ANZSIL *Perspective*

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EDITORIAL

WELCOME to our 31st edition of ANZSIL *Perspective* with an excellent perspective by Simon Levett on **The Shifting Protections of War Correspondents under International Law, a spotlight on** H.E. Judge Antonio Augusto Cançado Trindade and two book reviews

Since Edition 30, we've seen an array of judicial and non-judicial developments in the international human rights arena. The Commonwealth Games' opening ceremony included a statement of solidarity with LGBTQIA+ athletes as timely reminder of equity and inclusion challenges faced by transgender, non-binary and gender diverse sportspersons. Australia's forty-seventh Parliament achieved a historic moment in accessibility, with Senator David Pocock and Senator Shoebridge delivering their first speeches with an Auslan interpreter. In this first sitting, the Upper House called upon Government to consider Julian Assange's health and welfare, referring to former UN Special Rapporteur on Torture, Nils Melzer's human rights representation to British authorities. In other news New Zealand was invited by the International Labour Organisation to supply information to the 110th formal session in Geneva next week on New Zealand's proposed Fair Pay Agreements policy.

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Finally, the 15th of August marked one year since Kabul fell to the Taliban. As many Afghans continue to face insecure futures as refugees in their own homeland, as well as abroad, we are reminded that international assistance is just one mechanism by which economic security and political and human rights might be furthered.

As always, I extend a warm invitation to ANZSIL members and non-members to submit your perspectives for publication. We accept submissions on public and private law international law issues and where international law may be a topic for domestic decision making particularly international law issues related to the multicultural nature of Australia's and New Zealand's societies. My team and I welcome analyses of this and other similar issues in both jurisdictions.

As ever, I look forward to receiving submissions from a diverse range of scholars who have previously contributed to ANZSIL Perspective, and welcome new and emerging authors at every level of postgraduate scholarship and legal practice.

Felicity Gerry QC (Editor)

The deadlines for the next ANZSIL *Perspectives* are 23 September 2022 and 21 October 2022. The current call for *Perspectives* and submission details and guidelines are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

PERSPECTIVES

The Shifting Protections of War Correspondents under International Law - the example of Israel and the Palestinian Territories and South-East Europe

By Simon Levett

Journalists are continually subject to harm or the threat of harm during their reporting in foreign wars. The US based Committee to Protect Journalists states that at least 24 journalists have been murdered in 2022 so far globally.

The surge in armed groups such as Islamic State and Al Qaeda after September 11, 2001, have also led to the increased targeting of war correspondents with corresponding unsafe conditions. Journalist for the Wall Street Journal Daniel Pearl was beheaded whilst reporting on the deteriorating situation in Pakistan in 2002. Many media staff have also been deliberately targeted.

According to a 2022 report by the United Nations Economic, Social and Cultural Organisation, enforced disappearances, journalists reporting as "missing" and arbitrary detentions are key concerns for the international community.

Any measure to ensure the protection of such journalists should acknowledge the threat faced by journalists seeking to cover wars domestically as seen by the example of Julian Assange and Laura Poitras.

Israel and the Palestinian Territories

At least one journalist has been killed in Israel and the Palestinian Territories so far in 2022. However, many more have been excluded from reporting by restrictions put in place by the Israeli authorities.

There are well-publicised procedures for the accreditation of foreign journalists wishing to enter Israel. However, the Geneva Conventions do not take notice of whether (or not) a journalist has been accredited by a state party. Nor does the protective scope of the Geneva Conventions

guarantee that a foreign journalist can access a territory, which is the remit of International Human Rights Law.

The Geneva Conventions classify all war correspondents as belonging to the category of the "civilians" according to Article 79 of the First Additional Protocol to the Geneva Conventions. War correspondents who accompany the armed forces according to Article 4(A)(4) of the Third Geneva Convention are also classified as "civilians" under this provision. War correspondents are entitled to the protections "civilians" enjoy under the Fourth Geneva Convention.

Shireen Abu Aqleh was a "civilian" journalist shot in Jenin in the Palestinian Territories on 11 May 2022. Israeli authorities argued that it was not possible to determine whether or not she was killed by indiscriminate shooting by a Palestinian gunman or inadvertently by a soldier from the Israeli Defence Force. A United Nations investigation found that she had been targeted by the Israeli Defence Force.

