

Florou is surely right that investor opportunism, when tendering for public service concessions with the intent of renegotiating more favourable terms, matters in the determination of a FET claim launched against the state when renegotiations fail. She is also right that one way to curb investor opportunism is by recognizing the relational nature of public service concessions, where the propriety of one contracting party's conduct cannot be understood in isolation from the other contracting party's conduct. But Florou rests her case before showing us how the current system of investment treaty arbitration and all its deficiencies allow her ideas to endure. And I rest mine before I desecrate the virtue of simplicity with excessive scrutiny.

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Martin Jarrett. ***Contributory Fault and Investor Misconduct in Investment Arbitration***. Cambridge: Cambridge University Press, 2019. Pp. 202. £85. ISBN: 9781108481403

1 Introduction

Investment treaties and investor–state arbitration have both been subject to sustained criticism and calls for reform in recent years. Critics have called, inter alia, for a ‘rebalancing’ of treaties to address perceived asymmetries between states and investors,¹ and for a reconnection of investment law to other bodies of law.² As reform discussions have matured, analysis of how to address these asymmetries and fragmentations in investment law has become increasingly nuanced. Contributing to this line of scholarship, Martin Jarrett’s book tackles difficult questions concerning how an investor’s ‘faultworthy’ conduct should impact the analysis of a host state’s responsibility for internationally wrongful conduct under an investment treaty. Jarrett’s book introduces and examines three defences to investor–state arbitration claims, which are each based on an investor’s contribution to investment damage and/or an investor’s misconduct

¹ See, e.g., Cotula and B. Guven, ‘Investor–State Arbitration: An Opportunity for Real Reform?’, International Institute for Environment and Development Blog (7 December 2019), available at www.iiied.org/investor-state-arbitration-opportunity-for-real-reform (referring to investment protection as a ‘one-way street’); R. Peels et al., ‘Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business, and Workers’ (ILO Research Paper No. 13, 2016).

² See, e.g., Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’, in P.-M. Dupuy, E.-U. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (2009) 45.

in connection with a protected investment. These are: ‘mismanagement’, ‘investment reprisal’ and ‘post-establishment illegality’. ‘Investor mismanagement’ is introduced as a defence relevant to situations in which the ‘investor directly contribute[s] to the relevant consequence’ at issue in the investment claim, because it invests in the host state ‘when it was foreseeable that the host state could perform some conduct that would harm the investment’ (at 79). ‘Investment reprisal’ is introduced as a defence for situations in which the investor makes an ‘indirect contribution’ to the host state’s internationally wrongful conduct by provoking that conduct through acts amounting to an ‘affront to the host state’s sovereignty’ (at 79). The defence of ‘investment reprisal’ follows an investor’s breach of a state’s ‘sovereign rights’ (at 127), allowing the state’s responsibility to be reduced to recognize its ‘liberty of exacting revenge (which is also the conduct constituting its breach) on the investor for the latter’s wrongdoing’ (at 115). ‘Post-investment illegality’ is introduced as a defence relevant to the breach by the investor ‘of an established liability rule’, including under a contract, or rule of domestic or international law (at 128).

The book opens in chapter 1 with a ‘schematic of international investment law’, in which Jarrett identifies the various components of investor–state arbitration claims, breaking such claims down to distinguish between questions of jurisdiction, admissibility, liability (including defences to liability) and remedies. He distinguishes these elements of an investor–state arbitration claim based on the function of the rules relevant to each of these issues. This lays the groundwork for an analysis of defences to liability in chapter 2, and a detailed analysis of causation in chapter 3. Jarrett then uses this schematic to argue that an investor’s contribution to damage or other ‘faultworthy’ conduct ought to operate as part of one of the above three ‘defences’ to liability, rather than as an objection to a tribunal’s jurisdiction or the admissibility of a claim, or as a rule relevant to the analysis of remedies. This approach distinguishes the book from other contributions on investor misconduct, which have examined misconduct as relevant also to jurisdictional or admissibility objections,³ and to counterclaims by the host state.⁴ Jarrett thereafter identifies the three above-mentioned ‘defences’ founded on investor misconduct or contribution to injury (‘mismanagement’, ‘investment reprisal’ and ‘post-establishment illegality’), with the contents and implications of these defences drawn out in chapters 4 and 5. This is followed in chapter 6 by a summary and ‘restatement’ of the principles applicable to analysing the relevance of an investor’s alleged contributory fault or misconduct to a state’s responsibility in an investor–state arbitration claim.

