The final chapters (14–17) discuss the war's inevitability and the standards of responsibility of the parties involved. Khadduri and Ghareeb come down harshly on Kuwait for rejecting all Iraqi overtures for resolution of disputes between the two countries before the invasion. They examine each failed attempt at peaceful resolution, such as the missions of U.S. Secretary of State Baker, and they critique the actors, including the United Nations, the Arab League, the Gulf Cooperation Council, and even the Islamic Congress. All of the regional organizations is examined as to its degree of responsibility for not stopping the conflict. Instructive insight is provided.

The authors next examine Western intervention and its rationale. They appear to believe, though they do not say so directly, that the United States forced the resort to military action. Their evidence is that the United Nations acted with "unprecedented" speed in condemning the invasion of Kuwait and issuing dozens of resolutions, in sharp contrast to its lethargy at the start of the Iran-Iraq war in spite of repeated pleadings by Iraq's representative to the United Nations. The authors state their belief that the crisis could have been resolved by peaceful means had the West, and particularly the United States, exercised more patience and waited for an Arab solution. They conclude that the war was not inevitable, not "foreordained"—in the Islamic sense that Allah controls all actions.

I am not sure I agree with all this, given the peril to the world's oil reserves posed by an invader on the border of Saudi Arabia. The United States could not wait for an Arab solution. Furthermore, who could blame Kuwait for their coolness to Iraq's concerns involving their territory? Because of all that had passed between the two, how could Kuwait not be concerned that appeasement would not lead to more demands? The ball, in reality, was in Saddam's court. In a sense, he had made his point with the invasion. If he was amenable to a peaceful resolution, he could have withdrawn.

The book has many spelling and punctuation errors—unusual for this type of work. However, that should not take away from the substance of what the authors have presented. Additionally, while format may not be attributable to the authors, the publisher has used the unusual tactic of presenting the introduction of each of the four major parts of the book in a different, larger type than that used in the body of the text. This is somewhat disconcerting, as is the authors' use of unusual transliterations to identify countries like Yamen (Yemen) and Uman (Oman), organizations like Hizb Allah (Hezbollah), and persons like Saddam Hussayn (Hussein) and Shaykh Abd-Allah (Sheikh Abdullah). Since transliteration of Arabic is an imprecise art, these spellings, while perhaps more precise, could have been made more recognizable to the English-speaking reader.

Additionally, this book can be used as a valuable research tool to try to understand the forces that are shaping the modern Middle East. For those who wish to analyze what has come to be known as the Gulf War, the book presents an Arab perspective of the forces of history, personality, religion and law that came together in that war. It is also instructive to learn that—even though the UN-sanctioned coalition won a swift and decisive victory over Iraq—nothing much has changed. Iraq still has designs on Kuwait; the borders between the countries—while settled by a UN Commission—are still not accepted by Iraq; Saddam Hussein remains in power; the effect of the UN economic sanctions imposed after the 1990 invasion still ensure suffering by the Iraqi people; and a semi-war footing is still maintained by the UN/Coalition forces against Iraq. As the authors remind us, we will be dealing with the Iraq-Kuwait issue for some time to come. As long as oil remains in the picture, nothing much will really change.

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International Law and United States Law. By John M. Rogers. Aldershot, Brookfield VT: Ashgate, 1999. Pp. viii, 242. Index. $87.85, £50.

In this timely and informative book, Professor John Rogers of the University of Kentucky College of Law considers the relationship between international law and United States law. This is a subject of increasing practical importance, as international law has come to regulate many matters that were formerly of only domestic concern, and as international institutions have come to interact more directly with the United States legal system. Both of these phenomena were evident in the recent *Breard* case (discussed last year in this *Journal*[1]), in which the Interna

[*] The views and opinions expressed are those of the reviewer and do not necessarily represent those of the Department of the U.S. Air Force.

[1] *See* Vienna Convention on Consular Relations (Para. V. U.S.), Provisional Measures, 1998 ICJ REP. (April 9) (forthcoming), *reprinted in* 37 ILM 810 (1998).

tional Court of Justice ordered the United States to "take all measures at its disposal" to stay the execution of a Paraguayan on death row in Virginia, and the U.S. Supreme Court then had to decide what effect, if any, to give to the order.[2]

Rogers begins his book by correctly observing that many lawyers and academics misperceive the relationship between international law and U.S. law. As a result, he notes, "[a] clear treatment of the relationship . . . is in order" (p. vii). Rogers' approach to the topic, as he acknowledges, is both "dualistic" and "positivistic"—that is, he views the international and domestic legal systems as separate and not necessarily consistent, and he considers law to be a societal tool rather than a reflection of objective truth. Nevertheless, Rogers is not a skeptic of international law *per se.* Indeed, one purpose of the book, says Rogers, is to explain to non-international lawyers why international law is important, "without subjecting the treatment to dismissal as naïve naturalism or monism" (p. viii).