The Israeli air force also bombed a tower block in Gaza City housing the offices of the Associated Press and Al Jazeera on 15 May 2021.

The Committee to Protect Journalists asserted that the bombing "raises the specter that the Israel Defence Forces is deliberately targeting media facilities in order to disrupt coverage of human suffering". A consequence of this strategy could be a "chilling effect" to discourage journalists from reporting and is contrary to International Human Rights Law.

Certainly, targeting "civilians" can be lawful according to the doctrine of proportionality under Article 51(5)(b) of the First Additional Protocol where there is "incidental loss of civilian life" that is not "excessive in relation to the concrete and direct military advantage anticipated". The Israeli military had claimed that that the tower block had housed Hamas military intelligence.

Furthermore, Article 34 of the Customary International Humanitarian Law study stated that "civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities".

There are circumstances under which the activities of the journalist may amount to a "civilian" taking part in hostilities if they satisfy the definition in the Interpretative Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law.

The journalist might also indirectly participate in hostilities, through activities that are part of "the general war effort" or "war-sustaining activities", with the specific mention of "media activities".

South-East Europe

At least 12 journalists have been killed in The Ukraine so far in 2022 in Europe's most recent conflict. It is likely that any future body holding Russia accountable for serious violations of international law in the Ukraine such as the International Criminal Court will also investigate how war correspondents could be targeted with apparent impunity.

International Lawyers have attempted to strengthen the protections for the modern war correspondent during Europe's earlier war in the Balkans in the 1990s. This was seen in the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) to protect ex-Washington Post journalist Jonathan Randal's pledge to the secret identity of his sources.

In times of war, bodies such as the ICTY have also confirmed that media infrastructure can contribute to the war effort. The argument of the North Atlantic Treaty Organisation that Radio Television Serbia in Belgrade was a legitimate military objective during air-strikes in 1999 was accepted by the ICTY Prosecutor. NATO indicated that "strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a part of President Milosevic's control mechanism".

In general, European media networks have been more willing to make sure that journalists meet certain, high standards of journalism. Journalist Klaas Relotius of Der Spiegel was forced to hand back his prizes and an inquiry was held when it was found that he fabricated whole investigations over a protracted period of time.

Conclusion

Journalists are not only the victims in International Law but they are its best defenders. The old adage is that if a tree falls in a forest and no-one hears it, does it ever really fall at all?

Yet there is hesitancy shown by the international courts towards war correspondents as seen in the judgements of the *International Court of Justice in Nicaragua and the United States of America (Merits)* and *Congo v Uganda (Merits)*. These decisions recommended that international lawyers exercise restraint before relying upon media reports as evidence of judicial purposes.

The Court in *Nicaragua and the United States of America* said "widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge".

A greater rapprochement between war correspondents and international courts will enhance the international framework in the context of weak legal protections.

Simon Levett is an international human rights lawyer and educator specialising in the protection of journalists reporting on war zones. In 2018 and 2019, he undertook and published extensive empirical research with war correspondents in Israel, the Palestinian Territories and Australia. He has a Masters of Advanced Studies in International Humanitarian Law from the Geneva Academy of International Humanitarian Law and Human Rights. He has worked with the International Development Law Organisation, the United Nations Office for the High Commissioner for Human Rights, the International Criminal Tribunal for the Former Yugoslavia and the Diplomacy Training Program.

SPOTLIGHT

H.E. Judge Antonio Augusto Cançado Trindade

By Justin Sobion

It was in the early days of June, while on a visit to my native country Trinidad and Tobago, that I learned about the sad passing of Judge Antonio Augusto Cançado Trindade. Although I never met the learned Judge in person, as a sitting Member of the International Court of Justice (ICJ) for well over a decade, I felt like I "knew" him vicariously through his work at this august institution. There are three reasons why I gravitated towards the esteemed Judge (and these reasons ascend in importance tremendously in chronological order). The first reason is that one of his names – "Trindade" – makes me feel somewhat nostalgic as it reminds me of the name of my beloved island. Secondly, coming from the GRULAC (Group of Latin America and Caribbean countries), I was pleased that our region was represented by a Judge of such a high intellectual calibre and international standing. Thirdly, I was impressed by the Judge's academic career and the quality of his judgments handed down, first at the Inter-American Court of Human Rights and later at the ICJ. For all intents and purposes this essay will focus on the third reason.

