international law (at 106–107); realism for advancing 'myths' about the aggressiveness of human nature that may prove 'devastating for human coexistence' (at 110); axiologism for thinking too much about the law as it should be (at 112); deconstructionism for being 'too logical' to be mindful of common sense and practical knowledge (at 114); sociologism for being too ready to believe in the existence of a 'harmonious society' (at 122); constitutionalism for its prescriptive overtones (124–126); administrativism for promoting a 'technocratic project' aimed at concealing rather than constraining power (at 129); third-worldism for 'stating the obvious', when it claims that international law reflects the interests of the powerful, and for its 'misconceived' analyses aimed at 'smuggling for legal what is a political claim' (at 131–132). Focarelli then suggests that international legal science should set itself the task of 'remythologizing' international law 'by investigating all the legal traditions known in comparative legal analysis, rather than on (Western) jurisprudential grounds' (at 140). His book could thus be seen as a provisional *remythologization* of international law as a social construct firmly grounded in humankind's mythic belief in the existence of a state-centred (and West-dominated) international community which determines the sources, expresses the values, and churns out the rules of its law. 'How people construct social reality is at the heart of international law', Focarelli writes on the book's last page. This statement is not warranted by social reality itself. It is, in fact, a myth. 'The struggle is for the *reality* of the law – presumably shared by most people – as it is, however uncomfortable' (at 497). But who is lying to whom about international law's reality? How can one tell the truth from a lie, if 'beliefs' are all important? Moreover, it can be surmised that the not-so-unorthodox image of international law emerging from Part II of the book would have been much more uncomfortable, ill-defined, and fractured had it not been filtered by the author's *esprit de géométrie* and a dense layer of doctrinal rationalizations. What ultimately grounds the international law edifice depicted by Focarelli is not so much a collection of social facts as the author's espousal of a positive anthropology whose Hobbesian–Freudian traits – overemphasized in Part I of the book in order to pull the rug from under the realist's feet – end up being muffled in enlightened reason and noble sentiment. Human behaviour is determined not only by fear (or death drives) but also by a sense of 'wonder', which 'advises people that love is the key to life' while 'nourishing a cosmopolitan, even sacred sense of humanity' (at 493). Remember the investigation into the epigraph's origin and meaning, Jean Piaget, and his young interviewee named Rou? Focarelli's international law *is* like a mountain, in which impenetrable stone (a metaphor for power) enchantingly blends with a child's poetic imagination. It is, *mutatis mutandis*, very much like Rou's mountain: the brainchild of one of the most learned international lawyers of his generation, 'for the moon to set behind'.

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Philipp Dann. ***The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany***. Cambridge: Cambridge University Press, 2013. Pp. 604. $130. ISBN: 9781107020290. [First published in German by Mohr Siebeck in 2012.]

Philipp Dann has long been committed to the legal issues of international development cooperation, and now his monograph on this subject, originally written in German, has been published

in English.[1] The comprehensive monograph entitled *The Law of Development Cooperation* skilfully builds upon the knowledge that already exists on this topic and systematizes an enormous amount of relevant literature. The reader is presented with a stimulating text that is dense in terms of its arguments and yet easy to engage with.

The book is indeed a monumental piece of writing. Not only does it attempt to glue together the whole array of relevant regulations into a common legal framework that applies to development cooperation,[2] but it also contextualizes simultaneously this framework with past and present debates about law and development. Hence, the task of the book is immense by any measure, and it clearly runs a risk of not striking the right balance between the breadth and the depth of the argument. However, Dann masters this challenge well. The book can be treated as both a thorough research handbook on legal aspects of international development cooperation and, at the same time, as an academic contribution that contains a plausible set of arguments. While the encyclopaedic element of the monograph is arguably of great value in itself, the following review will engage with two central claims of the book that are proposing new perspectives to the academic debate.[3]

The argument that the 'law of development cooperation' should be regarded as a distinct field of study in international law is a common thread that runs throughout the entire book. To posit that development cooperation is the subject of a body of international law may encounter criticism. It might seem as an attempt to legalize something that is by definition political and that should be left primarily to diplomacy and inter-state negotiations. However, in his work, Dann does not linger much upon the abstract dichotomy between international law and international relations.[4] Instead, his position is firmly grounded in real-life practices and regulations, rather than in theoretical ideals. His mode of reasoning is inductive, and his starting point is the comparative analysis of rules applicable to, and applied by, three institutional donors: the World Bank (global), the European Union (regional) and Germany (bilateral).[5] By taking norms and practices as a starting point, Dann is tacitly bypassing many of the critiques that could be addressed at him from the more conservative end of international legal studies. Moreover, those