The book consists of eleven chapters. In the first three, Rogers considers what is meant by the term "international law," how customary international law is established, and the relationship between treaties, customary international law, and *jus cogens* norms. He then proceeds in the fourth chapter to explain his "dualist" approach to the relationship between international and U.S. law. He argues that international law and domestic law should be thought of as regulating different systems, with international law governing "how nations relate to each other" and domestic law governing "how the elements of the nation . . . relate to each other" (p. 22). The laws of these systems may interact and even incorporate one another, he says, "but there is no reason to assume without more that this has been done" (*id.*). He further argues that a "logical corollary" of this idea of separate systems is that "*courts apply the law of the system that sets them up*" (*id.*) (emphasis in original). As a result, he contends that international law is not binding in U.S. courts "*without an independent basis for reference to it in domestic law*" (p. 31) (emphasis in original).

Rogers explains some of the specific implications of this dualist approach in subsequent chapters, which discuss, among other things, the use of international law in interpreting statutes, the self-execution doctrine for treaties, the later-in-time rule governing conflicts between treaties and statutes, the scope of the treaty power, the meaning of the Alien Tort Statute, the role of international law as U.S. common law and the ability of U.S. courts to adjudicate the international obligations of foreign states. Many of his conclusions in these chapters are likely to be controversial. For example, he concludes that, contrary to conventional wisdom, there are federalism limits on the national government's ability to implement treaties and executive agreements (pp. 97–98, 105); that the landmark international human rights law decision, *Filartiga v. Peña-Irala,*[3] was "wrongly decided" (p. 122); and that the argument (made by some plaintiffs and scholars) that foreign sovereign immunity in U.S. courts is overridden by *jus cogens* norms is "about as incoherent as a non sequitur can get" (p. 235).

Rogers makes a significant contribution in his analysis of Congress's likely intent in enacting the Alien Tort Statute.[4] This one-sentence statute, first enacted as part of the Judiciary Act of 1789, states that the federal "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[5] To the acclaim of much of the international law academy, some courts have invoked this statute in recent years as the basis for adjudicating disputes between foreign citizens concerning alleged human rights abuses committed in foreign countries. As Rogers notes, it is unlikely that this was the intended purpose of the statute. Instead, he argues, the statute was designed "to extend federal court jurisdiction only to individual actions which might result in international responsibility *on the part of the United States*" (p. 118). As Rogers notes, in addition to comporting with the statute's "of the United States" clause, as well as historical evidence, this interpretation helps explain why the statute does not apply to claims

For discussion of this case, see Jonathan I. Charney & W. Michael Reisman, *Agora: Breard,* 92 AJIL 666 (1998); *see also* Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception,* 51 STAN. L. REV. 529 (1999).

[2] *See* Charney & Reisman, *supra* note 1, at 666. The Supreme Court declined to stay the execution, *see* Breard v. Greene, 118 S. Ct. 1352 (1998), and Mr. Breard subsequently was executed.

[3] 630 F. 2d 876 (2d Cir. 1980). The court in *Filartiga* held that the Alien Tort Statute gives the federal courts jurisdiction over suits between aliens concerning violations of international human rights law occurring outside the United States.

[4] His discussion in this part of the book is drawn to some extent from an earlier article. *See* John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law,* 21 VAND. J. TRANSNAT'L L. 47 (1988).

[5] *See* 28 U.S.C. §1350 (1994).

brought by U.S. plaintiffs: the United States, at the time the statute was enacted, could not be internationally responsible for torts committed against its own citizens. Despite this strong support, Rogers' construction of the Alien Tort Statute runs up against the prevailing wisdom in the international law academy and lower federal courts.

In part because it will be controversial, this book is a significant addition to the literature. At least until recently, discussions of the relationship between international law and U.S. law have been dominated by internationalist commentators who have argued that international law should be supreme in various ways over U.S. law and should apply automatically within the U.S. legal system. The most notable example of this internationalist view is Louis Henkin's now-updated classic, *Foreign Affairs and the Constitution*.[6] Rogers covers many of the same topics as Henkin but reaches substantially different conclusions, in large part because Rogers gives more weight to the structural constitutional concerns associated with incorporating international law into the U.S. legal system. To be sure, Rogers' book is not as comprehensive as Henkin's, and it lacks some of that book's depth and complexity. As a result, this book may not be the definitive response to Henkin, but it at least helps point the way.

The controversial nature of this book likely will be heightened by Rogers' periodic suggestions that all is not well in the U.S. international law academy. In particular, Rogers is troubled by what he perceives to be a combination in the academy of both insecurity and hubris. Because of limitations on enforceability, international law professors tend to be insecure, he suggests, regarding whether their subject matter is really law. He argues that many of them compensate for this insecurity by overstating the status of international law in the U.S. legal system and by becoming directly involved in the development and application of this law. Says Rogers: "To law professors who are too often treated by students and colleagues as not being concerned with 'real' law, how intoxicating the idea must be not only to be talking about 'real' law, but to be a source of it!" (p. 138). Rogers notes, for example, that a group of twelve prominent international law professors submitted an *amicus curiae* brief to the Supreme Court in the *Breard* case, and that they began the brief by stating that the views of scholars, such as themselves, "are among the sources to be consulted in determining rules of international law," and that they had personally "contributed to the development of jurisprudence on various questions relating to the present matter" (p. 138 n.51).

