Book Reviews

Merrills, J.G. ***International Dispute Settlement*** (3rd ed.). Cambridge: Cambridge University Press, 1998. Pp. xxiv, 354.

Collier, John and Vaughan Lowe. ***The Settlement of International Disputes. Institutions and Procedures***. Oxford: Oxford University Press, 1999. Pp. xxviii, 395.

There has been a growing tendency among states in recent years to settle international disputes by recourse to arbitration. The docket of the International Court of Justice is longer than ever before in its history; a number of new judicial bodies have been established; and existing bodies have undergone considerable reforms. Viewed against this background of renewed interest in international arbitration, the publication of a third edition of Merrills' standard work in the field and of a new volume by Collier and Lowe may be seen as timely contributions to the literature.

This third edition of Merrills' book supersedes the second edition published in 1991. A new chapter on the WTO dispute settlement system has been added, but the book's main structure and style generally remain unchanged. Its focus is on inter-state disputes, though it also gives some attention to the role of mixed arbitration. The book is written from a practical perspective, taking account of political realities rather than idealistically portraying the role of dispute settlement in the international legal system. Its 12 chapters may be roughly divided into three parts: the first (Chapters 1–4) dealing with diplomatic means of dispute settlement; the second (Chapters 5–9) with international arbitration; and the third (Chapters 10–11) with the role of the United Nations and regional organizations. A final chapter traces trends and future prospects for international dispute settlement.

The first four chapters introduce the different means of diplomatic dispute settlement. The author underlines the role of negotiation as the most important method of resolving disputes. His writing style is anecdotal; prominent examples are used to illustrate important points. At times, descriptions will bring a smile to readers — for example, when Cardinal Samoré, the Papal mediator in the Beagle Channel controversy, is described as a 'beaming Pickwickian prelate . . . bubbling over with goodwill and humour' (p. 33, cited from a newspaper article).

The chapters on inquiry and conciliation are similarly anecdotal: important instances, e.g. the *Red Crusader* inquiry, are discussed at considerable length (pp. 52–55). This detailed account makes for interesting reading, at least for those with a sense of the history of international law. However, one wonders whether so much detail was indeed necessary, especially given the limited importance of inquiry and conciliation (which the author himself acknowledges: pp. 58 and 84).

Compared with Chapters 1–4, the description of the various systems of international arbitration in Chapters 5–9 seems disproportionately short.

Chapter 5 on ad hoc arbitration stresses the huge influence that parties can exercise on the arbitral procedure. This chapter provides a useful survey of recent examples of arbitral practice, although this reviewer would have appreciated a comprehensive analysis of the advantages and disadvantages of ad hoc arbitration over institutionalized systems of dispute settlement.

Chapters 6 and 7 deal with the ICJ as the principal judicial organ for the settlement of disputes. Again, Merrills provides useful and sound information, and his conclusions can

be fully endorsed.[1] However, one would have wished for a more in-depth treatment of some of the issues. Prominent among these is the question of interim protection before the ICJ, to which the author devotes a mere two pages (pp. 129–131). Moreover, there is no reference to the ongoing debate about the binding (or otherwise) character of orders under Article 41 of the ICJ Statute.[2] The discussion on the Court's advisory jurisdiction occupies little more than one page (pp. 136–137), with only a passing reference to as important an example as the 1996 *Nuclear Weapons* case. In addition, this reviewer would have hoped for a more general discussion of the potential role of the Court as a law-maker and conciliator.

Chapters 8 and 9 on dispute settlement in the framework of the Law of the Sea Convention and the WTO agreements provide good introductions to the respective legal systems. In particular, the author shows very clearly how both of these systems combine diplomatic and judicial forms of dispute settlement (cf. pp. 170–172 and 178–180). The chapter on the WTO is a welcome addition, and the author's conviction that 'trade issues are now simply too important to be left out' (Preface, p. x) deserves full support. Again, however, some aspects might well have merited greater attention than is given in the book. For example, the jurisdiction of the International Tribunal of the Law of the Sea under Article 290 of the Law of the Sea Convention is particularly worthy of mention. It has become the most important aspect of its jurisprudence, but is left out of the book. With regard to the WTO dispute settlement system, comments on the problematic relation between Panels and the Appellate Body would add considerably to the discussion.[3]

In the third part of the book, the author examines the role of the UN and of various regional organizations in the field of dispute settlement. The functions of all relevant UN organs are described, with a particular focus on the evolution of the Secretary General's role.

