked with planning and appropriating resources to secure a future of peace, reconciliation, and reconstruction. While recognizing that post-conflict efforts are generally well-intentioned, *On the Frontlines: Gender, War and the Post-Conflict Process* exposes how they fall far short in addressing gender imbalances—an issue that has prevented post-conflict countries from fully recovering. Authors Fionnuala Ní Aoláin, Dina Francesca Haynes, and Naomi Cahn introduce the concept of “gender-centrality” as the solution to this problem, and insist upon using this framework during post-conflict processes.

In the authors’ words, “a consistent theme of this book is that societies that are not safe for women are not safe. Period.” (p. 62). This notion becomes increasingly evident with each turn of the page, as the authors highlight gender disparities at each stage of the post-conflict process. The book’s structure of following the order in which post-conflict processes take place over time provides logical order to an otherwise complex and broad subject and allows a lay reader to understand the authors’ arguments. To their advantage and disadvantage, the authors substantiate each of their arguments with international case studies. On the one hand, this method reifies lofty and abstract concepts that would otherwise seem out of touch with reality. On the other, because the book lacks any indication of the authors’ first-hand experiences, their frequent references to arm’s length studies of post-conflict countries call their critical expertise into question.

In Part I, the authors discuss common gender issues that emerge either before or during conflict as a preface to the lengthier discussion of post-conflict issues in Parts II and III. They cite gendered economic disadvantage as a salient pre-conflict factor that makes women especially vulnerable during and after a conflict (p. 28). In order to grasp the extent to which poverty exacerbates gender inequities, the authors suggest that statistical information surrounding women’s health, education, and economic welfare be gathered to map women’s statuses within social and economic contexts (p. 29). While this initiative

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1. Gender-centrality places gender “at the center of any given problem or issue in a post-conflict setting and integrates women specifically from the point of recognition” (p. 14).
would prove useful for multiple purposes, the authors are noticeably silent as to who would bear the logistical costs, which presumably would be prohibitively high for an impoverished country on the brink of conflict.

During conflict, the presence of violence compounds women’s economic vulnerability. Because armed confrontation and the causalities thereof traditionally involve male combatants (p. 47), violence toward women, especially sexual violence, is often marginalized. To the authors’ chagrin, “only relatively recently has sexual violence been recognized as a crime subject to criminal sanctions” (p. 45). For example, “accounts of systematic sexual violence against women emerged from the former Yugoslavia in the early 1990s,” which triggered a global academic and policy debate regarding the appropriate legal responses to sexual violence (p. 156). But such developments, though laudable, are hampered by the tendency to reduce the status of women to victims, which implicitly renders them powerless to later becoming leading agents of social change.

The authors focus their discussion of the complex nature of gendered violence by highlighting a commonly overlooked dimension: men as victims of sexual violence (pp. 146-47). Though this dynamic may not be nearly as common, international and domestic agencies need to address it in order to comprehensively place gender at the forefront of post-conflict processes. That the authors frequently address men’s issues in conjunction with women’s is a unique employment of feminist theory, testifying to the authors’ genuine commitment to gender equality.

Part II, the most substantive section of the book, provides an overview of gender issues either inadequately addressed or altogether ignored during post-conflict processes. In keeping with the chronological structure of the book, the authors first address security and peace, the presumed priorities in the immediate aftermath of conflict. They take issue with how security sector reform policies are dominated by a masculine narrative that overemphasizes physical security (p. 75), proposing to expand the definition of security to include political, economic, and cultural security (p. 79).

The authors’ proposition is consistent with the overall thrust of the book; they criticize narrow, oversimplified post-conflict processes and call for them to be diversified to better incorporate the interests of women. While appealing, this approach may be too ambitious during the earliest post-conflict stages when a country is most vulnerable to relapse into conflict. In other words, that security policies are narrowly preoccupied with physical security may not be detrimental to early post-conflict processes if the exigencies (such as combat and internal displacement) happen to be physical and resources are limited. Moreover, by first addressing physical security, countries will be in a better position to establish and sustain political, economic, and cultural security shortly thereafter.

The authors then turn to the role that intervening international agencies, such as the United Nations and special-interest nongovernmental organizations, play in engendering security and peace. While international institutions may be gender-sensitive in principle, the authors correctly point out that they are not
always procedurally or structurally so. Peacekeeping missions, which mostly comprise missions sent from international third parties to neutralize tensions between hostile parties, are a prime example. While recognizing the semblance of security and stability that peacekeeping missions bring to conflict zones, the authors condemn some peacekeepers’ propensity to commit “egregious human rights violations, including gender-based violence and the exploitation of women” (p. 112). These gender-based crimes are often committed with impunity, which the authors contend can be combated with zero-tolerance policies to deter future abuses (p. 126). For example, the authors recommend that peacekeeping bodies write Codes of Conduct and enforce them “at the hard end of the military justice system . . . as well as internationally, through the ICC” (p. 129). Furthermore, the authors call for more women peacekeepers (as most peacekeeping missions are more than ninety-five percent male) and better training programs—designed in consultation with local women—to inform peacekeepers on how gender-sensitivity is integral to the success of their work (p. 129).

Peacekeeping efforts are usually coupled with disarmament, demobilization, and reintegration (DDR) programs, or grassroots efforts which foster security at the local level (pp. 131–33). Though DDR programs do much to instill a sense of confidence in the peace processes, they have too narrowly defined the eligibility of groups targeted for services, the types of services offered, and the parameters of the reintegration process (p. 136). The authors call for DDR programs to increase their effectiveness by augmenting women’s access to resources and by addressing “hypermasculinity” and male victimization (pp. 144–46). Unlike the practical steps the authors offer to improve peacekeeping missions, however, missing from the discussion of DDR is a blueprint for how these “more effective” DDR programs would implement the authors’ abstract suggestions.

In addition to DDR, accountability and the enforcement of sanctions for sexual violence are identified as a gendered component that must be central to post-conflict processes. One forum for sexual violence victims to confront their perpetrators is the truth commission, which attempts to construct the truth to identify “who did what” during the conflict and to determine “who gets what” in the aftermath (p. 176). Although truth commissions are “regarded as a means of placing the victim at the center of the [peace] process and dealing with abuse at a collective or societal level” (p. 178), the authors lament that they have always “lacked a gender dimension” (p. 179). To rectify this imbalance, the authors recommend that “[s]ubstantial and not tokenistic representation of women on truth commissions [become] critical, as well as gender diversity within the professional staff discharging the day-to-day work of such bodies”

2. Hypermasculinity may be defined as “[t]he exaggerated exhibition of physical strength and personal aggression [] in an attempt to gain social status.” Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 STAN. L. REV. 777, 785 (2000). The authors assert that hypermasculinity “plays an enlarged and elevated role” during conflict, “and is directly related to the way in which women are subjected to and experience violence” (p. 51).
Gendered participation is a recurring theme of the book that is not only achievable, but also brings multiple benefits: the women who participate are empowered to have a stake in the decision-making processes, which in turn benefits the women affected by those gendered decisions.