Antonio Augusto Cançado Trindade was born in 1947, in Belo Horizonte, Brazil to a family of medical doctors. He obtained a Bachelors' degree in law from the Federal University of Minas Gerais (receiving the First Prize in Civil Law in 1969). He later obtained an LLM (1973) and a PhD (1977), both in International Law, at the University of Cambridge. For his PhD thesis on "Developments in the Rule of Exhaustion of Local Remedies in International Law" he was awarded the coveted Yorke Prize. Following his university success were a series of academic appointments and Visiting Professorships which included: Professor of Public International Law at the University of Brasilia, Lecturer at The Hague Academy of International Law, Lecturer at the International Institute of Human Rights in Strasbourg and Lecturer at the Academy on Human Rights and Humanitarian Law at Washington D.C.

In terms of judicial appointments, he was elected as a Judge of the Inter-American Court of Human Rights in 1995, serving as its President between 1999 and 2004. In February 2009, Judge

Trindade became a member of the ICJ. Having been re-elected to the Court in February 2018, his term of office was due to expire in 2027. In a press release issued by the ICJ a day after his demise, the Court expressed that the late Judge "led an illustrious career in the fields of international law and human rights." This is evinced not only by his judicial pronouncements, but also by his broad publication of scholarly work. His curriculum vitae states that he authored 78 books and some 790 monographs, including contributions to books, essays and articles on international law which were published in numerous countries and in several languages. It therefore comes as no surprise that fellow countryman, Rodolfo Ribeiro, described the Judge as "a towering figure of international law" and one whose "inexhaustible intellectual curiosity and deep passion for international law were only matched by his kindness and humility." Such an apt description is evidently seen in the Judge's judicial pronouncements.

While presiding at the Inter-American Court of Human Rights, the Judge's consistent reasoning on jus cogens principles (peremptory norms) and their application to distinct human rights has been very instructive. For example, in his 1998 landmark judgment of *Blake v Guatemala*, the Judge viewed the prohibition of torture as an international jus cogens rule. In *Advisory Opinion No. 18*, the Judge, now sitting as President of the Court, held that under international human rights law jus cogens also applied to the principles of equality and non-discrimination. In this Advisory Opinion, Judge Cançado Trindade was swift to add that human rights do not belong to the domain of jus dispositivum and therefore cannot be considered as simply "negotiable". On the contrary, human rights are of a higher status, and permeate both the national and international legal order. Judge Cançado Trindade continued expressing his views on jus cogens while sitting as Judge of the ICJ. In his Separate Opinion in the *Legal Consequences of the Separation of The Chagos Archipelago From Mauritius in 1965* he addressed, as a matter of importance, the jus cogens right of peoples to self-determination.

Judge Cançado Trindade also constantly underlined the importance and the necessity of a compulsory jurisdiction of International Tribunals. In the interest of time and space, I would like to highlight his views to this effect in the ICJ case of *Marshall Islands v Pakistan*. Not only does his Dissenting Opinion in this case display his underlying wisdom, but also his unwavering commitment to achieve a fair and just result. In *Marshall Islands v Pakistan,* the Marshall Islands claimed that Pakistan had not fulfilled its obligation under customary international law to pursue good faith negotiations to cease the nuclear arms race at an early date. The case against Pakistan was brought by the Marshall Islands on the basis that Pakistan recognised the compulsory jurisdiction of the Court (art 36 (2) of the ICJ Statute). Pakistan in response claimed that the ICJ lacked jurisdiction to entertain the alleged dispute by the Marshall Islands, and consequently the latter's application to the Court was inadmissible. One of the preliminary objections raised by Pakistan was that at the time of filing the application, there was no legal dispute existing between

the two Parties. As a result, since there was no dispute, art 36(2) of the ICJ Statute could not have been invoked.

The Court, in a majority decision, agreed with Pakistan. The Court held that the determination of a dispute was a matter of substance and not a question of form or procedure, and that at the time of filing the application Pakistan was not aware that its views were positively opposed by the Marshall Islands. In arriving at this decision, the Court noted, inter alia, that the Marshall Islands failed to refer to any bilateral diplomatic exchanges between it and Pakistan.