A final chapter on 'Trends and Prospects' summarizes the findings of the book and presents some general observations and comments. The author's analysis of the function of adjudication in the international legal system is particularly valuable. In line with his generally pragmatic approach, Merrills sees clear limits to the role of judicial dispute settlement. In his view, international adjudication has been most effective in resolving strictly bilateral disputes. In contrast, it has proved less suited for the satisfactory settlement of multilateral or highly politicized disputes, for which the diplomatic path remains irreplaceable (pp. 296–297). The overall conclusion from this discussion is therefore a rather cautious note, epitomized in the statement that '[w]hile it is difficult to imagine adjudication without law, law without adjudication is actually the normal situation in international affairs' (p. 292). Of course, one need not agree with these comments, and a more positive view of the role of judicial bodies in ensuring respect for international law could well be put forward. However, there is no denying that Merrills' position is well argued and carries a certain force, if only as a restatement of a realistic approach to international dispute settlement.

The author finally examines the problems posed by the recent proliferation of international courts and tribunals. His discussion

[1] A possible exception might be the author's assessment of the chambers procedure before the ICJ. Perhaps a little too optimistic, he speaks of the ICJ's 'successful effort to encourage the use of chambers' (p. 186).

[2] The question has been forcefully raised by Judge Weeramantry in his separate opinion in the 1993 order in the *Genocide Case*, ICJ Reports (1993) 372. It also played, and continues to play, an important role in the two 'death penalty cases' between Paraguay and the United States (*Breard Case*, Provisional Measures, reproduced in 37 ILM (1998) 812, discontinued in November 1998) and Germany and the United States (*LaGrand Case*, Provisional Measures, Order of 3 March 1999, available at http://www.icj-cij.org; pending).

[3] Of course, account must be taken of the publication date of the book, which prevented the author from referring to the Appellate Body's jurisprudence.

is based on the assumption that such proliferation 'in itself is neither good . . . nor bad' (p. 309). In the context of a widely held belief that the creation of new judicial bodies endangered the unity of international law, and this without good reason to support it, Merrills' point indeed provides a necessary clarification. His 'neutral' approach to the question of proliferation recognizes that the creation of new judicial bodies has always been a reaction to very real and pressing political demands.[4] While acknowledging the risk of fragmentation, the author ultimately relies on the personality of judges, who, if trained as general international lawyers, should reach, 'as a matter of course', decisions acceptable for other tribunals (p. 310). In light of developments since the book's publication, this statement might seem over-optimistic. The express (and unnecessary) critique of the ICJ's *Nicaragua* judgment in the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia[5] shows that the expertise of judges in matters of general international law does not always prevent them from making decisions capable of producing fragmentation.[6] The creation of rules governing the respective areas of jurisdiction, which Merrills cautiously encourages (p. 309), would therefore be a more effective way of avoiding the risks of fragmentation.

This reviewer's minor criticisms do not alter his overall opinion that Merrills' third edition is a very good analysis of the function of dispute settlement in the international system. The information given is sound, and the writing style makes the book very readable. The insightful conclusions closing each chapter provide additional food for thought. Despite the critical comments or suggestions for more in-depth treatment of some issues, the book can therefore be recommended.

The new book by John Collier and Vaughan Lowe, while bearing a similar title, is considerably different to that by Merrills. In the first instance, the term 'international dispute' is defined differently. Rather than focusing on inter-state disputes, the authors examine mixed arbitration and international commercial litigation. The focus of the book is on legal means of dispute resolution, to the exclusion of political mechanisms such as international (regional) organizations.

In addition to this difference in scope, Collier and Lowe have chosen a different methodological approach. While Merrills deals with each institution or mechanism in turn, Collier and Lowe first treat diplomatic and legal means of dispute settlement ('Institutions', pp. 19–185) and then analyse the common aspects of international procedural law applicable to all judicial systems ('Procedure', pp. 189–273).

Mechanisms for the resolution of inter-state disputes (diplomatic means, ICJ, Law of the Sea Tribunal, ad hoc arbitration) are dealt with as thoroughly as in Merrills' volume, although the discussion is considerably shorter. This is possible because Collier and Lowe's presentation is more concise, with clearer subdivisions and a less illustrative style of writing. At times, in the reviewer's opinion, this brevity is quite welcome, such as in the chapters on the diplomatic means of dispute settlement. At other times, the authors' succinctness comes at the expense of vital information. This is most noticeable in the chapter on WTO dispute settlement. Although Collier

[4] This is perhaps most evident with regard to the creation of the International Tribunal for the Law of the Sea, whose establishment was seen as a way to accommodate the interests of those states unwilling to accept the jurisdiction of the ICJ.

