

**CHARLES LEBEN, *THE ADVANCEMENT OF
INTERNATIONAL LAW,*
OXFORD AND PORTLAND, HART PUBLISHING 2010**

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International lawyers are familiar with the argument – dating back to Austin, but still quite common today – that there is no international *law*, but, to say it in a nutshell, international *powers* only. Prof. Charles Leben's book, *The Advancement of International Law*, is a rich, stimulating, and up-to-date rebuttal to such an assertion. Emeritus Professor of international law at Panthéon-Assas University in Paris, France, Prof. Leben is the new NYU Straus/Tikvah Fellow for the academic year 2011/2012. One of the leading French scholars in public international and international economic law, Prof. Leben is a practitioner as well as a theorist of law: this new volume of the French Studies in International Law series, published by Hart Publishing under the direction of Prof. Emmanuelle Jouannet, links together the two facets of its author.

This book is indeed a collection of articles published between 1989 and 2006, divided here into three sections: Advances in the techniques of International Law, Advances in the theoretical analysis of international law, and European Union Law. Following a “kelsenian-influenced monism” perspective, Prof. Leben intends to show that international law is “going beyond (or at least avoiding) the anarchic system”¹ by relying mostly, but not only, on the development of investment law. Today's international law issues are thus linked to the old one of the nature of international law.

Divided into three chapters, the first section of the book is devoted to the advancement in the techniques of international law. The author focuses here mainly on State contracts and indirect expropriation. One of the recurring topics of the book, the notion of State contract is examined in the first chapter under the question of its legal qualification. The author's main argument is that such contracts should be qualified as “new international legal acts”, governed by public international law. Indeed, Prof. Leben argues that international law should not be conceived as a purely inter-states law. Grounded upon a definition of the “subjects of law” – general enough to include private persons as soon as they have rights and obligations under international law – the argument shows that since numerous bilateral and multilateral investment treaties between States and private companies refer to general international law and provide for international means of dispute settlements, there exists no serious objection to the qualification of State contracts as international law acts, governed by an “international contract law”, characterized by a mix of municipal law and peculiar clauses. This is why it is argued in the second chapter that disputes arising from investment promotion and protection treaties are governed by international law, an assertion confirmed by a lengthy examination of the

* Ph.D in Public International Law (2011, Panthéon-Assas University).

¹ Charles Leben, *The Advancement of International Law* (Oxford: Hart Publishing, 2010) at 216.

International Centre for Settlement of Investment Disputes (ICSID) case law. State Responsibility on the basis of protection treaties then forms a “sub-system” within the general regime of States’ international responsibility.

The third and last chapter of that first section, devoted to indirect expropriation, focuses on a “crucial problem”: “under what circumstances can an enterprise challenge a state’s normative action when the action is conducted in the general interest and does not aim to expropriate any particular enterprise?” To assert both the prohibition of indirect expropriation and the normative freedom of the state under international law, Prof. Leben shows that the conditions for indirect expropriations to be recognized by international courts or arbitrators are rarely fulfilled, and that there is a presumption in favour of measures of general interest adopted by States. Thanks to the prudence of arbitrators, which is essentially the same as the French *Conseil d’Etat*’s prudence, the prohibition of indirect expropriation and the normative freedom of the State are two compatible rules of international law.

Those technical advancements in international law – which offer the opportunity to private persons to contract with states and to engage their responsibility without being subjected to domestic law – have important theoretical consequences, set out in the second section of the book. Chapters four, five and eight are devoted to the consequences of those technical advancements on the theory of the State and the definition of international law’s subjects, while chapters six and seven offer a broader theory of the development of international law through the lens of Kelsen’s theory of international law.

In chapters four, five and eight of the second section, Prof. Leben explores the theoretical consequences of his definition of State contracts as a new kind of international acts. Two main critics have been formulated against C. Leben’s argument: since State contracts are concluded by States with private persons, they cannot be qualified as contracts governed by international law; the entity with which private persons conclude the contracts is not the State in the sense of international law, but the State in the sense of municipal law. The former criticism is addressed in chapter five, while the latter is addressed in chapters four and eight. The fifth chapter thus deepens the theoretical analysis of the legal status of private persons in international law. Grounding its explanation on Kelsen’s theory of international law, the author first explains that “international law is law” since it is sanctioned in case of violation by reprisals and war, which perhaps are primitive sanctions, but sanctions nevertheless, fitted to the decentralized nature of the international legal order. The articulation between the notions of sanction and decentralization is very important here, because it leads to the conclusion that the international order *is* a legal order—not to the same degree than an internal legal order, but of the same kind. Mayer’s criticism that a State contract is not an international act because private persons are party to it is thus weakened by Kelsen’s theory, according to which it is not contrary to the nature of international law that individuals could be its subjects. Chapters four and eight offer numerous precisions about the concept of State Contracts. One of the most important is related to the definition of the State when it acts as a party to such a contract. Indeed, Prof. Leben rejects the argument of