In addition to truth commissions, post-conflict countries usually undergo legal reforms that not only affect war victims, but society writ large. The authors suggest that a common weakness in most legal systems is the faulty assumption of the “gender-neutral” citizen (p. 205). To sensitize legal systems and constitutions to gender, the authors argue that the interests of women, as articulated by women, be codified in the legal system (p. 199). Missing from this discussion, however, is the recognition that systemic changes to legal systems will only be superficial insofar as societal views toward women remain the same. Without fundamental changes to social and cultural norms that marginalize women, legal reform will be ineffective.

In Part III, the authors critically examine how post-conflict processes eventually evolve into longer term reconstruction and development efforts. The authors first identify governance and democratization as processes that wield considerable influence in either centralizing or marginalizing gender issues (p. 231). A gender-central approach to democracy, according to the authors, starts with “distinguishing between procedural and substantive democracy, emphasizing and valuing the latter” (p. 234). To promote gendered democracy, women should be brought into the public sphere; invited to participate in public discourse and negotiation; included in formal political and economic institutions; and regularly consulted in ways that ensure discourse between formal and informal political systems (p. 250). The authors’ suggestions, however, beg the question: how exactly should countries formalize women’s participation in the political landscape? Through political affirmative action? Quotas? Such formalization would not only include women during post-conflict processes, but would also pave the way for women to assume political positions in the long run.

For the last chapter, the authors emphasize economics, health, and education as the key indicators of gendered progress. They introduce the concept of “social services justice” as a bridge that transitions a society from addressing the immediate needs of the population to promoting long-term welfare (p. 255). The book thus comes full circle as it revisits the same indicators touched upon in the first chapter’s examination of countries before conflict. Implicit is the hope that when the economic, health, and educational conditions of women long after conflict are measured, the results will show a drastic improvement, thanks in part to gender-centralization.

Overall, On the Frontlines adds a compelling feminist perspective to the scholarly dialogue surrounding post-conflict processes. In spite of its shortcomings—minor compared to the widespread positive change the authors’ recommendations, if implemented, would bring to women—the authors convey the concept of gender-centralization in a way that is both theoretically and practically sound. Lay-readers, academics, and political leaders should find the book indispensable to learn that gender-centralization is a necessary
precondition for a successful post-conflict process.


Anicée Van Engeland believes that international humanitarian law is in crisis. Her new book, *Civilian or Combatant?: A Challenge for the Twenty-First Century,* opens with a litany of atrocities ranging from the Athenian massacre of Melos during the Peloponnesian War to the Sri Lankan government’s brutal offensive against the Tamil Tigers in the spring of 2009. Those atrocities, she suggests, are all symptomatic of the same problem: the failure to protect civilians from the ravages of war. And although she catalogues instances of civilian slaughter spanning several millennia of human history, she claims that this problem is growing ever more acute. The “current main trend of thought and interpretation,” she says, is to subordinate the humanitarian value of protection to the “pressure of military necessity” (p. xvii). Changes in the nature of modern warfare, such as asymmetric conflicts, advances in weapons technology, and the rise of international terrorism exacerbate this ethical decline.

Van Engeland proposes to remedy this problem by renewing our commitment to the principle of distinction. This principle, fundamental to humanitarian law, forbids the targeting of civilians and civilian property in warfare; only combatants and military facilities are legitimate targets for armed attack. Distinction has as its legal basis the 1949 Geneva Conventions and their Additional Protocols, adopted in 1977 to elaborate the rules of humanitarian law and expand them to conflicts involving non-state actors. Van Engeland calls for the strictest possible adherence to the provisions of those treaties. The conventional regime of humanitarian law embodied in the Geneva Conventions, she insists, must be applied even in the course of unconventional conflicts. States must take seriously their commitments to protect civilians even when their adversaries refuse to do so. In short, Van Engeland’s prescription for the “Challenge for the Twenty-First Century” is to revitalize mid-twentieth century legal principles.

Van Engeland’s project is ambitious. International humanitarian law has never been a model of clarity; its perplexing array of rules must be applied to widely shifting circumstances. The September 11th attacks and ensuing “War on Terror” have thrust this arcane area of law into the forefront of public discourse. Questions about the legal boundaries of warfare have become matters of urgent international concern. As a result, a principled defense of the continuing viability of the Geneva framework would be a valuable contribution.

Unfortunately, *Civilian or Combatant* fails to live up to Van Engeland’s ambitions. Faced with subtle and complex questions, Van Engeland resorts to polemics. Her central concern is that derogation from the Geneva Conventions will lead to atrocities. She argues, quite rightly, that belligerents have a duty to
limit the extent of civilian suffering. But much of her argument consists of recitation of the relevant treaty provisions, followed by outraged condemnation of their breach. Consequently, she engages only superficially with the many difficult legal and moral issues in this area of international law.

Van Engeland begins with a historical narrative, asserting that the “necessity of distinguishing between civilians and combatants in war has been clear since early in history” (p. 1). This assertion is puzzling given that in the pages that follow she cites a number of early legal, philosophical, and religious texts ranging from the Bible and the Quran to the tragedies of Euripides, some of which advocate for protection of civilians, while others seem to justify their slaughter. If anything, her collection of early sources and examples of atrocities demonstrate that there was no consensus regarding constraints during wartime.

Van Engeland continues by describing the development of the Just War tradition in the middle ages, when ideas about protection of non-combatants emerged in Catholic theology. She then shows how, during the Enlightenment era, restraints on warfare moved from the religious to the legal realm. She traces the “legalization of war” (p. 13) from the Lieber Code promulgated by Abraham Lincoln during the Civil War, to the 1868 St. Petersburg declaration prohibiting certain types of bullets, to the Hague Conventions of 1907 setting forth rules for the conduct of hostilities and governance of occupied territories. Van Engeland’s historical narrative culminates in the Geneva Conventions and their Additional Protocols and ends with a plea to respect their provisions regarding distinction at all costs.

The book’s middle chapters summarize the relevant Articles of the Geneva Conventions and Additional Protocols. Van Engeland first surveys the provisions defining the categories of combatant and civilian (pp. 27-49). The Conventions reflect the classical model of warfare between nation states that predominated at the time of their drafting. They define the first category, combatants, as members of the armed forces or militia of a state, who are part of a responsible command structure, wear a uniform, carry arms openly, and respect the laws of war. Such combatants are entitled to prisoner-of-war status if captured, and may not be prosecuted for their participation in hostilities. The second category, civilians, is defined as anyone who is not a combatant. Because these people are considered to be outside of the conflict, they may not be targeted. If they engage in hostilities, they are liable to prosecution under domestic law. This structure, crafted in the wake of World War II, has come under strain in contemporary conflicts involving terrorists, insurgents, and private military contractors. Van Engeland briefly points out the areas of controversy, reserving that discussion for later chapters.