³ See, especially, Newcombe, ‘Investor Misconduct’ in A. L. C. De Mestral and C. Levesque (eds), *Improving International Investment Agreements* (2014) 195; Newcombe, ‘Investor Misconduct: Jurisdiction, Admissibility or Merits’, in C. Brown and K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2011) 187.

⁴ See, e.g., Rivas, ‘ICSID Treaty Counterclaims: Case Law and Treaty Evolution’, in J. Kalicki and A. Joubin-Bret (eds), *Reshaping the Investor–State Dispute Settlement System: Journeys for the 21st Century* (2015) 779; Bjorklund, ‘The Role of Counterclaims in Rebalancing Investment Law’, 17 *Lewis and Clark Law Review* (2013) 461; de Brabandere, ‘Human Rights Counterclaims in Investment Treaty Arbitration’ (Grotius Centre Working Paper Series 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264167.

This book will appeal to those engaged with investment treaty law and arbitration, but also to scholars of international law more broadly. For those engaged with investment treaty law, the book's appeal lies primarily in its contributions to the growing literature directed towards reforming and rebalancing investment treaties. The book grapples in detail with one way to achieve such a rebalancing, focusing specifically on how an investor's conduct might impact its chances of succeeding in an investor–state arbitration claim under an investment treaty. The book will likely also appeal to those engaged with international law more broadly because it develops a framework for analysing the concept of causation – a topic relatively under-theorized in international law scholarship. Three features of the book are particularly noteworthy, as considered in the sections below.

2 Approaching Investment Law Based on Principle, Rather than Authority

One of the book's distinguishing features is the approach used by Jarrett to investigate the impact of investor misconduct on investment claims. Jarrett works from first principles rather than basing his analysis on existing doctrinal categories or extensive case references. This approach distinguishes the book from existing scholarly analyses of contributory fault, which have largely reasoned from precedent, doctrine and/or trends in case law. Jarrett's methodology is introduced in chapter 1, in which he notes that 'there is an existing body of jurisprudence on contributory fault and investor misconduct' which is 'disorganised and underdeveloped' (at 2). He adopts the view that much existing analysis of the issues addressed in the book 'is ultimately a house of cards built on appeals to authority' (at 2). Rather than basing his analysis on similar appeals to authority, Jarrett focuses instead on returning to 'the fundamentals' to 'create a new paradigm for contributory fault and investor misconduct' (at 2). This is achieved through extended theoretical and conceptual analysis drawing on domestic legal rules,⁵ legal-philosophical literature and general rules of international law. This distinctive methodology is both a strength and a weakness of the work.

The methodology is a strength because it results in a principled and (for the most part) nuanced analysis of the implications of investor misconduct for state responsibility in investor–state claims. Restatements of rules and principles are incorporated throughout the book in an approach – particularly in chapter 6 – that bears resemblance to that taken by Zachary Douglas in his well-known text on investment law.⁶ Chapter 6 sets out a series of 'rules' relevant to each of the identified defences, detailing their proposed elements and impact on investment claims. This includes, for example, the following proposed 'rules' on 'investment reprisal' (at 163):

⁵ Jarrett draws particularly on Anglo-American and German law – perhaps reflecting his background and training as an Australian working in Germany.

⁶ Z. Douglas, *The International Law of Investment Claims* (2009).

Rule 1 – Investment Reprisal

It is a defence to any breach of an investment treaty by the host state if such breach is motivated by conduct of the investor that amounts to an affront to the host state's sovereignty.

Rule 2 – Investment Reprisal

If the host state's conduct which constitutes its breach:

- (i) achieves proportionate restitution, then its liability is eliminated; or
- (ii) exceeds proportionate restitution, then its liability is reduced by an amount that reflects any gains that the investor made and any losses that the host state incurred on account of the affront to its sovereignty.

This follows earlier chapters in which these various elements and impacts are subjected to sustained analysis and refinement. These rules respond directly to what Jarrett observes is a notable 'absence of any rules on the topic of investor misconduct in the new generation of investment treaties' (at 2). The strength of the approach is that it produces practical guidance based on a detailed engagement with the conceptual structure and function of the three identified investor misconduct defences. This produce tangible reform options for states and international organizations considering how to 'rebalance' this area of law. The approach also frees Jarrett from path dependency, insofar as his analysis is not limited by the approaches adopted by tribunals and stakeholders to date, allowing him to proceed instead from a more theoretical and principled perspective.