[5] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadic*, Appeals Chamber, Judgment of 15 July 1999 (available at http://www.un.org/icty/judgement.htm), paras 115–145. Paragraph 115 of the judgment runs as follows: 'The Appeals Chamber, with respect, does not hold the Nicaragua test [of the 1986 ICJ judgment] to be persuasive.'

[6] In his separate opinion, Judge Shahabuddeen convincingly argues that *Tadic* and *Nicaragua* could have been distinguished, and that the express criticism made in the *Tadic* majority judgment therefore should have been avoided. Cf. Separate Opinion of Judge Shahabuddeen, paras 17–21, available at http://www.un.org/icty/judgements.htm.

and Lowe (unlike Merrills, whose work was published earlier) could have made use of the growing Panel and Appellate Body jurisprudence, they treat the entire subject of WTO dispute settlement in a mere eight pages. Unfortunately, acknowledgment that the WTO Dispute Settlement Understanding 'represents the most extensive network of compulsory dispute settlement obligation in contemporary international law' (p. 104) is not accompanied by more than a brief survey of that network's basic characteristics. It is to be hoped that future editions will include a more in-depth analysis of the WTO dispute settlement system.

The book's most interesting and distinctive feature is the chapters on disputes between states and non-state entities. From the range of existing mechanisms, Collier and Lowe have chosen to deal with international commercial litigation, ICSID, and the Iran–US Claims Tribunal. In this reviewer's opinion, this broadening of the scope of the book is most commendable, as it enables the reader to understand the common starting points and distinctive features of private and inter-state arbitration.

As to the substance of these chapters, the information is once again clearly presented and well documented. For instance, the chapter on ICSID examines the self-contained nature of ICSID and its growing importance in the field of investment disputes (pp. 69–71). In line with much of the literature, the authors are critical of the frequent annulment of awards that threatened to render ICSID ineffective in the late 1980s.[7]

While there exists a large body of special literature particularly devoted to ICSID and the Iran–US Claims tribunal, the inclusion of chapters on these two institutions in Collier and Lowe's book has filled a gap that existed in the literature on general international law. It is to be hoped that other authors will follow the example of this book and no longer relegate the treatment of mixed arbitration to a few footnotes.

Finally, the methodological approach used by the authors merits some comment. As has been noted, Part Two of the book aims at giving a survey of the basic principles of international procedural law. Such an approach, in the opinion of this reviewer, is to be endorsed in principle, as it could raise the understanding of common problems and specific features of the various judicial systems. However, when reading the second part of Collier and Lowe's book, one wonders whether the authors have taken their own aim seriously, namely to 'give an account of the law [which] is in principle applicable to all international tribunals' (p. 190). The bulk of references is to one or the other form of private dispute, while the ICJ and the International Tribunal for the Law of the Sea are mentioned less frequently. The main reason for this imbalance is that specific aspects (such as intervention of third parties) were included in the discussion of the ICJ in Part One, but were left out of Part One's treatment of international commercial litigation. Hence Part Two's treatment of the rules on third-party intervention consists of a cross-reference to the discussion of Article 62 of the ICJ Statute in Part One and then deals with the rules of other legal systems (see pp. 208–210). Moreover, some of the procedural problems that Part Two deals with (e.g. delocalization, pp. 232–235) only exist in international commercial litigation or mixed arbitration, but are of no relevance for the procedure before the ICJ, the International Tribunal for the Law of the Sea or the WTO tribunals. Unfortunately, therefore, the specific aim of Part Two, namely to convey an understanding of common procedural problems, is not really met.

