

*WAR, TORTURE AND TERRORISM: RETHINKING THE RULES OF INTERNATIONAL SECURITY* BY ANTHONY F LANG JR AND AMANDA RUSSELL BEATTIE (EDS) (ROUTLEDGE, ABINGDON, 2009) 213 PAGES. PRICE US\$42.95 (PAPERBACK) ISBN 9780415465229.

So much of the post-September 11 discussion of terrorism and security begins with bold assertions about the radical novelty of contemporary threats, such as terrorism and weapons of mass destruction, and the urgency of doing something drastic about it. Unfortunately, this book is no exception. It is premised on the belief that ‘the new international security order has forced changes in the standard rules’<sup>1</sup> on torture, collective security, weapons technologies and war crimes. Consequently, the book insists on a ‘rethinking of the rules governing international security’.<sup>2</sup> The introduction by Anthony Lang even suggests that ‘[i]nstead of a lack of rules, we might say that there is a surfeit of rules, rules appearing at random and without any sense of how they fit into the current order’.<sup>3</sup> It is in this context of supposed ‘radical change’<sup>4</sup> that this book asks the central question: ‘What role should rules have in the current international security order?’<sup>5</sup>

These are bold claims indeed. Old-fashioned international lawyers — taking a longer view of history and legal change — and perhaps a little suspicious of the more anxiously reactive strands of international relations, might rightly be sceptical. Challenges to international law, even by an apparently hegemonic superpower like the United States, rarely succeed in unilaterally imposing changes upon the international legal system. International law has often proved itself far more resilient and flexible than some of its realist opponents give it credit for. Within an increasingly thick and complex legal order with a multiplicity of actors, even superpowers can find themselves thwarted at many turns. As a Foucauldian analysis would suggest, power is not distributed in a simple binary relationship of domination and subordination, but is dispersed throughout multiple actors who each exercise varying degrees of influence, resistance and opposition.<sup>6</sup>

As is now evident almost eight years after September 11, the ambitious assertion of US military power under former President George W Bush succeeded only in demonstrating the weakness and fragility of US power rather than its dominance. Much of the world turned against the US; most states rejected its plea for special or exceptional legal rights; and the international community reasserted its commitment to fundamental norms such as the prohibition on torture, the necessity of collective security, the importance of multilateral arms control and the value of international criminal justice. Even

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<sup>1</sup> Anthony F Lang Jr, ‘Introduction: Rules and International Security: Dilemmas of a New World Order’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 1, 3.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid 2.

<sup>4</sup> Ibid 7.

<sup>5</sup> Ibid 3.

<sup>6</sup> Michel Foucault, *The History of Sexuality* (Robert Hurley trans, 1980 ed) [trans of: *History de la sexualité*].

Americans became disillusioned and elected President Barack Obama in 2008, who quickly sought to re-establish the country's moral authority by pledging his commitment to the international rule of law, multilateral cooperation and the end of torture and Guantánamo Bay. There is danger in premising books on an assumption of radical change, which then risks disappearing with the election of a new President. In assessing normative developments, it would be more beneficial to take a longer view of history rather than focusing on an eight-year snapshot of one President's violence.

None of this is to suggest that international law has functioned well throughout this period. However, it has not been drastically revised as the book suggests; and at least the book concedes that the rule-based order has not collapsed.<sup>7</sup> What is valuable about this book is its application of international relations discourse to some of the more dysfunctional or ineffective features of international law and the challenges to international law in the security field. The introductory chapter by Anthony Lang neatly frames the book around a theoretical discussion of the nature and role of 'rules' in international relations, particularly in security discourse, organised around the related tropes of 'legitimacy', 'adaptability' and 'enforcement'.<sup>8</sup> A central argument is that the increasing illegitimacy of international security rules has shorn previously 'constitutive and regulative' rules of 'their constitutive dimension'.<sup>9</sup> Consequent to unilateral US challenges, it is argued that the rules have lost their power to constitute (and explain) international politics; even their regulative function has become strained because, by itself, the US is too weak to coerce all other actors to comply with its new order.<sup>10</sup>