She then turns to the substantive protections codified in the Conventions, listing the relevant provisions and their content. These include the familiar prohibitions on torture, attacks on civilian populations, and destruction of civilian property (pp. 61-71). They also include heightened protection for specific classes of civilians, such as women, children, refugees and internally displaced persons, and journalists (pp. 75-89). In addition to listing relevant treaty provisions, Van Engeland catalogues example after example of their
breach: Saddam Hussein’s use of human shields violated the prohibition on hostage taking (p. 64); The Taliban’s bombing of the Buddha of Bamyan violated the prohibition on destruction of cultural property (p. 71); The use of rape as a weapon in the former Yugoslavia violated the prohibition on sexual violence (p. 77). The list goes on. Van Engeland no doubt intends to convince the reader of the need to adhere to the Conventions. Ironically, this list may prompt the reader to question whether international law can have any effect in the face of such widespread brutality. Other than exhortations to abide by the law, Van Engeland offers little prescription for solving the problem of noncompliance.

Having described the Geneva Conventions’ structure, Van Engeland turns to the central challenge of her book: the application of traditional rules to the changing contours of war. Transnational terrorism and other forms of irregular warfare, she observes, have “blurred” the categories of civilians and combatants (p. 101). On the one hand, many of those fighting in current conflicts are not members of formal armed forces, wear no uniforms, and hide among the civilian population. On the other, the Additional Protocols afford combatant status to members of national liberation movements, even though they do not meet the formal criteria.

Van Engeland asserts that the Geneva framework can accommodate these evolving types of conflicts: “humanitarian law addresses all situations” (p. 133). For example, she notes that civilians may lose their immunity and become lawful targets through the concept of “direct participation in hostilities” (p. 102). This category, though controversial, has become critical to U.S. efforts to combat terrorism and the insurgencies in Iraq and Afghanistan. While acknowledging that “[t]here is little agreement” with respect to “the level of participation” (p. 103) or “the length of time of a civilian’s participation” (p. 107) required, Van Engeland’s discussion does not attempt to break new ground. She merely summarizes the guidelines issued by the International Committee of the Red Cross and concludes that “it is to be hoped that all will follow the interpretation given by the document” (p. 108).

In the book’s final chapter, Van Engeland addresses three “concrete challenges” to international humanitarian law: asymmetric conflicts, terrorism, and the evolution of weapons technology (pp. 133-57). Her discussion here is, frankly, incoherent. With respect to asymmetric conflicts, Van Engeland defines the term and then lists a range of examples from ancient Persia to contemporary Sudan (pp. 136-37). She points out that during these conflicts, it

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was often difficult to distinguish between civilians and combatants, and again lists atrocities that have resulted from this difficulty. But her conclusion is simply that it is “not acceptable” (p. 144) to lower humanitarian standards or to treat civilians aiding rebel groups as combatants.

Van Engeland’s discussion of terrorism is scarcely more illuminating. She argues vehemently against the Bush Administration’s 2002 assertion that humanitarian law does not apply to members of al Qaeda and the Taliban (pp. 150-52). But this point has long been moot. The Bush Administration eventually retreated from its aggressive stance. The Supreme Court has recognized that detainees benefit from the protections of Common Article 3 of the Geneva Conventions, and the Obama Administration has announced that it will comply with Article 75 of Additional Protocol I.

Finally, with respect to technological change, Van Engeland reminds us that weapons must be capable of distinguishing civilian targets and may not cause unnecessary suffering to combatants. She argues that “the type of weapons and war strategies used today allow for less differentiation between combatants and civilians” (p. 153). (Inexplicably, in the following sentence, she asserts that this is “not an entirely new phenomenon,” citing civilian casualties during the Thirty Years War.) But surely, developments in technology over the past decades have enhanced the ability, at least of developed nations, to limit civilian damage. We are now able to deliver surgical strikes, based on far more accurate intelligence than in previous generations. The more provocative question is whether our enhanced technological capabilities necessitate a higher duty of care in avoiding civilian casualties.

Van Engeland’s thesis—that the Geneva Conventions remain a viable source of constraints on warfare—is laudable. However, her conclusory and polemical approach undermines her ability to persuade. The most fundamental problem with Civilian or Combatant is its assumption that all civilian deaths in warfare stem from the same root cause. The reality is much more complicated. In modern conflicts, the status of many belligerents is unclear, and there are legitimate questions as to whether and when they may be targeted or detained. Reasonable minds may differ, and military leaders need legal guidance. But Van Engeland treats true atrocities such as the massacre at Srebrenica (p. 74) and the September 11th attack on the World Trade Center (p. 17) as examples of the same undifferentiated problem: the failure to respect the principle of distinction. By doing so, she cheapens the efforts that responsible powers have


made to respect the laws of war while defending themselves from genuine threats. And just as her appeals to international humanitarian law will not persuade those bent on civilian slaughter to change their course, her dogmatic insistence on the primacy of the Geneva Conventions is unlikely to sway the minds of those wielding military power.


Recent events, including the armed conflicts in the former Yugoslavia, Iraq, and Afghanistan, have increased the prominence of the doctrine of state complicity in international law. This doctrine allows for responsibility to be imputed to states that have provided assistance to other states involved in the commission or perpetration of internationally wrongful acts. The state complicity doctrine will only become more important over time, as the realities of international politics and the requirements of modern warfare result in state actors committing atrocities increasingly with some form of aid or assistance from third party states. There is, however, relatively little jurisprudence or commentary on the doctrine of state complicity. Helmut Philipp Aust’s recent book, Complicity and the Law of State Responsibility contains a structured and insightful analysis of this area of international law and provides a timely examination of the subject.