[1] On conceptual issues of development cooperation, see, e.g., Dann, 'Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight', 44 *Archiv des Völkerrechts* (2006) 381–404; Dann 'Solidarity and the Law of Development Cooperation', in R. Wolfrum and C. Kojima (eds), *Solidarity: A Structural Principle of International Law* (2010), at 55–77. On a more specific analysis of certain aspects of development cooperation, see, e.g., P. Dann 'The World Bank's Program for Results Financing: Timid Instrument for the "Age of Choice"?' (Draft text for the workshop 'Innovation in the Governance of Development Finance', Giessen/New York University, April 2013), available at http://www.iilj.org/newsandevents/documents/dann.pdf (last accessed 12 May 2014).

[2] Different ways of naming the same phenomenon often underline authors' understanding about their respective field, which is significant in the context of this book. In this review, the most popular terms such as 'development financing', 'development cooperation' and 'development aid' will be used interchangeably.

[3] There are several relatively recent essay collections that are important in this debate, for instance, D.D. Bradlow and D.B. Hunter (eds), *International Law and the Operations of the International Financial Institutions* (2010); J. Faúndez and C. Tan (eds), *International Economic Law, Globalization and Developing Countries* (2010); and D.D. Bradlow, H. Cisse and B. Kingsbury, *The World Bank Legal Review,* volume 3: *International Financial Institutions and Global Legal Governance* (2012) (all of which contain ideas that can be justly considered as 'cutting edge' in the area and, therefore, serve as a benchmark for Dann's arguments).

[4] In his introduction, he lists the 'reasons for reluctance of lawyers' as well as the 'chances' that such engagement would create (at 27–32). In addition, he also refers throughout the book to the complex links between law and politics (at 17–21, 24, 239–243, 259–262). However, nowhere in the argument does he explicitly explain his understanding about the link between the two disciplines.

[5] He calls this kind of analysis the 'institutional turn' in law and development studies, which is best understood as an off-spring of legal approaches to global governance (at 9–12).

concerned with the rule of law in the context of development cooperation will be willing to engage with him despite a certain lack of deeper theoretical justifications for positing an international law framework for development cooperation.

Rather early in his book, Philipp Dann delineates his field of study. He ties it to the notion of official development assistance (ODA), which means focusing on the institutions of a public nature and transferring public funds. He explicitly excludes related private transactions and complexities that arise from mixing ODA with private sector investments.[6] Although he recognizes the trend to merge private and public capital in development cooperation (at 18–21), he nevertheless holds such clear-cut delimitation between public and private to be necessary for him to employ what he calls the 'public law approach'.[7] In summary, we can track the following specificities of Dann's project that allows us to position his argument in the larger discourse on development and law. First, the subject matter of his 'law of development cooperation' is limited to public institutions and their capital flows, as opposed to the greater realm of development financing that also involves capital transfers by private actors. Second, he employs an institutional perspective, focusing on the procedural aspects of law.[8] Third, he considers the sources of this field to be found primarily in (public) international law and only to some extent in domestic legal systems.[9]

Thus far, there have been several strands of academic literature, which have attempted to conceptualize a distinct field that covers both (international) law and development studies. Several decades ago the law and development movement (which Dann acknowledges as a scholarly pioneer of his endeavour) attempted to merge the two areas of study (at 18). Nevertheless, this early literature mainly focused on the role of domestic law in aid recipient countries, following an instrumental or functionalist rationale similar to that of law and economics.[10] Another related field of study that Dann also mentions in his book, which accommodates a vast variety of scholars, can be referred to as international development law.[11] As the name suggests, a major difference

[6] This is exactly where his approach differs considerably from another relatively recent scholarly attempt to define the legal field pertaining to development financing, proposed by Kevin E. Davis. See Davis, 'Financing Development as a Field of Practice, Study and Innovation', 1 *Acta Juridica* (2009) 168.

[7] His key argument seems to be the following: '[P]ublic actors spending public funds are ultimately faced with different and higher standards of accountability and legitimacy than private donors and corporate actors – for good reasons: only public actors have the authority to unilaterally determine the fate of citizens' (at 18). His public law approach is presumably derived from, or at least inspired by, the academic project on the exercise of international public authority championed by the Max Planck Institute in Heidelberg, Germany. See, e.g., A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010); see also in particular Von Bogdandy and Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' 9(11) *German Law Journal* (2008) 2013–2039.

[8] It would be incorrect to say that Dann avoids related substantive legal issues altogether, since by examining 'donors' law' he considers both procedural and substantive frameworks. See, in particular, his concluding remarks on this matter (at 510).