The approach nonetheless has its weaknesses, insofar as it places greater emphasis on principles and theory than on closely analysing investment-specific examples or on integrating existing scholarly and adjudicative analyses of these issues with Jarrett's own. Jarrett is cognizant of these limitations in his methodology, which follow from his desire to set aside the existing 'walls of jurisprudence' (at 2) to place the identified defences on 'firmer theoretical foundations', '[r]ather than substantiating [the] position by citing the practice of arbitral tribunals' (at 160). More extensive engagement with the existing case law might nonetheless have been consistent with this aim because it would have helped to further draw out the contours and distinctiveness of Jarrett's proposed defences. Many of the rules distilled throughout the book, for instance, are illustrated with examples from outside the investment law context. In chapter 2, for example, Jarrett illustrates the nature of defences and exceptions by reference to a 'rule' providing that '[a] student must not arrive late to class' (at 35). Using more hypothetical investment law examples might have better illustrated the application and implications of the rules being developed. Closer engagement with arbitral analyses of these issues would also have helped to draw out the potential role for Jarrett's proposed defences and highlight his contribution. For example, while Jarrett cites the *Burlington* proceedings to discuss the requirements for counterclaims (at 115, 149) and to draw out the distinction between defences and denials (at 33), he does not draw on the analysis of contributory fault conducted by that tribunal.⁷ In *Burlington*, the tribunal analysed investor misconduct as relevant to remedies, noting

⁷ *Burlington Resources v. Ecuador – Decision on Reconsideration and Award*, 7 February 2017, ICSID Case No. ARB/08/5, ¶¶ 548–585.

that '[i]t is undisputed that a claimant's conduct may justify an exclusion or reduction of damages if it has contributed to the injury'.⁸ The tribunal connected this to principles of causation, to examine the 'chain of causation between the wrongful conduct and the injury'⁹ in order to determine whether 'some part of the [investor's] injury can be shown to be severable in causal terms from that attributed to the responsible state'.¹⁰ The tribunal ultimately determined, *inter alia*, that even if the investor's conduct 'were considered to be one of the factors in the chain of events that eventually culminated [in the wrongful conduct] . . . it is neither the triggering factor, nor the decisive factor'.¹¹ This reasoning of the tribunal links closely to – and provides relevant counterpoints for – approaches proposed by Jarrett in the book. It might have provided a useful counterpoint, for instance, to Jarrett's position that analysis of investor misconduct is relevant to defences to liability rather than the analysis of remedies. So, too, engagement with the analysis of tribunals (including the *Burlington* analysis) would have helped Jarrett to illustrate the practical application of his approach to analysing causation, including to break up some of the dense theoretical discussion throughout the book. Indeed, the passages in the book where Jarrett does engage with cases relevant to contributory fault or investor misconduct (e.g., at 137) assist to draw out key principles and illustrate the limitations of existing analyses. More specific and detailed references to arbitral analyses would also have helped Jarrett to better anticipate potential objections to his argument and improve the likelihood of it having traction in future arbitration proceedings. This was particularly the case for Jarrett's 'investment reprisal' defence, according to which it would be a defence for the state to 'exact revenge' on an investor for 'some blameworthy conduct performed by the investor' (at 110, 115). While Jarrett notes that 'there are a growing number of arbitral awards in which it has been implicitly found' (at 111), the exact contours of that 'growing' jurisprudence are not clearly identified. This makes it difficult to appraise whether the defence of reprisal has already achieved some acceptance amongst tribunals or other stakeholders, and, if so, how far Jarrett's proposal deviates from such existing recognition. Better integrating the proposed defences with existing case law and literature would have clarified their content whilst also facilitating the ease with which tribunals, practitioners and treaty negotiators could make use of Jarrett's proposed approaches in practice.

3 Connecting Investor Misconduct to Principles of Causation

A second key feature of the book is Jarrett's serious conceptual engagement with issues of causation. This makes the book relevant to both investment and international

⁸ *Ibid.*, ¶ 572.

⁹ *Ibid.*, ¶ 579.

¹⁰ *Ibid.*, ¶ 574.