Aust begins by discussing the theoretical underpinnings for the doctrine of state complicity. He considers the doctrine of state complicity in the context of the framework of bilateralism/community interest and the international rule of law. The latter is described as making a “plausible case” for the need for international law to respond to issues of state complicity (p. 95). Next, Aust considers the question of whether Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) expresses customary international law on the doctrine of state complicity. In its decision in the Genocide Convention Case, the International Court of Justice (ICJ) described Article 16 as reflecting customary international law on the doctrine of state complicity. In discussing Article 16, Aust embarks on an extensive examination of international practice, and governmental statements

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10. Id. at 527.
and comments. He concludes that Article 16 reflects customary international law (pp. 191, 419). This is a view shared by many other commentators (p. 98), although some have expressed doubts (p. 99). Aust then proceeds to analyze the requirements for the establishment of state complicity under Article 16, followed by an examination of the legal consequences of state complicity. In this regard, one of the main points that Aust makes is that satisfaction as defined in Article 37 of the Draft Articles (e.g., an expression of regret or a formal apology) is the least problematic form of reparation that can be ordered in most situations as it does not require the difficult task of quantifying compensation (pp. 284-85). Aust then proceeds to consider the impact of the regime for aggravated responsibility under Articles 40 and 41, which pertain to serious breaches of peremptory norms, on the doctrine of state complicity. In this respect, one observation that he makes is that there may be a greater obligation on states to avoid complicity where the regime of aggravated responsibility becomes germane (p. 373). Lastly, Aust examines areas such as the law of collective security, international humanitarian law, and human rights law, and contends, for one, that the rules in these areas might address some of the concerns with Article 16 (pp. 415-16).

Despite the large number of topics covered in Complicity and the Law of State Responsibility, a significant portion of the book focuses on Article 16 of the Draft Articles. This is somewhat unsurprising, given the fact that Article 16 is the most important statement of the doctrine of state complicity. The Draft Articles are the culmination of decades of effort on the part of the International Law Commission (ILC). This work commenced a number of years after the ILC’s inaugural session in 1949, when it chose the topic of state responsibility for codification and development. Adopted in 2001, there are fifty-six Draft Articles, including Article 16 on state complicity, which states:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.

The predecessor to Article 16 in earlier drafts of the Draft Articles was Article 27. The latter was worded differently:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

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15. Draft Articles, supra note 12, art. 16.
One of the more debated aspects of Article 16 is whether it requires intent to assist in an international wrong.\textsuperscript{17} In Aust’s view, such an intent requirement is “indispensable” (p. 249). Some of his points in support of this view, however, can be questioned. To begin with, the plain text of Article 16 does not mention any intent requirement. All that Article 16 requires is establishing that a state aided or assisted another state in committing an internationally wrongful act “with knowledge of the circumstances of the internationally wrongful act.”\textsuperscript{18} The phrase “rendered for the commission of an internationally wrongful act,” found in the predecessor to Article 16 (i.e., Article 27), was interpreted to impose an intent requirement.\textsuperscript{19} Article 16 does not contain similar terminology.\textsuperscript{20} Aust, however, posits that an intent requirement has been introduced through the commentary accompanying the Draft Articles (pp. 235, 237), which states, “aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so.”\textsuperscript{21} Leaving aside issues concerning the authoritative value of such commentary,\textsuperscript{22} the term “with a view,” which seems to form the crux of Aust’s argument (see p. 235), by no means can be taken as conclusive proof of an intent requirement. As one commentator observed, “[t]he word ‘view’ seems to connote more of an awareness rather than a contemplated plan such as would be connoted by the word ‘intent.’”\textsuperscript{23}

To Aust, an intent requirement is essential to prevent the application of Article 16 to an overly broad spectrum of factual scenarios. He argues that the lack of an intent requirement might “multiply the bases of responsibility beyond sensible reach” (p. 240). Nonetheless, he does not explain why the knowledge requirement that is expressly set out in the text of Article 16 should be construed as being insufficient to prevent excessive findings of state complicity. There is no reason to presume that the knowledge requirement is inadequate, especially if it is construed in the manner espoused by one commentator—namely “one of specific knowledge of the alleged accomplice . . . of an internationally wrongful act with a high degree of particularity.”\textsuperscript{24} The same commentator observed that the ICJ applied this standard in the Genocide

\begin{itemize}
  \item \textsuperscript{17} See Kate Nahapetian, \textit{Confronting State Complicity in International Law}, 7 UCLA J. INT’L L. & FOREIGN AFF. 99, 105 (2002).
  \item \textsuperscript{18} Id. at 107.
  \item \textsuperscript{19} Id. at 106.
  \item \textsuperscript{20} Id. at 107.
  \item \textsuperscript{21} Draft Articles, supra note 12, art. 16, cmt. ¶ 3.
  \item \textsuperscript{22} See Theresa A. DiPerna, \textit{Small Arms and Light Weapons: Complicity “With a View” Toward Extended State Responsibility}, 20 FLA. J. INT’L L. 25, 70-71 (2008) (arguing that the ILC should set aside the intent requirement because of its greatly diminished value within the commentary).
  \item \textsuperscript{23} Nahapetian, supra note 17, at 108.
  \item \textsuperscript{24} Christian Dominič, \textit{Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State}, in \textit{THE LAW OF INTERNATIONAL RESPONSIBILITY} 281, 286 (James Crawford et al. eds., 2010) (emphasis added).
\end{itemize}
Convention Case.25 Aust, in contrast, believes that in that case, the ICJ, by stating that there had to be knowledge “at the least,”26 indicated that mere knowledge is insufficient (p. 236). Moreover, the evidentiary hurdles that would be imposed if an intent requirement is present, which Aust downplays, are not inconsiderable. To begin with, countries rarely express their intentions to aid in committing human rights abuses or atrocities.27 Even if evidence of the requisite intent exists, it is unlikely to be found in the public domain.28 Such considerations led one commentator to argue that “the object and purpose of Article 16 would be eviscerated by an intent requirement.”29 Aust, it could be added, does concede that the imposition of an intent requirement “could well stand in the way of holding complicit States responsible in a number of cases,” this being possible “even . . . when perceptions of justice and fairness militate for a finding of responsibility of the complicit State” (p. 378).

Aust’s stance on intent notwithstanding, Complicity and the Law of State Responsibility is a useful treatise that comprehensively scrutinizes the topic of state complicity. All the major themes and subthemes that relate to state complicity are canvassed. Due to its breadth, depth of coverage, and systematic analysis, Aust’s work will likely become regarded as an important treatise on state complicity.


In When International Law Works: Realistic Idealism After 9/11 and the Global Recession, Tai-Heng Cheng develops a general approach to decisions in international law. Cheng’s approach requires decisionmakers to balance the “general morality” of strict adherence to international law against the “specific morality” involved in individual decisions. Cheng adds that decisionmakers should consider the practical effects of decisions, along with their own national and institutional obligations. He posits that judges, arbitrators, regulators, legal advisors, and officials can employ his approach, and he uses case studies to illustrate its potential applications.

Through the case studies, Cheng develops three secondary theses. First, international law consists of both prescriptions and elites’ shared expectations about legal processes. Second, when decisionmakers deviate from international law, they should propose alternative rules that would accommodate their conduct. This technique, Cheng argues, helps develop international law and prevents a feedback loop of successive deviations. Finally, Cheng advocates

25. Id.
27. Nahapetian, supra note 17, at 110.
29. Nahapetian, supra note 17, at 126.
“legalism” in the treatment of international law, which involves recognition of legal prescriptions and deference to shared norms, thereby reinforcing the importance of international law (pp. 80-82).

