Yuval Shany


International lawyers have always tended to struggle with questions about the reality and effectiveness of international law. Almost every conceivable approach has been tried – from openly acknowledging and accepting that international law is not, or at least not yet, ‘real’ law, to simply trying to forget about the entire question and deal with international law as is, or rather, as positively found in the ‘sources’ of international law. The most recent tendency in international legal scholarship has been either to seek refuge from academic escapism that does not even attempt to approach international law as law but rather as a field of cultural studies, or to gravitate towards an emphatically realist approach – that is, to forget about philosophy and first principles and focus on what we have, however imperfect.

Yuval Shany’s book belongs to the latter category. Quite appropriately for a book that is based on the author’s Hersch Lauterpacht Memorial Lectures at the University of Cambridge in 2012, Professor Shany adopts an emphatically ‘functional’ approach to international law.¹ According to Professor Shany, international courts can be understood ‘as policy instruments in the hands of two principal sets of constituencies: (1) their mandate providers – that is, states and international organizations that establish international courts, fund and support their operation, and who may ultimately decide to shut down and dissolve them; and (2) the parties to any specific dispute, who may choose to submit their differences to adjudication before an international court’ (pp. 7–8). In other words, according to Professor Shany, the establishment of an international court ‘implies a transfer of legal power from states and other international actors to international courts’ (p. 22). In this context, jurisdiction and admissibility – the main themes of the book – can be understood ‘as a form of

delegated authority’ and ‘the most important consequence of the application by international courts of the rules on jurisdiction and admissibility governing their legal powers is case selection’ (pp. 1–2).

Assuming one agrees with these premises, Professor Shany introduces a conceptual framework that is difficult to disagree with. Relying on Gerald Fitzmaurice, he endorses the conceptual distinction between ‘jurisdiction’ and ‘competence’ of international courts, a distinction which he re-dubs as a distinction between ‘foundational’ and ‘specific’ jurisdiction (pp. 22 et seq.). He convincingly argues that this distinction can be understood as one between the court’s potential jurisdiction under its constitutive instrument and its actual jurisdiction in any particular case, which in turn depends on the specific act of referral (p. 23). The court’s ‘foundational jurisdiction’ is a reflection of the delegation of the power to an international court of a decision-making power that the States themselves may but do not necessarily individually possess, but which they nevertheless agree to delegate to an international court, whereas the court’s specific jurisdiction (or ‘competence’, in Fitzmaurice’s terms) is based on the consent of the State, which ‘establishes the acceptance by the [parties] of the power of an international court to adjudicate a specific dispute’ (p. 34).

If jurisdiction is about the power to adjudicate a dispute, the rules of admissibility pertain to ‘the terms permitting an international court to decline to exercise its legal powers’ (p. 47). Admissibility is thus more about propriety and expediency (and therefore, by implication, about legitimacy and effectiveness) than about the lack of legal powers – although decisions on the interpretation of jurisdictional provisions, in particular when driven by a ‘goal attainment perspective’, may lead to effectively the same result, albeit covertly (pp. 54–57). While the author then engages in a lengthy analysis of international courts’ and tribunals’ jurisdictional and admissibility decisions based on this distinction, it ultimately remains unclear how precisely, and on what basis, a distinction between a decision dismissing a claim for lack of jurisdiction and a decision dismissing a claim as inadmissible should or could be drawn. Similarly, Professor Shany’s distinction between jurisdictional decisions as ‘category-based case selection’ and admissibility decisions as “specific case selection” tends to blur the distinction between specific jurisdiction (or competence) and admissibility – by definition, both are about “specific case selection”. As a result, the distinction between jurisdiction and admissibility remains conceptually less than clear.

It is perhaps not surprising that Professor Shany’s broad theoretical framework is in the end a more compelling aspect of the book than his proposed