[9] He describes 'law of development cooperation' as a multi-level legal system that consists of three sources of law: 'donor law (which, depending on the donor, can be either national, supranational or international), international treaty law between donors and recipients, and, finally, overarching principles of general international law which set general standards for ODA allocations' (at 223).

[10] For a critical overview of this movement, see Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement', 25(3) *American Journal of Comparative Law* (1977) 457.

[11] It is indeed difficult to identify a common line of thinking in this strand of literature, possibly with the exception that it takes seriously the post-colonial legacies of international law and relations. Two conceptual, quite recent, and most notable monographs that can be placed within this category are B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2011) and R. Sarkar, *International Development Law: Rule of Law, Human Rights, and Global Finance* (2009).

with law and development 'classics' is the more explicit recognition of the international element in development. This latter strand contains many critical views, mainly directed against exploitative practices by foreign entities in the global south. These authors managed to expose many structural and ideological weaknesses that are inherent in the system of international financial assistance; however, they do not seem to have engaged in much constructive deliberation.

It is rather evident that the critical approach is not exactly Dann's 'cup of tea'. Thus, his approach might be best likened to that of the International Law Association's (ILA) task force, which had previously examined the link between international law and development on a similar conceptual level and produced the New Delhi Declaration of Principles of International Law Relating to Sustainable Development (New Delhi Principles).[12] Like Dann, the group of ILA scholars working on this matter was looking at the problematic effects of economic transactions between North and South, including development finance. In order to come up with some tangible conclusions, they also had to define their field of inquiry. The conceptual difference between the ILA project (and sustainable development scholarship more broadly) and Dann's scholarship appears to be the fact that the sustainable development literature is triggered by a perceived clash of substantive issues in making and applying international law. It is concerned with the capacity of international legal norms to balance out economic, social and environmental concerns, especially where those have severe effects on least developed countries. However, these concerns are not conceptually attached to any particular institutions.[13] Dann, by contrast, pioneers a primarily institutional approach to development finance. He defines the range of relevant actors at the outset of his analysis, reducing it to those institutions that exercise specific functions of public authority, in particular, those of channelling and distributing ODA. Since ODA can be allocated to a wide variety of public policies, it affects a wide range of substantive issues.

One might be tempted to conclude that Dann defines the 'law of development cooperation' in relatively narrow terms and that by doing so he is taking a shortcut, since many complicated matters in development financing do arise from this intimate link between public–private spheres and also from the clash of substantive issues. Yet, he appears to be fully aware of the conceptual blind spots that his methodological choices imply (at 12–21). As a matter of academic approach, his manoeuvre seems to be a reasonable attempt to strip a problematic field down to its core issues or, in other words, to avoid 'eating an elephant'. However, from a normative perspective, Dann's exercise remains problematic. Can the public law approach actually help us tackle the most evasive loopholes of accountability in the present system of development cooperation? Is this 'procedural concept of development' (at 18) capable of protecting the most vulnerable groups affected by development transactions? These questions will surely be debated extensively in future engagements with Dann's argument.

[12] International Law Association (ILA), New Delhi Declaration of Principles of International Law Relating to Sustainable Development, reprinted in 2(2) *International Environmental Agreements: Politics, Law and Economics* (2002) 209 (later published as UN Doc. A/57/329) [New Delhi Principles]. The declaration was the outcome of collaboration between the ILA, the Centre for International Sustainable Development Law (www.cisdl.org) and the International Development Law Organization (IDLO) (www.idlo.int), all of which had continued their work in the respective field. The reports of the ILA committee that followed up with deliberation upon related matters after the adoption of this declaration can be found online at http://www.ila-hq.org/en/committees/index.cfm/cid/1017 (last accessed 20 March 2014).

[13] As a matter of fact, most of the recent literature on sustainable development seems to be concentrating on trade or investment as opposed to direct financial assistance for development since both of these areas are more heavily influenced by formal international legal sources and have viable dispute settlement mechanisms that provide a lot of material for legal research. See, e.g., M. Cordonier Segger, M.W. Gehring and A. Newcombe, *Sustainable Development in World Investment Law* (2011), which was headed by IDLO.