Ultimately, Cheng’s account of international law is “justificatory.” Cheng does not insist that international law is compulsory and universally enforceable because, as he explains, decisionmakers do not and will not treat it that way. Cheng does assert that international law promotes the general good and therefore deserves independent moral consideration. Cheng aspires to offer practical guidance by reformulating the abstract “what laws require of people” question to the concrete “what should people do about law” question (p. 296).

When International Law Works treats many topics. It surveys historical and contemporary debates over international law, explores the politics of legal theory, posits that adherence to international law is generally moral, and develops and applies an approach to international legal decisionmaking. As a result, the book spans 300 pages of dense and heavily footnoted text.

The book does several things well. It offers an excellent overview of the debate over whether international law is law. It convincingly outlines the political motivations behind theoretical disputes in international law. It points away from the gridlocked debate over whether international law is law toward a less grandiose and more useful set of questions.

The book’s ambitious scope, however, creates two issues. First, the book’s audience is unclear. It is ostensibly aimed at practitioners of international law, but its demanding format and theoretical content make it an unlikely read for diplomats and political advisers. Second, the analysis in the case studies is quite brief. The first of twelve studies appears halfway through the text, and concrete applications of Cheng’s decision framework feel crowded between theory and background. This is unfortunate because the framework is quite abstract: decisionmakers are asked to consider the general importance of international law, the specific morality of a decision, the practical effect of a decision, and their own institutional obligations. Without thorough examples of application, it is hard to distinguish this approach from what decisionmakers currently do.

When International Law Works begins by arguing that international law is good. It defines international law as a series of prescriptions—both formal and informal—that are interpreted and applied by elites according to shared expectations (p. 13). These prescriptions are necessary for global stability and order, which in turn permit various communities to pursue their values and interests (p. 14). The prescriptions promote the common good, and adherence to international law therefore possesses independent moral value.

Cheng applies his decision framework in a series of case studies, which he groups around five decisionmakers: judges, arbitrators, regulators, legal advisors, and officials. The chapter on judges focuses on three decisions of the International Court of Justice (ICJ). Cheng emphasizes judges’ special obligations to legalism. He describes departures from legalism in Nicaragua v.
The chapter on arbitrators emphasizes that the parties largely determine arbitrators’ responsibilities. Arbitrators have strong obligations to interpret prescriptions in a legalistic fashion, though Cheng leaves some space for arbitrators to defer to situational morality. For example, in the NAFTA arbitration case of Loewen Group, Inc. v. United States of America, a Canadian corporation was denied a fair trial in state court, but the tribunal denied recovery because the corporation failed to exhaust rather implausible local remedies. The decision was “at the outer margins of legal reasoning” and likely motivated by a desire to prevent the United States from leaving NAFTA (p. 191). Cheng concludes that the arbitrators could have used his framework to conclude that the specific morality of preserving NAFTA warranted this strained legalism.

The chapter on regulators defines them as appointed officials or civil servants who create informal prescriptions and shared expectations in a field of their expertise (pp. 196-97). Cheng posits that regulators have special obligations to carefully evaluate new prescriptions and devise rules that minimize disruption of national policies. Cheng uses the financial crisis, the resultant crisis management efforts, and the creation of the Financial Stability Board as a case study. He concludes that regulators’ obligations to promote order, make beneficial prescriptions, and ensure that their prescriptions are effective typically converge.

The chapters on legal advisers and officials are the richest. Legal advisers are government officials who provide legal guidance to other governing elites (p. 217). Cheng believes that while legal advisers must promote their nation’s interests, they must nevertheless balance those interests against the global common good. Cheng uses the memoranda authorizing waterboarding as a case study, concluding that some of the torture memos fit this framework. They were legally defensible, and the drafters could have prioritized the specific morality of gaining actionable intelligence over the general morality of legalistic adherence to international law. Cheng finds other memoranda morally indefensible for their overbreadth (p. 239). Given the moral significance of torture and the very few people waterboarded, Cheng argues that the legal advisors should have demanded to specifically authorize each instance of waterboarding.

The chapter on government officials defines them as key officers and cabinet members in the executive branch. Cheng argues that these officials must particularly emphasize specific morality and effectiveness, as well as constituents’ values (p. 249). Cheng notes, however, that constituents’ well-being requires the minimum world order ensured by international law. Cheng uses U.N. Security Council resolutions concerning the 1990 Gulf War, the 1999

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NATO bombing of the Federal Republic of Yugoslavia, and the 2003 invasion of Iraq as case studies. In the 1990 Gulf War, coalition forces secured increasingly stringent resolutions against Iraq, culminating in an authorization to use force. That resolution did not authorize the forces to invade Iraq, and President George H. W. Bush cited the resolution’s limits to justify his decision not to cross the border (p. 260). In this instance, Cheng argues, specific morality, effectiveness, and general morality were aligned, and official decisions reinforced international law norms.

Cheng believes that bombing Yugoslavia was not legalist or even necessarily legal, as NATO left the Security Council out of the process entirely. NATO feared that seeking a resolution would establish Russia and China’s veto over NATO actions (p. 266). The bombing of Yugoslavia thus deviated from norms regarding the use of military force and damaged the international legal system. However, Cheng feels the decision satisfies his framework. It was the rare decision in which the specific morality (preventing humanitarian catastrophe) outweighed the general morality of adherence to international law.

The decision to bomb Yugoslavia informed a more questionable decision to invade Iraq in 2003. The United States had secured a Security Council resolution requiring Iraqi disarmament but not authorizing force. In Cheng’s words, the events leading to the invasion were “remarkable not because the United States invaded Iraq without a second resolution, but because it tried so hard to get one” (p. 280). Upon failing, the United States and partners invaded Iraq, claiming that the “inescapable logic” of the resolution permitted an invasion upon Iraq’s failure to comply (p. 282). Yet language authorizing force had been specifically removed from the text as a condition of France, Russia, and China’s votes (p. 284). The invasion clearly contravened the Security Council’s intent, could not be justified in legal terms, and damaged the international order. However, Cheng argues that the specific morality of protecting citizens from chemical and biological terrorism, if decisionmakers believed in good faith that the threat existed, could justify the invasion.

Cheng’s decision framework is difficult to dispute for its generality. Decisionmakers in different positions should weight certain moral and practical considerations differently. For example, judges probably should emphasize legalism while executives emphasize national interests. The import of Cheng’s thesis turns on the weights decisionmakers assign to these values in the context of particular decisions, and that turns on moral considerations specific to a given decision. Without more texture, it is only clear that decisionmakers should not dismiss international law as mere politics without independent moral significance.