Apart from this criticism, Part Two of the book does provide a good introduction to the main problems of arbitral procedure. The list of topics encompasses questions of admissibility of claims; the autonomy of arbitration clauses; and the effects and enforcement of

[7] Cf. pp. 71–73 for a discussion of the respective 'sagas' in the *Klöckner*, *AMCO Asia* and *MINE* cases. For an analysis of ICSID's annulment procedure, see W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* (1992) chapter 3; and Elihu Lauterpacht, *Aspects of the Administration of International Justice* (1991) 101–103.

awards. Out of this variety of topics, the very good chapters on the *lex arbitri* (pp. 229–232) and delocalization (pp. 232–235) deserve to be mentioned, in which Collier and Lowe succeed in presenting very difficult questions in a clear and comprehensible manner. After a distinction between the law applicable to the merits of the case ('the applicable law'), and the law governing the arbitral process (*lex arbitri*), they introduce the main theories about the nature of arbitration in a very accessible way. They show that the trend towards delocalization of proceedings has its roots in a 'party autonomy understanding' of arbitration. Acknowledging a tendency among states such as France, Belgium or Switzerland, to limit the restraints of the *lex loci arbitri* on international arbitrations, their own view remains somewhat cautious. It is well encapsulated by the following:

> Paradoxically, the delocalizationists had to await the intervention of the very laws which they sought to escape in order to achieve their aims. (p. 234)

In sum, Collier and Lowe's book is a valuable addition to the literature on dispute settlement. As to its structure, readjustments would make Part Two more balanced and less focused on private and mixed arbitration. Future editions also would have to correct some minor (mostly printing) errors: the most prominent factual error occurs on page 16 where the *Lockerbie Case* is said to have been 'brought by the United Kingdom and the United States against Libya'(!). However, these few criticisms do not detract from the book's value as one of the first generally available legal studies treating questions of inter-state, mixed and private arbitration in one volume.

Despite the difference in scope, arising from different understandings of the term 'international dispute', both books will appeal to a similar group of readers: students of international law and international relations, and practitioners seeking easily accessible information about the role and function of the various means of dispute resolution.

Those readers who are only interested in purchasing one of the two certainly have the choice between two good works. In the reviewer's opinion, the comparative strengths of Merrills' book are its readability and its inclusion of insightful conclusions at the end of each chapter. On the other hand, Collier and Lowe's book is better suited for those who seek concise and well-structured information about the various problems of each of the judicial institutions. Ultimately, however, both books deserve to be widely read, as they are evidence of the growing importance of peaceful, judicial means of dispute resolution.

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Brad R. Roth, *Governmental Illegitimacy in International Law.* Oxford: Clarendon Press, 1999.

There is a refreshing aspect to Brad R. Roth's new work, *Governmental Illegitimacy in International Law*, and it starts with the title and the author's awareness of the irony in it. 'Legitimacy' criteria, grouped around principles of liberal democracy and human rights, have reappeared in contemporary practice concerning how international law reacts to municipal governance. Writers and practitioners may herald this as essentially progressive — an advance toward the final frontier of human rights and world public order. But by involving themselves in decision-making processes of certain states, states and the various formations they constitute may equally be seen as returning to habits of intervention long identified as inimical to orderly and just global society. As Roth points out later in this impressive work, it was under the very rubric 'legitimacy' that states in the past enforced odious ideologies on non-conforming members of the international community (at 136-137, 426-428).[8]

[8] In an earlier review, Alain Pellet regrets that Roth did not present a more detailed history of legitimacy principles. 'Book Reviews and Notes,' 92 *AJIL* (2000) 419, at 420. Given the formidable scope of the work, however (consider its survey of political philosophy), Roth seems to have had little choice but to leave some things out. His omissions strike this reviewer as generally judicious. *Governmental Illegitimacy* is also reviewed at 25 *Yale J. Int'l L.* 233 (2000).

So why is it — and to what extent is it — that states are returning to a variation of legitimacy doctrine today?

These are questions central to Roth's work, and from them stem closely related and useful *Problemstellungen*. Roth asks whether the principle of popular sovereignty — itself, he says, by now rooted firmly in international law — requires liberal democracy. In view of the pluralism of international society, Roth suggests that recent writers who identify the two too tightly are wrong.[9] Liberal democracy, though ascendant in the economically advanced states of Western Europe and North America, remains, Roth implies, a culturally-determined phenomenon and not a universal value necessarily suitable as a source of international legal directive. Policy aiming to impose liberal democracy, Roth argues, is frequently misguided and threatens violence to two core principles of the UN Charter: that force shall not be used or threatened against a state's political independence (Charter Article 2(4)); and that states shall not interfere in matters 'essentially' within a state's domestic jurisdiction (Article 2(7)). 'If the effective control doctrine [under which governments were recognized solely on the basis of the fact of their governing] is to give way', Roth writes, 'its replacement will have to provide assurance to a world still leery of heavy-handed (and predatory) interventionism that the door will not be opened to new, and potentially even more dangerous, arbitrariness' (at 149). Yet recent state practice, Roth discusses at length (Chapter 9), has witnessed intensified international involvement in the reshaping of domestic governmental order. The discussions here of Haiti, Angola, Cambodia, Liberia, Somalia, and Sierra Leone are highly instructive, the last in particular, in view of the collective auspices under which West African states intervened there.[10] Roth's views on NATO intervention in Kosovo and EU Member State measures toward Austria — developments too late for inclusion in the present work — would be welcome in a second edition.