a “double personality of the State” set forth by Lemaire². According to C. Leben, who relies once again on Kelsen, a State has one personality only, but with two faces: the “administration” face, and the “international” face, state contracts being concerned with the second face only. The author makes clear, in chapter eight, that the State cannot be conceived as having two distinct personalities, because this would lead, as put forth by the French jurist Michoud, to “inextricable consequences”. He also rejects the theory formulated by Arango-Ruiz according to which the State exists only as a municipal entity, international law knowing no *legal person* such as the “State” since it has no rules governing the creation of such entities. If the State does not have two distinct personalities, but if it exists nevertheless as a legal entity of international law, it remains necessary for Prof. Leben to explain how the State can conclude contracts with private persons without acting under domestic but under international law. This is what the author demonstrates by restating Kelsen’s theory of the State. Unraveling the ambiguities of Kelsen’s theory, C. Leben makes a new proposal: what is called a “State” designates two different but closely linked legal orders, a partial one and a broader one. Following Hart’s proposal, the partial order is considered as made of secondary rules – those rules, which govern the creation and modification of primary rules. The broader legal order that the State also designates is comprised of primary and secondary rules. Then, since a legal order can only be a legal person in the eyes of another order, the partial order is a legal person in the eyes of the total order, and the total order a person in the eyes of international law. When concluding a contract with a State, a private person can conclude it either with the State as a partial legal order, or with the State as a total legal order, the criteria being which law governs the contract.

Chapters six and seven of the second section provide the reader with a broader analysis of Kelsen’s construction of the notion of *civitas maxima* – which stands for, to put it simply, the higher community that each system of law requires – and of the definite role played by international courts to end anarchy between States, a role that the construction of the European Union, which is the object of the last section of the book, illustrates in a striking manner.

The first two chapters of the last section of the book try to answer the question of whether the European Union “surpassed international law” or is an example of the advancement of international law. Prof. Leben clearly chooses the second option, defining the European Union as an international organization, which is far more centralized than other international organizations but has not yet reached the turning point to statehood. The author shows that the most well-known and remarkable features of the E.U. (the role of the ECJ, the direct applicability and primacy of European law...) are improvements of existing features of the international legal order. The book ends with a concluding chapter devoted to human rights and the question of a “European approach” to human rights, where the author shows that even though human rights – peculiar to states or union of states – exist, this does not preclude – and is even a condition for – the development of universal rights.

² Sophie Lemaire, *Les contrats internationaux de l’administration* (Paris: L.G.D.J., 2005).

The Advancement of International Law constitutes a fascinating overview of Prof. Leben's works and knowledge. It offers stimulating and challenging thoughts on a rich variety of topics, even for the reader who is not familiar with some of them, and confers to Kelsen's theory of international law a new actuality. One could regret that the book is only a collection of articles, which are not always arranged in a convincing manner. The notion of State contract is, for example, treated in a similar way in several chapters, giving to the reader the feeling that he is reading again what he has read before. This is true also for the developments on the legal status of private persons. But this is perhaps inherent to such books.

Nevertheless, what is also inherent to books treating the "advancement of international law" is the vexatious question of how "advancement" should be understood. According to the front flap of the book, "advancement" means new legal possibilities. According to Prof. Leben's own argument, it is "every step toward the end of anarchy." The two meanings are very different, and the latter is quite problematic. Indeed, is it not contradictory to assert in the meantime that international law is law even though the international legal order is a very decentralized one, and that international law is advancing towards "something else", i.e. a non-anarchic order, an order with a supreme authority? In such a case, do we have to consider that international law is advancing towards its own disappearance? The book lacks a preface from the author, explaining how he defines "advancement", and how he would address such a critic, which is raised in the book but which finds no convincing answer.