Dann divides his book into three major parts: (i) institutional and intellectual history of development cooperation; (ii) its constitutional foundations and (iii) its administrative law. The historical part of the book is not really taken up in the rest of the argument; however, it serves as an important background analysis that facilitates understanding of the following parts of the book for those who are not closely familiar with development discourses. The second part, entitled 'Constitutional Foundations of the Law of Development Cooperation' is arguably the most important one, at least in terms of its contribution to the academic debate. It portrays the legal framework of development cooperation as guided by certain principles (at 155). In his general analysis of the legal framework, Dann observes that most transactions between donors and recipients are 'at the very minimum "pre-structured" by the donors' own rules' (at 217), which provides the justification for the book's focus on donors' frameworks.[14]

The principles of the law of development cooperation that Dann identifies in this part are vital for understanding, interpreting and evaluating his legal framework of development cooperation. Dann provides four principles – collective and individual autonomy, on the one hand, (which he considers to be legal principles) and development and efficiency, on the other (which he calls structural principles) (219–224). The distinction between structural and legal principles is probably the most valuable idea within the entire book, both in terms of its novel application in this particular field of academic debate and its potential implications in practice.[15] Dann explains that such distinction is necessary to recognize that the two groups are different in terms of their normativity. Legal principles are legally binding, whereas the structural ones are not. Most importantly, the former are always meant to prevail over the latter. This is so because legal principles are derived from existing norms of public international law, whereas the other two just describe the core features of development cooperation.[16]

One of the greatest strengths of this matrix with different levels of normativity is that it is astoundingly simple and clear and also incredibly easy to engage with. It clarifies the potential points of conflict and tension within the system. Such clarity is frequently missing in the analyses of other authors who prefer to stress the complexity of the area.[17] In this respect, Dann's way of 'colour-coding' the key norms applicable to development assistance is a significant shift in thinking. It essentially introduces the binary code that distinguishes law from mere policy considerations. With this kind of reasoning, Dann is seemingly attempting to establish a 'hard' legal core to his 'law of development cooperation'.

It needs to be noted that Dann himself contrasts his principles with the principles suggested by other scholars. He argues that most principles provided by the literature thus far were in fact teleological – that is, aimed at creating specific standards of treatment for developing states, whereas his own list serves heuristic, explanatory and, most importantly, evaluative functions. While such an argument does not come across as entirely convincing (see, for instance, such principles as the precautionary principle or the principle of participation and access to justice, which is contained

[14] Dann explains that his legal framework of development cooperation is constructed by using a functional approach (at 157–158). The analysis that follows from this approach examines the norms and practices of donors, recipients and 'standard-promoting collectives' (such as the United Nations or the Organisation for Economic Co-operation and Development) (at 158–218).

[15] The distinction between structural, guiding and legal principles in abstract and theoretical terms was first introduced by Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', 9(11) *German Law Journal* (2008) 1909–1938.

[16] An example that is given in order to explain this idea is the principle of cooperation in environmental law (at 222).

[17] The earlier-mentioned New Delhi Principles, *supra* note 12, could be considered to be comparable to Dann's use of principled reasoning. Among the more recent literature, the same could be noted, for example, about the list that Bradlow suggests in Bradlow, 'The Reform of the Governance of the IFIs: A Critical Assessment', in Bradlow, Cisse and Kingsbury, *supra* note 3, 37, at 46–49.

in the New Delhi Principles), what is indeed considerably different about Dann's reasoning is the stringent methodology employed to arrive at these legal principles. As mentioned previously, they are based solely and exclusively on formal sources of public international law (at 223) and not on other sources of normativity, such as the constitutional standards of donors and recipients.

This brings me to the observation that Dann's methodology, which roots legal principles solidly within the existing norms of public international law, gives rise to a larger conceptual issue. General norms of public international law (the making and application of which still primarily depend on the consent of states) are often silent about the rights of individuals and smaller political entities. This relatively low level of protection at the sub-state level is the pathologic weakness of the international legal framework, and it has preoccupied many scholars of various fields of international law.[18] Therefore, rooting normative principles solely in the general norms of public international law, especially if such principles serve to evaluate rules and acts of public authorities within a specialized and multi-layered system such as the 'law of development cooperation', entails some bias towards lower rather than higher standards of protection for individual and collective autonomy.[19] The approach goes for the common lowest denominator, as opposed to more flexible or at least better tailored standards of protection.[20] Put differently, given Dann's methodology in identifying legal principles of development cooperation, his reasoning comes across as deeply conservative.

Finally, the last part of the book, the 'Administrative Law of Development Cooperation,' appears to be the most problematic one. In broad terms, it describes the rules and regulations governing three different stages of development cooperation – strategic planning of ODA, transferring ODA through certain programmes and issues of accountability in distributing ODA.[21] This part gives Dann a chance to elaborate upon the legal nitty-gritty of development cooperation and is in itself a truly informative secondary source, potentially highly useful to most development practitioners. Still, after the elaborate and stringent legal reasoning of the first half of his book, in this part the author seems to have been sidetracked at times by the sheer volume of information that he intends to convey.