Judge Cançado Trindade disagreed. Indeed, a strong and passionate disagreement is recorded in the opening lines of his Dissenting Opinion [at 44]:

> I entirely disagree with the present Judgment… In doing so, I distance myself as much as I can from the position of the Court's majority, so as to remain in peace with my conscience.

As to whether a dispute exists, the Judge opined that this was a matter for an "objective determination" by the Court and that "the mere denial of the existence of a dispute does not prove its non-existence." Judge Cançado Trindade particularly noted that the majority judgment was not in line with previous ICJ decisions. One of these was the case of the *Land and Maritime Boundary between Cameroon and Nigeria (1988)* where the ICJ stated, in its obiter dicta, that the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. For Judge Cançado Trindade there was a dispute, and this dispute was: whether there was a concrete breach of the customary international law obligation of nuclear disarmament. The ICJ should not have shirked its responsibility in addressing this issue on its merits.

At this point, it would be remiss of me if I did not refer to the related case of *Marshall Islands v United Kingdom*. There Judge Cançado Trindade's explored nuclear disarmament in depth in his powerful Dissenting Opinion. According to the learned Judge, nuclear disarmament is a matter of concern to humankind as a whole and that the *raison d'humanité* (reason of humanity) prevails over the *raison d'Etat* (reason of the state). These words of the Judge still resonate with us today.

As an intellectual warrior for human rights and as a Judge from the Global South, we salute ICJ Judge Antônio Augusto Cançado Trindade as one of the few who possessed a truly three-dimensional view of humankind and international law (the expression "three-dimensional" originates from the celebrated writer and Nobel laureate V.S. Naipaul, who also hailed from Trinidad and Tobago). Judge Cançado Trindade's passing comes at a time when the Pacific Island state of Vanuatu is championing a human rights and climate change ICJ Advisory Opinion at the

United Nations. If this Advisory Opinion proceeds to the ICJ for a determination, it is left to our imagination what Judge Cançado Trindade's views would be.

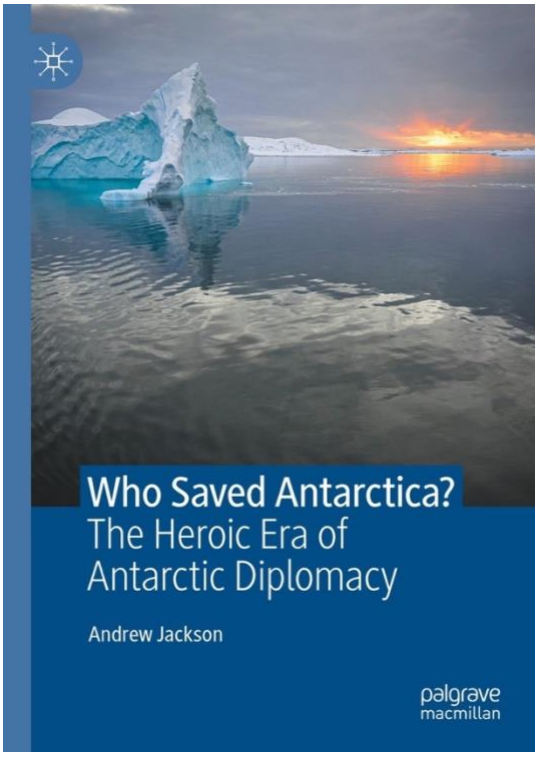
Judge Cançado Trindade will certainly be missed.

Justin Sobion was admitted to the Bar to practise law in Trinidad and Tobago in 2002 and later in Dominica (in 2008). After spending some time in private practice, Justin moved to diplomacy serving as First Secretary to Trinidad and Tobago's UN Mission in Geneva, Switzerland. He also served as an Associate Human Rights Officer at the Office of the President of the UN Human Rights Council in Geneva. Justin holds an LLM in International Law (University of Cape Town) and an LLM in Environmental Law (University of Auckland). He is currently pursuing his PhD at The University of Auckland, New Zealand.

BOOK REVIEWS

Who saved Antarctica? The Heroic Era of Antarctic Diplomacy by Andrew Jackson (Palgrave Macmillan, 2021).