Cheng’s insistence that decisionmakers offer accommodating interpretations or prescriptions when they deviate from international law is more troubling. First, unilateral proposals to validate illegal conduct seem likely to destabilize international law. Upon bombing Yugoslavia, multiple NATO members offered the novel rule—before the ICJ—that force may be used absent a Security Council resolution to prevent a humanitarian catastrophe (p. 269). This never-adopted proposal helped convince President Bush to
invade Iraq absent authorization (p. 288).

Conversely, the United States invaded Iraq in clear and largely-unexplained defiance of the Security Council’s intent. Subsequently, when the United States obtained a resolution requiring Iran to suspend its nuclear program, that resolution expressly required a return to the Security Council prior to the use of force (p. 289). It seems evidently undesirable for a deviating state to propose an exception and immediately establish precedent for its use. Cheng does fault the ICJ for not taking up and resolving the proposed rule after the bombing of Yugoslavia, but that hardly inspires confidence that future novel proposals would have positive effects.

Second, a norm that states propose new rules upon deviation from international law, as opposed to a norm forbidding new rules formed in the breach, creates perverse incentives. It reduces political sanctions for violating international law. The 2003 invasion of Iraq significantly damaged U.S. soft power (p. 261). However, if a state can dampen any diplomatic or public relations consequences with a proposed rule, it may engage in gamesmanship. If the rule is adopted, the consequences evaporate. If the rule is openly debated, the consequences are mitigated. International legal norms should encourage states to secure agreement to new rules before they operate under them. Cheng’s proposal does the opposite.

Cheng’s proposal also skews the incentives for drafters of proposed rules. States with the desire to ignore international law to solve a pressing problem are suboptimal policymakers. They will tailor proposals to their immediate needs, both practical and political. Debate on the rule will devolve into whether to bless specific deviations. Moreover, proposing states will have strong incentives to legitimate their deviations. When NATO states defended the bombing of Yugoslavia to the public and the ICJ, a formalized humanitarian exception would have been tremendously legitimating. In the long-term, however, giving Russia license to skirt the Security Council where it saw humanitarian issues could have been extremely problematic. Such balancing acts are undesirable. Proposed rules are mired in self-interest when they arise in the normal course of diplomacy. Acute crises and historical deviations from international law should not be added to the mix.

When International Law Works provides an important insight into international law’s proponents. Debates over whether international law is law will not persuade decisionmakers to assign it independent moral force. Instead, proponents must offer alternative approaches to valuing international law. Cheng’s decision framework is such an approach. However, its ambitious breadth dissipates much of its force. Moreover, hastily proposed general rules that justify particular deviations from the international legal regime seem destined to damage the regime itself. Perhaps the only thing worse than labeling international law mere politics is making it so.

On October 15, 1995, exactly two months before the signing of the Dayton Peace Agreement, President Bill Clinton spoke at the Thomas J. Dodd Archives and Research Center in Storrs, Connecticut. “Some people are concerned that pursuing peace in Bosnia and prosecuting war criminals are incompatible goals,” he told the crowd at the building’s dedication to the former senior Nuremberg prosecutor. “But I believe they are wrong. There must be peace for justice to prevail, but there must be justice when peace prevails” (pp. 130-31). In All the Missing Souls, former diplomat David Scheffer addresses the “tug-of-war between peace and justice” that characterized a number of Clinton-era conflicts (p. 4). But in contrast to the President under which he served, Scheffer makes an unconditional claim: for leaders responsible for atrocities, justice must prevail—no matter what. “[T]he arsenal of law,” Scheffer writes, “[must] defeat the arsenal of death” (p. 266).

The latest in the line of memoirs that engage directly with Clinton-era foreign policy, Scheffer’s book does not provide the only treatment of the human rights crises of the 1990s. Yet it stands alone in providing a detailed, insider’s perspective on the formation of both the International Criminal Court (ICC) and the war crimes tribunals. Sometimes heartbreaking, often frustrating, but always enlightening, All the Missing Souls is a worthwhile read for anyone interested in the pursuit of justice.

Scheffer’s book is a chronicle of his eight-year tour of diplomatic duty in the Clinton Administration—first, as senior adviser to Madeleine Albright in her posts both at the United Nations and at the State Department, and, later, as the United States’s first ambassador-at-large for war crimes issues. On the front lines of the battle against atrocities, Scheffer was a leader in the establishment of the war crimes tribunals in Rwanda, Sierra Leone, Cambodia, and in the former Yugoslavia, and in the negotiations that led to the ICC. Though Scheffer worked on several tribunals simultaneously, each chapter of All the Missing Souls addresses a single episode of court construction.

This simple organization results in a fast-paced but well-planned journey throughout the world: Scheffer takes the readers from the Map Room of the White House to the refugee camps of Rwanda, from a Cambodian official’s

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34. See, e.g., Samantha Power, A Problem from Hell: America and the Age of Genocide (2003); John Shattuck, Freedom on Fire: Human Rights Wars and America’s Response (2003); The United States and the International Criminal Court (Sarah B. Sewell & Karl Kaysen eds., 2000).
jackfruit farm on the outskirts of Phnom Penh to the Holiday Inn in Rome—as he relives the dozens of formal and informal discussions that gave shape to these important adjudicative bodies. Interspersed among exhaustive (and at times exhausting) accounts of high-level diplomatic debates are memorable vignettes, many of which feature familiar characters. In her early years as U.N. ambassador, Madeleine Albright serves her guests coffee in her D.C. office, systematically refusing any offers of assistance from embarrassed male visitors (p. 9). Then-First Lady Hillary Clinton—looking “as if she had been through some sort of hell and back”—presides as Scheffer and other officials discuss the issue of immunity for U.S. soldiers from ICC prosecution, her embattled husband preoccupied by the Lewinsky scandal and an upcoming trip to China (p. 196). As Scheffer advocates a controversial compromise on ICC jurisdiction, a U.S. official informs him that “no one likes you anymore” (p. 219). Never, however, do these anecdotes obscure Scheffer’s ultimate aim: “credible justice amidst carnage and mayhem” (p. 3).

A realist with ideals, Scheffer is a supremely engaging narrator. Now the Mayer Brown/ Robert A. Helman Professor of Law at Northwestern University Law School and the Director of the School’s Center for International Human Rights, Scheffer forges diplomatic sangfroid for refreshingly undiplomatic candor; in this book, he calls it as he saw it. The result is a rarity in the memoir genre: an authentic and relatable portrayal of the author. Sometimes, Scheffer displays a resigned frustration. Describing President Clinton’s response to a New York Times op-ed calling for the signing of the Rome Statute, Scheffer sighs, “[o]ne can write countless memoranda and hold the highest-level meetings on an issue, and yet what galvanizes a president is often what the rest of the world sees along with him on a cold winter’s morning” (p. 238). At other times, he is sorrowful. “I never adjusted to the agony of children,” he writes. “I saw so much misery for so many years that my memories remain consumed by human suffering” (p. 12). And occasionally, he is, like all of us, conflicted. In one of the book’s most bizarre moments, Scheffer, overwhelmed by U.S. diplomatic failures at the Rome Convention, seeks solace in the Sistine Chapel. “All that I had labored over seemed insignificant to me at that moment,” he mused, “as if the past five weeks were but a momentary passage that had brought me to this glorious masterpiece” (p. 226). The reviewer did not expect the “Ambassador to Hell” to admire celestial scenes (p. 3); but perhaps it is fitting for one so passionate about making history to be so entranced with the historical.

