slaughter of civilians. While, legally, the Yamashita case is consistent with the limitation contained within the Nuremberg principles, it is, as General Taylor recognizes, morally imperative that the leaders of the United States Army (whether aggressors or not) be subjected to the same standards by their own military courts.

The author has raised these issues candidly. That he has done so is evidence, as was the trial of Calley, of the spirit of self-criticism that still makes his country a realizable vision.

—D. C. McDONALD*

*B.A. (Alta.), M.A., B.C.L. (Oxon), partner of McCuaig Desrochers, Edmonton, Alberta.

THE CANADIAN YEARBOOK OF INTERNATIONAL LAW. Vol. 8. Edited by C. B. Bourne. Published under the auspices of The Canadian Branch, International Law Association. Vancouver, B.C.: University of British Columbia. 1970. Pp. 429. $14.

The collection maintains the high standard set by the previous volumes in the series of the *Canadian Yearbook*. This eighth volume upholds the excellence of the quality of presentation both in respect of the subject matter covered, as well as in pursuance of the systematic rendering of Canadian thought and practice in Public International Law and Conflicts of Law.

The present "mixed bag" includes, in the main section: two Canadian perspectives specifically devoted to the International Court of Justice and to the U.S. Anti-Trust Laws; two articles in French, on international regional co-operation for the development of the law of Direct Satellite Broadcasting, and on the problem of the Arctic, both in terms of technical progress and pollution, as well as in light of the recent developments in the Canadian law of the sea; also, the collection contains an examination, in one study, of the defence of Superior Orders; in another, of the concept of Consensus as it relates to public international law; followed by an essay on the perennial problem of Succession to Treaties. In the *Notes and Comments* section there are four contributions covering such diverse areas as the Revision of the 1929 Warsaw Convention; the International Control Commission in Cambodia; Commonwealth "extradition"; and international adjudication. There is the customary annual review of Canadian Practice and Digest of Important Cases covering the year 1969.

The article by Dean Macdonald on the April 1970 New Canadian Declaration as it relates to Canada's acceptance of the compulsory jurisdiction of the International Court of Justice, commences by tracing the development of the system of the "Optional Clause" in the jurisprudence of both the Permanent Court of Justice and the International Court of Justice. It next examines in some detail the Canadian Reservations, more specifically, in terms of Article 36 of the Statute of the International Court of Justice. The author reviews, at some length, the principle of reciprocity; notice of termination of acceptance; the question of applicability as it relates to disputes arising subsequent to the declaration; recourse to some other method of peaceful settle-

ment; the so-called *inter se* doctrine (as applied to Commonwealth members); the question of "domestic jurisdiction"; and the two subject matter reservations; on pollution and the living resources of the sea; and on the right to add, to amend or withdraw any of the foregoing reservations. The author's conclusion is that he finds it unobjectionable that Canada has in its new Declaration retained the phrase on condition of reciprocity. Similarly, though he concedes that a State that reserves the right to terminate on notice is clearly in an advantageous position to opt in or out of the system of compulsory jurisdiction as its interest dictates, and even though this seems "contrary to the purpose of the Optional Clause", nevertheless, his only criticism of the new Declaration in this respect is that it was not as enlightened as the one forty years ago. However, he feels that it "would be more consistent with Canada's commitment to the system of the Optional Clause to abandon the present vague reservation, *ratione temporis,* for one which excluded particular disputes or categories of disputes". It would not be incorrect to interpret his position, influenced presumably by present Canadian public opinion, as being that of devising "a compromise that will favour the system of compulsory jurisdiction while safeguarding felt national interests", even if this would be somewhat difficult to achieve.

He is clearly correct in concluding that "Commonwealth relations can probably be strengthened, not weakened, by referring to the Court more, rather than fewer appropriate international disputes." As for the "domestic jurisdiction" clause, he feels this is merely a declaration of international law and Canada should omit it from its new Declaration. His only stricture against this additional new Canadian reservation on pollution and the living resources of the sea is that "there is a price to be paid for such a reservation". One would have liked to know what Dean Macdonald's thoughts are on such questions as the claim put on behalf of the Canadian government that the applicable law in this field was undeveloped, and that a failure to achieve a satisfactory agreement at an international level gave a State the right to act unilaterally, moreso, where the question is of such scope as to be of world-wide interest. It is submitted that Dean Macdonald's criticism of reservations which give "a right to vary the scope of the declaration at any time during its pendancy by giving notice" on the ground that it brings about uncertainty is clearly valid. Finally, it goes to Dean Macdonald's credit that he is prepared to offer a suggested Canadian Declaration as an alternative.

Professor L. C. Green in his article on *Superior Orders and the Reasonable Man* deals in an adequate fashion with the perennial question of the defence of Superior Orders. The Nuremberg Judgment had specifically rejected the defence of Superior Orders when dealing with war crimes as being contrary to international law. However, recent events, particularly in Vietnam, have resurrected the whole question anew, both from the wider perspective of public international law and domestic municipal law. The whole question, even in municipal law, revolves around what is in fact an "unlawful order". The courts, no doubt, concern themselves in trying to discover this and utilize the objective test of "reasonableness", with expressions such as "manifestly unlawful", "exceeding the limits imposed by law", "illegal on its face", "clearly illegal", "palpably unlawful" as merely aids in its discernment.