¹¹ *Ibid.*, ¶ 580.

lawyers more generally. As Jarrett notes: 'Contributory fault is saturated with causation because, at its core, lies one essential ingredient: the claimant also causes the relevant loss. It follows that to acquire an understanding of contributory fault, an understanding of causation is a prerequisite' (at 43). The detailed discussion of causation in chapter 3 provides a particularly useful analytical frame to distinguish between the defences identified in the book. This chapter sets out a 'taxonomy' of consequences, to identify 'organic', 'physical circumstance', 'physical conduct', 'mental', 'legal circumstance', 'legal conduct' and 'artificial' consequences (at 60–62). From there, Jarrett argues that causation in law is 'continuous'. Jarrett's conceptual understanding of causation is illustrated at length with examples of the causal constellations that might lead to the various consequences identified in the taxonomy (at 63–76). This discussion sets the stage for an analysis of when causal responsibility might be justifiably transferred to an individual (in Jarrett's case, an investor) who has made some contribution to a causal constellation, or otherwise allocated between two or more individuals (investors and/or state officials) making their own separate causal contributions to a given situation (at 76–77). Jarrett's extended engagement with the concept of causation holds direct relevance to the subject of the book, because it generates a distinction between the three defences based upon whether (and how) investor misconduct has contributed to the 'causal constellation' giving rise to an investment claim.

Jarrett uses this analysis of causation to develop a strong and insightful conceptual framework for understanding contributory fault in investment law. The reader has to do some work to identify the centrality and consequences of causation in this analysis. This is partially a result of the book's structure (which lacks an introductory chapter to frame the contribution relative to causation), but also due to the examples selected to illustrate the complex principles of causation in chapter 3 (some of which are targeted to the analysis of how causal responsibility can be shifted to states for the conduct of third parties, rather than to investors for their contributory fault).¹² Nevertheless, Jarrett's book convincingly demonstrates how causation impacts the analysis of investor misconduct in assessing a state's responsibility for breach of an investment treaty. The first implication of the analysis of causation is that the defences of 'mismanagement' and 'investment reprisal' emerge as 'subspecies of contributory fault', while the defence of 'post-investment illegality' becomes 'an entirely separate species' of defence (at 79). Whereas the conduct at issue in the former two defences operates as part of the 'causal constellation', giving rise to an internationally wrongful act, the conduct forming the focus of the latter defence sits outside of this constellation. The second, related, implication is that investment mismanagement and reprisal can also be distinguished based upon the role of the investor's conduct in contributing to its injury. Jarrett conceives of investment mismanagement as a situation in which 'the investor performs a direct causal contribution with respect to its investment loss with subjective or objective foresight of this consequence' (at 93). For this defence, the investor's misconduct becomes 'part of the causal constellation for the investor's loss' (at 79), as a 'cause-prevention omission' (at 60). Investment reprisal, by contrast, is characterized as an 'indirect'

¹² See, e.g., at 77 (focusing on when causal responsibility for rioting might be justifiably transferred to a host state).

contribution, in which the investor's misconduct does not directly contribute to, but rather 'sits behind [the causal] constellation' for the investor's loss (at 79). This defence follows the investor's 'failure to perform some conduct which, if performed, would have avoided the occurrence of the relevant consequence' (at 58), making it a 'consequence-avoidance omission' (at 60). Jarrett's analysis of causation thus gives structure to the analysis of the function of each defence, and the role of investor misconduct in the resulting apportionment of liability.

Causation supplies the conceptual thread that binds much of the analysis in the book together, and the careful connection of causation to contributory fault is one of the book's core and most significant contributions. It also gives the book potential relevance beyond its primary field of investment law. The issue of causation is, in particular, central to many aspects of the law of state responsibility. Causation is of particular relevance to the analysis of reparations for internationally wrongful acts, the contribution of states to circumstances precluding wrongfulness (including, for instance, circumstances of necessity) and complicity and joint responsibility (including the allocation of responsibility between states and international organizations). The role of causation in each of these contexts has been largely underdeveloped in existing literature.¹³ Jarrett's conceptual framework may therefore offer a useful basis for future analyses of causation in other areas of international law.