More often, however, Scheffer’s disappointment with atrocity-crime policy manifests itself in anger rather than contemplation. His expressions of righteous rage make for some of the most compelling—and controversial—passages in the book. Scheffer mercilessly upbraids the “thuggish hypocrite[s]” who feign cooperation with international authorities yet continue their campaigns of death (p. 340) and the U.S. and international officials whose

“unbearable timidity” or self-indulgent theorizing obstructed the path to accountability (p. 124). “[D]oes anyone here give a damn about 1.7 million dead,” he writes about a meeting in New York, “or is this just a game of who can win the prize for arguing the perfect formula for justice . . . ?” (p. 392).

But he reserves some of his sharpest attacks for the Bush Administration. An avowed enemy of leadership impunity and American exceptionalism, Scheffer declares the “methodology employed in the campaign against terrorism” to be “deeply flawed and shameful for a nation otherwise committed to the rule of law” (p. 418). In perhaps his most extreme statement, he questions the lack of “legal consequences for senior officials involved in . . . blatant disregard for the law” (p. 438) in pursuit of the “so-called war on terror” (p. 423). Though some readers will surely admire his consistency, Scheffer’s stridency will alienate others. One might wonder why he closed the book by looking at America’s past rather than the future of war crimes tribunals.

Nevertheless, Scheffer’s passion should not be confused with partisanship. Often as harshly critical of himself as of others, Scheffer does not shy away from sharing the stories of his “own shameful moments” (p. 48). In one particularly painful exchange in the fall of 1993, he briefed congressional staffers on the situation in Rwanda. “We [are] not going to rush into each and every humanitarian catastrophe,” he told them, in a misguided attempt to underline the “Clinton administration’s reason-headed approach to peacekeeping” (p. 48). But while America exercised caution, genocide was occurring. Nor does Scheffer neglect the failures of the tribunals he worked so hard to make a reality. He candidly acknowledges the charges of corruption in Rwanda and Cambodia, and reminds readers of the many criminals who never stood trial for their acts. Scheffer rarely forgoes an “I told you so” moment, but he tries genuinely to eschew excuses throughout. After all, “excuses do not resurrect the dead,” he writes (p. 412).

Yet despite its honesty, Scheffer’s narrative is an uneven one. The irregular pace sometimes renders reading difficult. At some points in the story, the reader is furiously swept between continents; at others, twenty pages pass as diplomats sit, hammering out the details of an ultimately unimportant provision. This inconsistency, nevertheless, is strangely appropriate to Scheffer’s project: the reading experience echoes the ambassador’s. Scheffer’s, after all, was a job when hours could mean everything—Scheffer signed the Rome Statute late on New Year’s Eve, just before signatures closed on January 1—but years of negotiations sometimes came to nothing. The chapters on the ICC, for example, will be particularly hard for the casual reader, though scholars will appreciate Scheffer’s painstaking treatment of the drafting process.

The book’s other limitations are also ironically appropriate to its purpose. All the Missing Souls is, as its subtitle indicates, a Personal History, and, as such, it is necessarily limited in scope. Because it is “personal,” Scheffer provides very little analysis of the counterarguments to his claims. He does not seriously consider, for example, why so many officials opposed his initiatives; instead, he treats them primarily as obstacles to his mission. Nor does he
incorporate accounts of meetings or events to which he was not a party; this lack of outside information sometimes hinders the reader’s understanding of the diplomatic machinations surrounding the courts’ formation. Though the book helpfully summarizes the relevant conflicts, scholars must look elsewhere for more comprehensive treatments of Clinton-era foreign policy.  

As a “history,” All the Missing Souls is more descriptive than prescriptive. With the exception of the Postscript—in which Scheffer advocates for a clearer vocabulary for diplomatic discussions of atrocities—Scheffer provides few predictions about or recommendations for the future of international criminal tribunals. Given that Scheffer leaves current events unaddressed, one closes the book with countless questions unanswered: How should the United States respond to recent calls for an ICC investigation in Syria? Does the widespread use of new technologies, such as Twitter and cell phones, help or hurt in the fight against impunity? Will Kim Jong-il’s recent death affect the ICC’s preliminary inquiry in North Korea? What are the best strategies for apprehending the Sudanese leaders indicted by the ICC yet still at large in the war-torn country? How should the international community react to the Special Court of Sierra Leone’s recent conviction of former Liberian leader Charles Taylor on only a “reduced set of charges”? The book gives no answers. But perhaps that is the point. Scheffer does not want his readers to sit back complacently, satisfied with a sort of academic mastery of the history he presents; rather, he wants them to keep asking the tough questions. Perhaps the book does not provide closure because, for Scheffer, there is none. As long as impunity exists, society’s business is unfinished.


In March 2003, at the height of the U.S. wars in Afghanistan and Iraq,
Assistant Attorney General Jay Bybee sent a set of memos, drafted by Deputy Assistant Attorney General John Yoo, to the Department of Defense. The memos, now commonly known as the “torture memos,” dramatically reinterpreted the commonly held legal definition of torture. Yoo and Bybee argued that the Congressional legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) should be interpreted as implying that in order for an act to constitute torture “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.” The memos opened the possibility that acts like sleep deprivation and stress positions might therefore not be included in the legal definition of torture.

When the memos were leaked in 2004, scholars, pundits, and politicians were outraged. Yoo was accused of “defin[ing] torture down,” of taking a clear set of acts that are prohibited by international (and much domestic law) and moving them into the realm of respectability. As Harold Koh—then Dean of Yale Law School, now Legal Adviser at the State Department—put it, Yoo’s act of legal reinterpretation was akin to saying “that murder constitutes only serial killing.”