In addition to being a thought-provoking counterpoint to mainstream U.S. scholarship in international law, the book is stylistically a pleasure to read. It is concise, clear and largely free of technical jargon. It also is refreshingly light on footnotes, while at the same time directing interested readers to most of the important decisions in this area as well as to some of the relevant secondary literature. While portions of the book are based on previously published articles by the author, it reads as a coherent book rather than a collection of essays. In short, the book successfully meets its author's objective of providing "[a] clear treatment of the relationship" between international law and U.S. law. Because of both its clarity and the importance of its subject matter, the book should be of interest not only to international lawyers and academics, but also to U.S. lawyers more generally and to non-U.S. lawyers seeking a better understanding of how the U.S. legal system deals with international obligations.

Despite my high regard for this book, I do have two criticisms of it. First, the book would have benefited from a more concrete explanation of the benefits of dualism. There is, after all, nothing inevitable about the U.S. commitment to dualism; other nations, most notably members of the European Union, have been moving away from the dualist model in recent years. Rogers correctly observes that dualism "serves as a way for our domestic legal system to get the benefit of participating in the international legal system without losing the benefits that derive from our own constitutional structure" (p. 22). His analysis would have been more persuasive, however, if he had presented additional explanation and defense of the constitutional values at stake. He could, for example, have discussed the virtues of local accountability and decentralization. Or he could have explored possible democratic deficits associated with international lawmaking. Admittedly, Rogers does frequently invoke separation-of-powers concerns, especially concerns associated with the expansion of judicial power, but

[6] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996), rev. ed. of LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972). Another book with similar coverage is JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996). That book, however, is essentially just a collection of prior articles, and its extremely heavy footnoting limits its accessibility.

these concerns are not directly related to dualism and, in any event, are underdeveloped.

Rogers' failure to present a more developed normative framework may explain why his analysis does not always seem consistent. For example, despite his general belief that the U.S. political branches rather than the courts should control the incorporation of international law into the U.S. legal system, he suggests that courts may not be bound by the non-self-execution clauses that the Senate sometimes attaches to its consent to the ratification of treaties (pp. 86–87). Similarly, despite his insistence that courts should apply the law of the system that sets them up, he argues that U.S. courts should apply the customary international law obligations of the United States as "common law" when they lack other controlling authority (pp. 135, 157). And, despite his repeated concern with the expansion of judicial power, he endorses a relatively broad role for courts in preempting state laws when Congress is silent (pp. 143–50).

My second criticism is that Rogers never explains how either the general topic of the book or his specific conclusions are affected by modern developments. The reader is left to wonder, for example, how the book fits in with the end of the Cold War; the increasing globalization of trade, technology and culture; and changes in the nature of international law. In other words, although the book contains useful discussions of various legal doctrines, it never situates those discussions against the backdrop of broader changes in international relations. To take one example, when discussing the status of customary international law in U.S. courts, Rogers relies heavily on the Supreme Court's century-old *Paquete Habana* decision,[7] without considering the significant changes that have occurred in the structure and content of customary international law since World War II.[8] Similarly, in discussing the role of the states in foreign affairs, he relies heavily on decisions from the Cold War era, such as *Zschernig v. Miller*,[9] without considering whether the reasoning in those decisions has been undermined by subsequent changes in international politics.

Notwithstanding these criticisms, Rogers' book is a valuable and long-overdue contribution to the literature in this area. Among other things, the book provides a needed dose of common sense and realism in an area of study that for too long has been dominated by excessive aspiration and advocacy. It should be widely read and discussed.

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[7] 175 U.S. 677 (1900).

[8] For a description of these changes in customary international law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838–42 (1997). For a more general account of changes in international law, see Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999).

[9] 389 U.S. 429 (1968).

BRIEFER NOTICES

Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account (Vols. 1 & 2). By Drexel A. Sprecher. (Lanham MD, New York, Oxford: University Press of America, 1999. Pp. xvii, 1557. Index. $84.50.) In 1945, at the opening of the first trial in human history for crimes against the peace of the world, United States Supreme Court Justice Robert H. Jackson, on leave to serve as the American Chief Prosecutor, addressed the quadripartite International Military Tribunal (IMT) at Nuremberg, saying: "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated" (p. 152).

In holding Hitler's deputy Hermann Goering and twenty-three other Nazi leaders accountable for the horrors and inhumanities of World War II, nations ravaged by war tried to come to grips with the past. Yet, the world has not yet come to grips with the future. Justice and peace go hand in hand. Self-styled civilized nations continue to commit aggression, crimes against humanity and devastating war crimes with impunity, and we still do not have an effective legal mechanism to prevent or deter them. International lawyers would do well to study the lessons of historic international trials if law is to protect civilization from its own self-destruction.

Drexel A. Sprecher was an Assistant Trial Counsel to Jackson at Nuremberg. When the trial was over, General Telford Taylor, a key player on Jackson's staff, was appointed to direct a dozen additional American prosecutions against an-