Again, whether one accepts such analysis depends upon whether one is persuaded by the assumptions on which the book is premised: that American action has indeed radically changed the rules, as opposed to aggressively challenging them in an ultimately unsuccessful fashion. Perhaps it is still too soon to identify which rules have survived and which have been displaced. It is, however, hard to fault Lang's ultimate call for a turn to constitutionalism in international relations (involving the twin elements of the rule of law and a balance of power) in response to the undermining of law.<sup>11</sup> Such a call, however, is hardly novel. The suggestion that '[i]nternational lawyers have only started exploring constitutionalism'<sup>12</sup> is rather odd if one thinks of leading, early post-war jurists such as Hans Kelsen on the *United Nations Charter*, or even the earlier thinking underlying the establishment of the League of Nations after World War I. Whatever international relations scholars might think of this book, there are occasional moments of dissatisfaction throughout some of its chapters for international lawyers looking for a close and accurate engagement with international law by international relations theorists.

Some of the book's introductory concerns about rules are played out in the successive chapters devoted to particular issues. Part I ('Rules and Practices')

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<sup>7</sup> Lang, above n 1, 7.

<sup>8</sup> Ibid 3.

<sup>9</sup> Ibid 11.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 17.

<sup>12</sup> Ibid 18.

comprises three chapters on debates about torture. This topic has been extensively examined in recent years and is not approached in any particularly novel way in this book. In Chapter 1, Nicholas Onuf sets out various ways in which torture can operate as a rule-bound, institutionalised practice but which is typically accompanied by ‘moral backsliding’.<sup>13</sup> In Chapter 2, Jill Harries reverts to Roman jurisprudence on torture to similarly suggest that ‘rules and safeguards alone may not be enough to guarantee the rights of the accused or the suspect where national security is believed to be at stake’.<sup>14</sup> In Chapter 3, Caroline Kennedy-Pipe and Andrew Mumford consider interrogational torture in British Northern Ireland to warn against the ‘foolish’ assumption that torture can be formally rule-bound,<sup>15</sup> and argue for stronger institutional protections against it.

Part II (‘Rules and Legitimacy’) contains two chapters on normative change in the law on the use of force. Chapter 4 by Janne Haaland Matlary focuses on efforts to amend rules on the use of force progressively through policy-based proposals such as the ‘Responsibility to Protect’ doctrine (‘R2P’).<sup>16</sup> This doctrine seeks to recast national security as human security and national sovereignty as sovereign responsibility. It is argued that ‘a rule emerges when states practise the use of force in a *consistent* manner, supported by the *legitimacy* of UN norms and public opinion/other Western states’.<sup>17</sup> The R2P ‘norm’ is seen as potentially aiding ‘in establishing a preventive rule for intervention into failed states, especially on the part of European states’.<sup>18</sup> However, some of this discussion will appear curious to a technically-minded international lawyer preoccupied with tracking the usual processes of custom formation. Chapter 5 by Ariel Colonomos describes the new American strategy of preventive war and suggests that there are four possible eventualities: the eclipse of international law; the eclipse of preventive war; a shift in balance of power; or the reinforcement of collective security and international law.<sup>19</sup>

Part III (‘Rules and Regulations’) includes two chapters on the impact of science and technology on international norms. Chapter 6 by Michael E Smith looks at the implications of weapons technology for rule change in the law of armed conflict.<sup>20</sup> He then considers how armed conflicts can be dealt with as

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<sup>13</sup> Nicholas Onuf, ‘Rules for Torture?’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 25, 34.

<sup>14</sup> Jill Harries, ‘Contextualising Torture: Rules and Conventions in the Roman Digest’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 39, 53.

<sup>15</sup> Caroline Kennedy-Pipe and Andrew Mumford, ‘Is Torture Ever Justified? Torture, Rights and Rules from Northern Ireland to Iraq’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 54, 66.

<sup>16</sup> Janne Haaland Matlary, ‘Cannon before Canon: The Dynamics of *Ad Bellum* Rule Change’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 71.

<sup>17</sup> *Ibid* 82 (emphasis in original).

<sup>18</sup> *Ibid* 83.

<sup>19</sup> Ariel Colonomos, ‘Preventive War à l’Americaine: In the Fog of Norms’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 85, 98–100.