By Henry Burmester



The legal regime governing Antarctica has always been a subject of interest to Australian and New Zealand international lawyers, both in and outside government. Much has been written on the sovereignty claims and the treaty regimes governing the Antarctic, including the ill-fated Convention on the Regulation of Antarctic Mineral Resources(CRAMRA) and the subsequent Madrid Protocol on Environment Protection.

In *Who Saved Antarctica?* Andrew Jackson, a former Australian Antarctic Division officer, provides a detailed and enthralling account of the diplomatic effort to address the question of possible mining in Antarctica. He does a masterful job drawing mostly on Australian archives. He shows how the shift from a resource management to an environmental view of Antarctica was the result of multiple circumstances and events, both pre-existing and serendipitous. No single politician, whether Bob Hawke or anyone else, can claim the credit. There is no single hero.

The book provides a gripping account of the CRAMRA negotiations led by Chris Beeby of New Zealand, the background to the decision by Australia not to sign CRAMRA and the subsequent frantic effort to put a substitute regime in place to restore stability and consensus to the Antarctic Treaty system. It demonstrates the complex interaction of events and individuals involved in the search for acceptable outcomes in a treaty regime governed by consensus.

Jackson does more than provide an account of what happened- he seeks to explain the why. He does this by reference to theoretical approaches (by Robert Marks) that seek to characterise

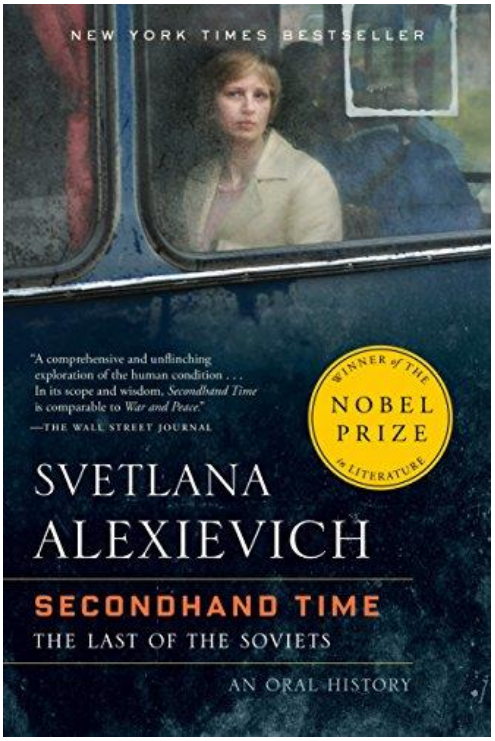
circumstances which precipitate historical events, and by seeking to evaluate the influence of individual players through Oran Young's typology of leadership styles.

The book provides, through a case study, an invaluable insight into how treaties are made and the enormous contribution of individuals in achieving solutions that governments find acceptable. The book, as well as being an engrossing read, is an excellent resource for diplomatic trainees, and international lawyers who may too often just focus on the final treaty text and not the story behind it.

Henry Burmester is a former head of the Office of International Law in the Australian Attorney-General's Department and Chief General Counsel in the Australian Government Solicitor. He was a participant in Australian interdepartmental deliberations concerning Antarctica over many years, and attended a few of the negotiating meetings concerning CRAMRA and the Madrid Protocol dealt with in the book.

Secondhand Time by Svetlana Alexievich

By Alberto Alvarez-Jimenez



Few books help us understand Russia's invasion of Ukraine as well as *Second-Hand Time*, authored by the Ukrainian-born Belarusian writer Svetlana Alexievich (London, Fitzcarraldo Editions 2016). Based on hundreds of interviews, it collects the voices of many individuals on the impact of the Soviet Union's collapse on multiple segments of Russian society, from the powerful to the anonymous, in Moscow and in the periphery of the Union, for the old and the young, from generals to civilians. What is the connection between understanding the present and recent past of Russia and international law? It is trite to say that States' international decisions are intimately connected with domestic politics, as Robert Putman illustrated years ago.

Putnam's analysis referred to well-functioning democracies, but it still applies to autocratic systems in imperfect democracies.

In this case, the Russian internal context shaped the decision to go to war and contravene key tenets of the international law order: the UN Charter, international humanitarian law, and the Rome Statute, among others.