In this part, Dann appears to draw the line between 'constitutional' and 'administrative' law of development cooperation solely based on the distinction between formal and informal sources of public international law.[22] Unfortunately, this division creates an impression that norms falling within the second group are merely derivative of the 'constitutional' framework. It implies that they themselves do not regulate issues of constitutional importance such as separation of powers within governments in the planning of development interventions or the protection of individuals *vis-à-vis* the actions of public authorities that exercise development interventions.[23]

[18] Kumm provides a great overarching analysis of the issues that are at stake in relocating more authority from domestic towards international law and institutions. See Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15(5) *EJIL* (2004) 907.

[19] It should be noted that Dann's legal principles of collective and individual autonomy are somewhat tailored to the context of development cooperation, at least in terms of their wording. However, if we look beyond this initial corrective exercise, their content is still only as thick as that of the formal rules of public international law – there is no 'additional' layer to be derived from some other sources, principles or interpretive devices.

[20] In Dann's argument, only the structural principles are considered to be 'sectoral' – that is, adjusted to this particular domain of international cooperation (at 224).

[21] The three specific programmes of ODA transfer that he examines are project-based aid, direct budget support and results-based financing (at 353–444).

[22] Dann does not fully explain his division and only touches upon it in a few introductory sentences to each part of the book (at 219, 299–301).

[23] Again, Dann elaborates on these issues in describing the legal principles of 'law of development cooperation' (at 238–284); however, only as far as they are covered by the norms of public international law, whereas specialized rules contain much more explicit and thicker content than the latter.

In practice, however, it is the case that some crucial matters in development cooperation are indeed regulated by the soft law type of instruments that Dann brands as 'administrative'. Thus, even though from a public law perspective his division makes sense, in terms of the 'law of development cooperation', as practised, such division is achingly bold. It further entrenches sensitive issues of insufficient legal safeguards for the sub-state level, such as the collective rights of indigenous peoples or the local authority over the use of natural resources. Arguably, this is exactly where further research and deliberation is needed, and where scholars will hopefully be able to build upon the vast comparative data with which Dann presents us.

All in all, *The Law of Development Cooperation* can justly be celebrated as the 'state of art' of legal reasoning. Every single page of the book is stimulating and full of insights valuable to both development practitioners and legal scholars alike. On the conceptual level, the construction of a multi-layered legal field of development cooperation from an institutional perspective that focuses on the legal norms of donors seems highly plausible. It presents academics with a rich yet workable area for further research. Nevertheless, placed against a wider background of academic debates about law-making and accountability in a transnational setting, the normative argument of the book comes across as putting a somewhat disproportionate weight on the international element of the system. In a way, the very project of establishing development cooperation as a field of study in international law presupposes an inclination to argue in favour of the application of international norms and principles, despite the slimness of their content, or the low level of individual and collective protection that they entail. Arguably, a greater understanding of how this system incorporates (or at least interacts with) relevant domestic legal frameworks is necessary to offer solutions to the most pressing challenges of development cooperation. In this respect, Dann's monograph is best perceived as an invitation to engage in constructive and systematic scholarly research on these issues.

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Efthymios Papastavridis. ***The Interception of Vessels on the High Seas, Contemporary Challenges to the Legal Order of the Oceans***. Oxford: Hart, 2013. Pp. 402. £65. ISBN: 9781849461832.

Many are the threats that challenge the security of the oceans today. Piracy, which was thought to be relegated to history and adventure books (and films), has re-appeared and threatens human lives but also, cynically more importantly for states, the safe transport of goods. The seas provide the main route for trade in goods worldwide. Their security is an imperative for a globalized economy. In the 2008 Report on Oceans and the Law of the Sea, the UN Secretary General identified seven specific threats to maritime security: (1) piracy and armed robbery; (2) terrorist acts against shipping, offshore installations, and other maritime interests; (3) illicit trafficking in arms and weapons of mass destruction (WMD); (4) illicit trafficking in narcotic drugs and psychotropic substances; (5) smuggling and trafficking of persons at sea; (6) illegal, unreported, and unregulated (IUU) fishing; and (7) international and unlawful damage to the marine environment.[1]

The law of the sea, and in particular the 1982 Law of the Sea Convention (UNCLOS),[2] does not specifically deal with maritime security. It nevertheless provides for some instruments in

[1] UNGA, 'Ocean and the Law of the Sea: Report of the Secretary General', 10 Mar. 2008, UN doc. a/63/63, paras 54, 63, 72, 82, 89, 98, 107–108.

[2] 21 ILM (1982) 1276; available at: www.un.org/Depts/los/index.htm.