Not everyone will agree with the author's conclusion that to decide what is "palpably unlawful", the standard of measurement depends on whether the accused is a civilian or a soldier, and that in situations essentially military in character, palpability must be looked at from the reasonable soldier's point of view. An alternative approach, particularly where war crimes are alleged, would be to treat soldiers and civilians alike and apply the usual objective test of reasonableness, moreso as it is usually asserted that superior order is not a defence because of a rule of fundamental criminal justice adopted by civilized nations.

The fourth paper, *On Consensus,* by Professor Anthony D'Amato, deals with a topic which is both jurisprudentially and in terms of the progressive development of international law most relevant, particularly when viewed from the activities of the U.N. General Assembly purporting to declare and proclaim the existence of various rules of international law binding on all states. The author poses the question whether "consensus" is "indeed the answer to the convoluted controversy over the "sources" of international law?" He indicates that it would "be helpful to distinguish four possible lines of "consensus"—(1) complete unanimity; (2) near-unanimity with few abstentions; (3) near-unanimity with one or more active dissents; (4) and majority opinion with substantial minority disagreement." He contends that in the first category the only problem that arises is that of "ascertaining whether the subscribed declaration purports to be expressive of a current rule of international law that the states agree is legal." In the situation of majority opinion with substantial minority disagreement he finds it difficult to consider majority opinion as constitutive of "consensus". As for near-unanimity with few abstentions he feels that current international legal thinking is that some abstentions would not operate to destroy the universal application of the rule, reliance being placed on the doctrine of estoppel working against those abstaining. The final category is the one that poses the greatest difficulty. In that situation the result is that dissent by such states it is held does not create law. The answer to how this comes about, Professor D'Amato suggests, is that "consensus" is not a law-creating process, even though it is often conveniently referred to as such. According to him consensus —the inference we draw from the process of international communication about norms—is international law; what states believe to be law in law. The illuminating analysis carried out by Professor D'Amato founders on his inability to adequately deal with the late Judge Lauterpacht's observation that "if universal acceptance is the hallmark of the existence of a rule of international law, how many rules of international law can there be said to be in effective existence?"[1]

The fifth study by Okon Udokang, while concerned primarily with treaty succession in the Commonwealth countries and the French system, also presents an analysis of the position of the new states in respect to questions of treaty succession. The author's conclusion is that "practice is on the whole inconsistent; some have acknowledged succession to certain treaties while denying it in respect of others. As a result, the number and character of treaties selected by each new state appear to be governed less by the terms of any devolution agreement that may have existed than by considerations of national policy, and

[1] Lauterpacht, *The Development of International Law by the International Court* at 191 (1958).

more particularly by the nature and object of each treaty." Recent attitudes of new states to the question of the legal validity of the devolution of treaties (particularly in the sessions of the International Law Commission) has, by implication assimilated devolution treaties to the category of unequal treaties. The author's argument that "this particular conception of inheritance agreements may well be one of the crucial determinants of the policy attitudes of the new states toward the problem of state succession in general" is especially deserving of attention.

As for the study on the *United States Antitrust Laws: A Canadian Viewpoint,* D. H. W. Henry Q.C., is well qualified by reason of his association with the Investigation and Research Branch under the Combines Investigation Act for such an undertaking. A commendable feature is the author's review, not only of the reports of several important public inquiries—the Report of the Task Force on Foreign Ownership and the Structure of Canadian Industry (Watkins Report); the Interim Report of the Economic Council of Canada on Competition Policy; the Royal Commission's Special Report on Prices (Farm Machinery)—but also, of the case-law on the extra-territorial application of U.S. Anti-trust laws. Few will disagree with the author's conclusion that "Canada has a real opportunity for continuing initiative" in this area by following "the present model of Canadian-United States Antitrust Notification and Consultation Procedure".

It is not possible to comment on all the Notes and Comments and other furnishings in this volume. Suffice to say that Professor Polieu Dai examines in some detail Canada's role in the International Commission for Supervision and Control in Cambodia. He reviews the terms of the Agreement establishing the International Commission in Cambodia, as well as its implementation. There is little criticism to offer save that the author documents extensively the positions of the various members of the International Commission, particularly on the investigatory role of the International Commission, without in fact commenting on the correctness or otherwise of their attitudes. Further, he feels optimistic that Canada may yet have an important role to play. However, recent events would seem to question his feelings of optimism.

In the section on current Canadian Practice in International Law that deals with Outer Space, the Canadian position, as outlined by the Canadian Alternative Representative to the U.N. Legal Sub-committee on Pacific Uses of Outer Space, on the definition of outer space is that Canada is not "convinced that there is yet a compelling need for a linear definition of outer space." Besides the foregoing, Canada contends that "rapid advances in the fabrication of heat-resistant materials, the need not to compromise some new and as yet unforeseen utilization of outer space", leads her to believe that it might be premature to do more than merely study the matter in the Sub-committee.

—MOHAMED ALI ADAM*

*M.A. (Oxon); of Lincoln's Inn, Barrister-at-Law; Advocate of the High Court of Southern Rhodesia; Crown Prosecutor, Alberta Attorney-General's Department; LL.M. Candidate, Faculty of Law, The University of Alberta.