The book was published in 2013, months before Russia occupied Crimea. In 2015, Alexievich was awarded the Nobel Prize in Literature. *Second-Hand Time* presents only the voices and leaves the analysis entirely to the reader. On this structure, she says "I'm piecing the history of 'domestic', 'interior' socialism … I've always been drawn to this miniature expanse: one person, the individual. It's where everything really happens".

Second-Hand Time reveals certain segments of Russian society that were relevant decades before the invasion and may play a role in subsequent phases, contributing to determining the tempo and terms of peace negotiations at some point in the future. This book review presents some of these facets in Alexievich's own words. Undoubtedly, the facets also have their antitheses within Russian society, and the latter may even become fundamental in the future.

Russia is exceptional

Many Russians continue to perceive their nation as a global superpower. In seeking to hoard territory in stark violation of international law, Russia is another "conqueror who sees in every new country annexed, only a new boundary", as Marx said in another context. The following quotes are examples:

> Russia is, has always been, and will always be an empire. We're not just a big country, we're the Russian civilization. We have our own path.
>
> We consider ourselves a special, exceptional people … Russia always seems to be on the verge of giving rise to something important.

This idea is not limited to those who lived through the Cold War. A young Russian told Alexievich:

> I'm so envious of the people who had an ideal to live up to. … I want a great Russia. I don't remember it, but I know it existed.

Russia & War

In her interviews, Alexievich found that the collapse of the Soviet Union did not eradicate Russia's close relation with armed conflict.

> At heart, we're built for war. We were always fighting or preparing to fight … Even in civilian life, everything was always militarized.
>
> My father lived to the age of ninety. He said that … he was always at war. That's all we're capable of.

On Democracy

Alexievich explored the prospects of democracy in the post-Soviet years. Putin's subsequent consolidation of power merely confirmed what she was told:

> Our country has a Tsarist mentality, it's subconsciously Tsarist … we need a Tsar. The Tsar the Father of the Russian people. Whether it's a general secretary or a president, it has to be a Tsar.
>
> [Y]ou can't buy democracy with oil and gas. You need free people, and we didn't have them.

> We thought that freedom was a very simple thing …. No one had taught us how to be free.

This is not to suggest that democracy has no hope in Russia. Anna Politkovskaya, Boris Nemtsov, Pussy Riot, and Alexander Navalny represent an important segment of Russian society pressuring for a real democracy.

Futile Capitalism

Capitalism has struggled in Russia. Multiple statements in this regard exist in *Second-Hand Time*:

> We believed in a beautiful life. Utopia … and how about you? You have your own utopia: the market. Market heaven. The market will make everyone happy! Pure fantasy! – A farce! Instead of the dictatorship of the proletariat, it's the law of the jungle … The oldest law in the world.

> Capitalism isn't taking root here. The spirit of capitalism is foreign to us. It never made it out of Moscow. The Russian man isn't rational or mercantile … Accumulating money isn't for him ….

> I have always lived in the same little house without any amenities … I still do today. My whole life, I've done honest work. I toiled and toiled …. All I had to eat was macaroni and potatoes, and that's all I eat today.

> In the West, capitalism is old, an established fact; here it's fresh, with brand-new fangs … While the government remains purely Byzantine.

Dread change

The chaos following the turbulent experience of the Soviet Union's collapse left deep wounds; many citizens associate change with disorder:

> [G]etting rid of an incompetent leader isn't our biggest problem. The question is what happens next.

> When the Communists were in power, I was an engineer- now I'm a cabbie. We chased out a group of bastards, and another group of bastards took their place.

Second-Hand Time, already a decade old, could not offer testimonies on contemporary events such as Putin's disinformation campaigns, which have fuelled the political climate for the invasion over several years. However, readers will find the book transformative in understanding the dynamics underlying Russia's ongoing violations of international law, the prospects, and challenges of any peace negotiations, and what may happen in the aftermath of the war in Ukraine.

P.S. The author is grateful to "Tito de Zubiria" for discussion on this and other books by S. Alexievich.

A Colombian and Canadian national based in Aotearoa New Zealand, **Dr Alberto Alvarez-Jimenez** (he/him) is a Senior Lecturer at the University of Waikato. His interest in international law stems from his life experience in several continents. His research is interdisciplinary and includes economics, political science, literature and art. It has appeared, among others, in AJIL, EJIL, JIEL and ICLQ. He speaks Spanish, English and French and enjoys architecture and music.