But as Tobias Kelly would explain to us, while the techniques validated by Yoo and Bybee were clearly beyond the pale of the international consensus on what constitutes torture, the modern legal category of torture itself is highly unstable, contingent, and limiting. In fact, says Kelly, a professor of social anthropology at the University of Edinburgh, “[i]t is only since the late twentieth century that torture has been associated with precise legal definitions and thought of as a specific human rights violation above nearly all others” (p. 4). Kelly’s short, intriguing, highly readable, but ultimately overambitious book, This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty, investigates the contours of torture, arguing that “our concepts of torture do not include all possible harms and that legal processes do more than neutrally recognize when torture takes place. They determine what acts count

41. The CAT, to which the United States is signatory, prohibits torture, defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.


as torture and how we should respond” (p. 4). Looking at the United Kingdom, the book employs history, theory, and ethnography to argue that the ways the legal category of torture has been employed in practice demonstrate the limitations of the very attempt to use law to “measure and calculate” the crime of torture (p. 173).

This vague but ambitious goal presents a challenge—one to which This Side of Silence fails to rise. Kelly investigates a wide range of situations in which the legal category of torture is employed in contemporary British law, including the evidentiary standards British immigration courts use to assess allegations of torture, the creation of “medicolegal” reports prepared by doctors examining torture victims, judicial attempts to “predict” whether an alien could be tortured if deported, the double standards at play when torture is charged in war crimes prosecutions, and the means used by NGOs to monitor states’ commitments not to engage in torture. While these varied discussions are independently compelling, are well-researched, and raise important questions about the imperfections of the British legal system, they ultimately fail to coalesce to support the broad theoretical claims of the book.

Kelly begins with a brief history of torture as a legal category. Working off of recent scholarship on the history of human rights, Kelly disputes the conventional wisdom that torture has always been singled out for condemnation by the law. Instead, he shows how torture, as an explicit crime, “has only relatively recently been given the ethical priority as close to the worst thing that the British army can do” (p. 27). The main historical source of this shift, according to Kelly, was Amnesty International, whose “campaign against torture” led directly to the creation of the CAT. The CAT, which was adopted by the U.N. General Assembly in 1984 and ultimately ratified by most member states, made torture a crime under British law for the first time (p. 43).

In outlining how the creation of this legal category of torture has affected legal mechanisms, Kelly turns to several case studies. He highlights the fascinating but troubling experience of an Iranian asylum seeker in British immigration court, exploring the prohibitively high burden of proof necessary to establish past instances of torture. In such proceedings, “applicants must demonstrate why they would be tortured, who tortured them, why they cannot move elsewhere in their own country, and why they cannot seek protection from the state” (p. 54). Due to the low standards of admissible evidence in these proceedings, judges must constantly question the veracity of the evidence before them, and the question of whether torture occurred is very difficult to settle. Many asylum seekers, including the Iranian refugee described by Kelly, are rejected for lack of credibility.

Kelly also analyzes a specific kind of evidence often employed in immigration cases involving torture: “medicolegal” reports prepared by doctors and clinicians that assess whether an alleged victim has in fact been tortured.

As in the case of British immigration standards generally, the specific construction of these reports is plagued with evidentiary requirements that are difficult to meet: “Clinicians are faced with a legal system of proof that all too often appears to be demanding a level of certainty that cannot be given” (p. 73). Even when physical signs of trauma are present, judges frequently demand a level of “certainty and objectivity” that is impossible to provide using the tools of modern medicine (p. 94).

Such case studies illuminate the difficulties of the British legal system, and especially the immigration courts, in addressing evidence of torture. It is less clear, however, whether they vindicate Kelly’s more grandiose claims about the problems inherent in the idea of creating a legal category of “torture” to begin with. For example, Kelly sees the lax evidentiary standards in the British immigration courts as particularly problematic in the case of torture but concedes that “[t]he problem of evidence is not unique to claims about torture or even to human rights claims but can be found in asylum claims more generally, where evidence is often scarce” (p. 70). He cautions that the evidentiary problems are more extreme in cases of torture, since the “perpetrator is always absent in cases before the tribunal” and since “clinical evidence and personal testimony can only speak about the causes of injury in an indirect manner” (p. 70). Nonetheless, the link between this argument and Kelly’s broader critique of the problems with treating torture as a cohesive legal category remains hazy. What emerges from Kelly’s ethnographies is the picture of a legal system with a fixable problem: the need for more concrete standards of evidence, better equipped to grasp the unique challenges of proving whether or not applicants have been tortured or could be tortured in the future. The leap from these case studies to Kelly’s broader claims that the very attempt to legally recognize torture produces “contradictory forms of knowledge about suffering and cruelty” (p. 13) is ultimately left unclear.

This problem may come down to the rather superficial way Kelly employs anthropology as a tool of investigation. Kelly believes that “there is something central to anthropology that lies between participant observation and high theory. This is a desire to interrogate our key political and social categories and to explore their implications, histories, and trajectories” (p. 16). Such statements are obscure to the point of being meaningless, and Kelly never actually explains how, exactly, anthropology can go about filling the gap between “participant observation” and “high theory” in order to arrive at substantive and novel arguments about the nature of torture as a legal category. By taking this claim for granted, he obfuscates how his case studies should be taken as proof of his broader theories.

Despite the overreach and haziness of Kelly’s thesis, his specific case studies are interesting in and of themselves, and touch on profound questions about the way torture is conceptualized in Western legal systems. For example, in the second-to-last chapter of the book, Kelly examines the use of torture as a legal category in war crimes prosecutions. Kelly points out that, since the United Kingdom ratified the CAT and codified torture as a specific criminal offense, only one person has been convicted of the crime: Faryadi Sarwar
Zardad, a former Afghani warlord who was tried in the United Kingdom in 2005. The United Kingdom treats torture as a crime over which it has “universal jurisdiction” and the acts of torture for which Zardad was convicted all occurred in Afghanistan (pp. 124-30). Kelly contrasts the Zardad trial with the 2005 trial of several British troops, accused of torturing an Iraqi detainee to death in Basra, but ultimately acquitted. He points out that while some of the acts allegedly committed by the soldiers were quite similar to those committed by Zardad, the soldiers were never charged with the specific crime of torture, and were instead charged with an offense more common in the British legal system: “inhuman treatment, assault, manslaughter, and negligence” (p. 136). Kelly argues that this apparent double standard attests to the fact that culpability for torture is “unevenly distributed. If torture is an international crime that speaks beyond the borders of the state, criminal prosecutions for torture also take place in the context of disparities in state sovereignty” (p. 120).

These latter chapters are less heavy on ethnographic case study, and instead incorporate more traditional sources of legal analysis, such as statutes, cases, and journalistic accounts. Perhaps for that reason, Kelly’s arguments seem more solid here: he points to an unsettling double standard and questions the motives that underlie it. His argument about the link between torture and state power is an important one that raises significant questions about Western states’ general reluctance to associate their own citizens with the stigma of the crime of torture. While This Side of Silence may not live up to its lofty theoretical goals, Kelly’s thorough and intelligent research does highlight areas where torture as a legal category requires substantial clarification, and, in doing so, underscores the high stakes of this task.