Moreover, Jarrett connects his analysis of causation to the attribution and imputation of conduct and knowledge to both investors and states. As he notes, for example, '[a]s a form of provocation, it follows that investment reprisal's link legal element requires that the investor's affront to state sovereignty must have motivated the host state's breach' (at 131). This causes Jarrett to ask: 'if only some members of the parliament know of the investor's conduct and vote [for a reprisal] on the basis of it, can their motivation be imputed to the host state?' (at 132). He concludes, 'if pressed to answer' this question, that 'the person with this knowledge would have to form part of the voting block that brings the relevant law into being for his or her motivation to be imputed' to the state (at 132). Jarrett thus connects principles of causation to the analysis of the knowledge of individual state officials about investor misconduct, holding that such knowledge should be imputed to the state only where those officials contribute in some way to the state adopting an 'investment reprisal'. This discussion again holds relevance outside of the investment context because it raises (though does not always resolve)¹⁴ key issues associated with attributing conduct

¹³ But see N. Voulgaris, *Allocating International Responsibility between Member States and International Organisations* (2019); D. Puszatai, 'Causation in the Law of State Responsibility' (2017) (Cambridge University, Ph.D. Thesis on file at <https://www.repository.cam.ac.uk/handle/1810/267922>).

¹⁴ While the discussion engages closely with some of the key difficulties that might be raised in applying the proposed defences (many of which pivot on investor or state knowledge of particular consequences), this discussion could have been strengthened through a closer engagement with the (admittedly relatively sparse) literature concerning how rules on attribution for internationally wrongful conduct might relate to the rules relevant for imputing knowledge and conduct in other circumstances. See, especially, J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002). See, for example, on the imputation of obligations in the context of analysing umbrella clauses: Feit, 'Attribution and the Umbrella Clause: Is There a Way Out of the Deadlock?', 21 *Minnesota Journal of International Law* (2012) 21.

and knowledge to states and investors, including issues arising from analysing the knowledge and conduct of these actors in a unitary versus a disaggregated way. While readers will need to extrapolate from Jarrett's analysis to draw conclusions of relevance to these issues, his conceptual framework sets up a potentially useful baseline for such further analysis.

4 Towards More Rational and Reasoned Liability Analysis in Cases of Investor Misconduct

Jarrett's analysis holds important implications for the apportionment of liability between states and investors for their contribution to the injury at issue in an investor–state claim. As Jarrett notes, the close connection between the three defences and principles of causation means that 'the default practice of intuitively picking a percentage [of responsibility] can be a thing of the past' (at 162). For mismanagement, for example, Jarrett develops a theory of 'restitutionary apportionment' to guide the delineation of liability between the investor and host state. This theory of apportionment begins from a starting point according to which, when mismanagement is found, the host state has 'liability of 0 percent' (at 95). This outcome reflects that the relationship between the investor's misconduct and the injury is such that 'causal responsibility for the action that should have been prevented [the investor's loss] is transferred from the performer of that action [the state] to the non-performing person [the investor]' (at 60). Jarrett recognizes, however, that 'mismanagement gives an undeserved gain to the host state' because it lets 'the host state take advantage of the economic benefits that the investor brings without being accountable for its own wrongful conduct' (at 95). As such, the host state becomes 'fully liable for all the direct contributions that the investor makes to its economy' (at 95) and partially responsible 'for net income from indirect contributions' (e.g. income or transaction tax payments) (at 96). The latter are subject to adjustment to reflect an apportionment of 'liability according to the degree of political risk', which is determined based upon how foreseeable and likely the state's conduct was at the time the investor made its investment (at 96). Jarrett contends that this approach 'accurately approximates the disputants' share of liability in accordance with defensible principles' (at 98).

The main criticism that might be levelled against such an approach relates to its complexity. The adoption of Jarrett's apportionment rules would, in particular, necessitate a very close analysis by tribunals of a range of different factors and underlying assumptions. This in practice would likely resemble the quantum analyses undertaken by investment tribunals, and would likely require at least some reliance upon the opinions of experts from other fields.¹⁵ Jarrett anticipates this criticism of his approach, noting that: '[o]bjections might be made to its complexity, but these

¹⁵ See, also Aisbett and Bonnitca, 'Compensation Under Investment Treaties – As If Host Interests Mattered' (UNSW Law Research Paper No. 80, 2018).