<sup>20</sup> Michael E Smith, ‘Technology Change, Rule Change, and the Law of Armed Conflict’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 105.

problems of global governance, international cooperation and policy coordination, involving multiple state, and increasingly, non-state actors.<sup>21</sup> While the leading powers can play decisive roles in ‘stimulating both technological change and rule changes’,<sup>22</sup> including through seeking loopholes in regulatory regimes, at the same time, the hegemony of great powers is limited by ‘technological diffusion’ to other states and entities.<sup>23</sup> Chapter 7 by William Walker examines the development of the international nuclear order, in particular the post-1990s decline of the *Treaty on the Non-Proliferation of Nuclear Weapons*<sup>24</sup> — a once ‘grand political settlement’<sup>25</sup> — in the face of American unilateralism in responding to nuclear threats.

Part IV (‘Rules and Responsibility’) provides two chapters on aspects of international criminal justice and alternative modes of justice. Chapter 8 by Larry May uses the protracted controversies on the crime of aggression to illustrate the complex conceptual and practical difficulties involved in assigning legal responsibility for war — whether through treaty, custom or specialised institutions — to individuals as opposed to states.<sup>26</sup> Chapter 9 by Mario I Aguilar moves on to consider ‘social mechanisms’, such as truth and reconciliation commissions, which are frequently used in the aftermath of intense violence.<sup>27</sup> It is argued that their validity depends on the possession of social authority for the task of reconstructing contested historical events and on the exploration of the causes for the disintegration of social relations.<sup>28</sup> It is further argued that such processes can assist in the implementation of rules in order to restore national and international security.<sup>29</sup>

Part V (‘Questioning Rules’) concludes the book with two chapters examining the wider theoretical questions surrounding contemporary politics, war and emergencies. In Chapter 10, Amanda Russell Beattie suggests that a constitutionalist desire for rule-based stability in international relations can in fact contribute to *insecurity*.<sup>30</sup> Instead, she argues for a natural law conception of ‘being political’ which involves reciprocal rights and duties,<sup>31</sup> although the theory here becomes rather hard to follow in places. In the final chapter, Nicholas Rengger closes the book with a discussion of the debates involving the

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<sup>21</sup> Ibid 119–20.

<sup>22</sup> Ibid 119.

<sup>23</sup> Ibid 120.

<sup>24</sup> Opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

<sup>25</sup> William Walker, ‘Rules and the Evolution of International Nuclear Order’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 125.

<sup>26</sup> Larry May, ‘International Rules, Custom, and the Crime of Aggression’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 147.

<sup>27</sup> Mario I Aguilar, ‘Truth Commissions and Rules: Justice and Peace’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 162, 162.

<sup>28</sup> Ibid 170.

<sup>29</sup> Ibid.

<sup>30</sup> Amanda Russell Beattie, ‘Absolute Ends and Dynamic Rules: Being Political as Human Beings’ in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 177, 177–9.

<sup>31</sup> Ibid 179.

setting aside of rules in cases of 'Supreme Emergency'.<sup>32</sup> Here, he criticises Michael Walzer's work on just war theory for its moral prioritisation of certain limited political communities' interest over broader human interests.<sup>33</sup>

Overall, this book contains some interesting theoretical insights (often with a realist bent) into a number of developments in the area of international security and international law. As always in an edited collection, the chapters are of varying quality and coherence and they cohere only up to a point. Interdisciplinarity can often be as confusing as it is fruitful. In places, the understanding of positive international law is rubbery and the obsessive jargon used by some international relations theorists can be taxing (particularly the endless and often circular discussions about 'legitimacy'). For international lawyers, the strength of this book is its potential to enlarge our own thinking by allowing us to see international law from an outsider's perspective. This sometimes delivers uncomfortable truths about how realists view rules and the capacity of law to not only shape behaviour and constrain power but also to nourish and produce violence.

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<sup>32</sup> Nicholas Rengger, 'Inter Arma, Silent Leges? The Political Community, Supreme Emergency and the Rules of War' in Anthony F Lang Jr and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (2009) 195, 196–8.

<sup>33</sup> *Ibid* 203.

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