Roth's work is thorough, not only in its coverage of state practice identified by many as indicative of the new 'democratic entitlement' under international law. He also prepares the theoretical groundwork for discussion of that practice. This involves a bold, if brief, analysis of past writings on popular sovereignty and domestic constitutionalism (at 37–74), and a discussion of the chief competitor to liberal democratic legitimacy doctrine since World War II, socialist 'revolutionary-democratic dictatorship' (at 75–120). The main point behind the latter seems to be to show the relativism inherent in selecting any particular governmental order as preferable to others. Roth admits that at the margins certain forms of force in domestic governance are rightfully deemed 'illegitimate' (racist or foreign domination, chief among these). But beyond marginal cases like Rhodesia and Manchukuo, Roth wishes to raise the level of scepticism among international law writers and to suggest that liberal democratic legitimacy criteria are not practical — or necessarily valid — criteria by which to establish regimes of non-recognition of governments or programmes of intervention.

At least three prominent omissions struck the present reviewer in reading *Governmental Illegitimacy*. M. J. Peterson's *Recognition of*

[9] Roth identifies as primary exponents of the view that liberal democratic governance is becoming a norm of international law Thomas Franck, Lois Fielding, Malvina Halberstam, W. Michael Reisman, and Anthony D'Amato. He refers to these writers collectively as constituting a 'democratic entitlement' school. (page 3, note 4). Roth might have mentioned in this context at least in passing the writings on this matter of James Crawford (whom he discusses at length elsewhere in connection with statehood and recognition). *See* James R. Crawford, 'Democracy and International Law,' 64 BYIL 113 (1993); *Democracy in International Law* (Cambridge: Grotius, 1994).

[10] Roth also reviews practice involving recognition and intervention from the late Cold War, including Nicaragua (290–303), Grenada (303–310), and Panama (310–318).

Governments falls quite squarely in Roth's brief, not least of all in light of the importance of the role of effectiveness principles in that work.[11] Stefan Talmon's *Recognition of Governments in International Law* covers quite different ground, but is equally relevant to Roth's inquiry. Talmon focuses on the status of governments in exile, a set of special cases that may well be argued to push effectiveness criteria to the margins.[12] Where a government lacking any longer even the slightest territorial nexus to the state on behalf of which it claims to act nonetheless retains international recognition, it would seem plausible that something other than effectiveness criteria are at work. Finally, Christian Hillgruber, in *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft* (1998),[13] stakes out a very strongly constitutivist position within a discussion of recognition of new states. Noting, in particular, cases of recognition that highlight the activism (or interventionism) that Roth identifies as a possible risk to international order, Hillgruber argues that existing states play an active role in creating new states, through the decisions they make as to which entities to treat as legal equals. Other writers who raise the constitutivist view to renewed prominence, if indirectly, include Colin Warbrick, Jorrri C. Duursma, and, Matthew Craven,[14] all identifying a 'constitutivist' element in recognition in the 1990s (including recognition of the European micro-states and Bosnia and possibly Croatia). Fuller reference to such relevant literature would have filled an ellipsis in Roth's work. This, however, is a minor complaint. At least two matters of greater substantive concern strike this reviewer as noteworthy.

First, Roth argues that, in a world highly plural in its national social, political, and legal orders, it is difficult to form consensus as to 'legitimacy' criteria, and, thus, an effectiveness test may be more desirable than alternative formulations.[15] And, second, Roth argues that obstacles to assessing empirically the 'will of the people' in a foreign country are too great for such a venture to succeed in any event.[16]

While international law must accommodate diversity, one is free to wonder whether the formula Roth sets up invites reliance on a 'tolerance' principle for inappropriate ends. It is certainly now the case that certain acts, even if contained within the borders of a state, are not immune from international sanction. States may even carry out armed intervention to stop them. Roth urges that intervention be limited to cases where there exists an 'overlapping consensus' (a construction he borrows from Rawls), and that international society not seek to impose 'universal values' on states (at 31–32). It is not entirely clear to this reviewer what Roth here means. Does he mean to reduce international law to the set of propositions that every constituent of the system voluntarily ratifies? Roth approves a passage of the arbitral decision in the *Tinoco*

[11] M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815–1995* (New York: St. Martin's Press, 1997).