should be disregarded on account of the truism that complexity is often a necessary incidental of developing the law' (at 109). The strengths and weaknesses of Jarrett's approach (detailed above) become particularly evident in the complex rules of apportionment that result from his analysis. On the one hand, Jarrett's approach allows him to distil 'rules' to guide such assessments. Regardless of whether one agrees with the ultimate principles of apportionment developed by Jarrett, the development of such a framework by reference to first principles produces an arguably 'more doctrinally sound' and 'rational' approach to apportionment than is currently adopted in cases of treaty breach where an investor has in some way contributed to the 'causal constellation' giving rise to its loss (at 98). On the other hand, additional practical commentary and guidelines might be required to put such rules into operation in practice. It might therefore be hoped that Jarrett's framework for analysing contributory fault and investor misconduct will be taken up and developed in future works, including to appraise existing and emerging arbitral case law. Such work will be particularly relevant to parties to investment proceedings given that, as Jarrett notes, 'a failure to provide reasons to support how liability should be divided is potentially a ground for challenging an arbitral award' (at 162).

5 Conclusion

Jarrett's book contributes a conceptual framework relevant to understanding the role of defences in investor–state arbitration, as well as rules for apportioning responsibility between investors and states in that context. Through its principled engagement with the difficult issues associated with apportioning responsibility in investment claims, this book joins a burgeoning literature that engages seriously with options to reform investment treaties. By focusing specifically on issues of responsibility, including the apportionment of financial liability for investor loss, the book differs from most other reform-oriented literature relevant to investment arbitration, which to date has typically focused largely on procedural reforms, the adjustment of jurisdictional provisions and a recalibration of substantive standards of protection.¹⁶ As Jarrett demonstrates, there is much scope for a more nuanced and principled analysis of possible reform options to rebalance investment treaties. While the book certainly speaks to this literature, the text could have been strengthened by inclusion of an introduction to draw these themes together more clearly and to position the work in relation to this broader body of scholarship. Readers might find it most fruitful to begin the book with the conclusion, which sets out the overarching thrust of the analysis, and provides a clear roadmap detailing the interaction between the chapters. I would also have liked in some cases to see greater justification and analysis of some of the conclusions reached,

¹⁶ See, generally, descriptions of this reform-oriented literature in Caron and Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences', in G. Ulfstein and A. Føllesdal (eds), *The Judicialization of International Law – A Mixed Blessing?* (2018) 150; Paine, 'The Project of System-Internal Reform in International Investment Law: An Appraisal', *Journal of International Dispute Settlement* (2015) 332.

especially those related to the application of rules of general international law to these issues.¹⁷ This notwithstanding, the book offers a thought-provoking contribution to the literature on international investment law. It provides a rich, novel and interesting study of how investor misconduct ought to factor into the analysis of state responsibility in investor–state arbitration claims. Jarrett offers rules that could conceivably form a basis for future debate and reforms, underpinned by a detailed discussion that grapples with the structure, content and implications of such rules for investment claims. The wide-ranging discussion will appeal to those engaged with investment law, but also more broadly to international lawyers grappling with issues of causation in other contexts. Jarrett adds depth to existing analyses of investor misconduct and delivers on his intention of removing the guesswork associated with apportioning responsibility in cases of investor misconduct, to transform ‘the concepts of contributory fault and investor misconduct from a state of primitivism to one of development’ (at 164).

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Maria Elander. ***Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal***. Abingdon: Routledge, 2018. Pp. 195. £31.19. ISBN: 9781138242302

1 Introduction

Showcased at Choeung Ek – the so-called ‘killing fields’ outside of Cambodia’s capital Phnom Penh – are rows upon rows of human skulls. The skulls are quite literally showcased: enclosed in glass cases, thousands of mottled, milky-white to brown-coloured bone pieces are displayed before the visitors to this key site of the Cambodian genocide. The tooth fragments of one skull rest on a cranium beneath. Equally distressing are the photographs of prisoners, most of them tortured and executed, hanging on the walls of the famous S-21 Prison in Cambodia’s capital Phnom Penh. The mug shots of over a hundred former prisoners, taken when they were first brought into the complex, can be viewed in what is now the Tuol Sleng Genocide Museum. These sites of victimhood are major tourist destinations. Choeung Ek and Tuol Sleng rank globally at number five on a ‘dark tourism’ website, where destinations

¹⁷ Especially, for example, on the role of investors as treaty parties or third-party beneficiaries/obligees under the law of treaties (at 112–113); on the distinction between the concepts of ‘liability’ and ‘responsibility’; and on the distinction between principles of attribution for internationally wrongful conduct, as opposed to those applicable to the attribution or imputation of knowledge and conduct in other circumstances (e.g. at 103, 132, 147).