[12] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford: Clarendon Press, 1998).

[13] *See also* Christian Hillgruber, 'Admission of New States to the International Community,' 9 EJIIL 491 (1998).

[14] Jorri C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-determination and Statehood* (Cambridge: Cambridge University Press, 1996); Colin Warbrick, 'Recognition of States,' 41 ICLQ 473, 480 (1992); Matthew C.R. Craven, 'The European Community Arbitration Commission on Yugoslavia,' 66 BYIL 333, 375 (1995).

[15] 'No criteria of legitimacy could possibly garner common acceptance without abstracting from all ideological considerations. Acceptance, for legal purposes, of the legitimacy of those foreign governments holding effective control was the most natural solution to dissensus on principles of internal governance, combined with consensus on the need for a peace and security order.' (117)

[16] Roth notes in a number of places that a lack of 'determinate gauges and effective institutions for verifying popular consent' impose a limit on popular will tests of legitimacy. (148 and *passim*).

matter, where Chief Justice Taft wrote, '[the legitimist principle that underlay the non-recognition of Costa Rica's short-lived revolutionary government] certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law'. (Roth quoting Taft, at 145-146). This resembles the notion, taken widely to be out of date, that international law is merely *jus gentium voluntarum* — the set of rules to which all states give their consent, and nothing more.[17] A sense that the law must be just that seems however to underlie much of what Roth writes about intervention and legitimacy. It would be interesting to know the author's views on how law, in that sense of 'law', could undergo the progressive development that so many writers have identified as necessary to strengthening a world order of human dignity.

Arising repeatedly in *Governmental Illegitimacy* is the idea that verifying popular will is a tricky business. (e.g., at 69, 141) His own experience as an election observer and visits to countries where elections have been internationally monitored gives Roth valuable perspective in this matter. It is with deference, then, that this reviewer asks whether Roth takes an overly pessimistic view of the fact-finding powers of international society. Roth argues that, so uncertain are our faculties of assessment when it comes to the constitution of governments in foreign lands and popular reaction to them, that international law regards effectiveness as the best indicator of consent. If a population is not in a tumult of opposition to a regime so intensive as to erode its effectiveness, then the population must be judged to consent to the regime. Supposing such an intelligence-gathering handicap is all the more curious in an age when the ability of communications technology to close gaps of distance and fill gaps of knowledge is signally famous. It may further be taken into account that the findings of fact that are likely to impel international action are not going to be 'close calls'. They are likely instead to be cases of extreme breach of popular will, manifest in notorious fashion—though, in cases, short of leading to collapse of the regime's effectiveness. It would be interesting to know Roth's views on globalization and the impact in particular of new modes of mass communication (not least of them the internet) on the empirical task of assessing popular will.[18]

Roth identifies effective control as a desirable measure for recognizing governments because it furnishes a stand-in in absence of agreement on legitimacy criteria — and, from it, Roth argues, we may draw presumptions about consent (at 69).[19] Roth admits the shortcomings of such a presumption, but he argues that those must be measured against an alternative that he identifies as even less desirable — second-guessing of internal processes of governance, which in turn may invite unregulated economic and military intervention into 'sovereign' state affairs. Pointing out that alternative approaches carry risks, however, does not lift the burden from Roth's own proposal. There is something distinctly unsettling in a presumption that effective control means the controlling entity enjoys popular consent. It imposes a difficult

[17] For a standard critique, see J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, Sixth Edition, Sir Humphrey Waldock, ed. (Oxford: Clarendon Press, 1963) 51–52. Relatedly, see Jochen Abr. Frowein, 'Jus Cogens' in R. Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. Three (Amsterdam: Elsevier, 1997) 65–69 ('The notion of *jus cogens* became essential for the understanding of international law at a time when it was again realized that the individual and arbitrary agreement of States could not be the highest value in the international community.')

[18] Roth expresses skepticism toward strong-form views about 'the end of history.' (page 430, note 22).

[19] The presumption Roth allows to be displaced only in cases where regimes have been installed by foreign invasion or are the result of 'alien, colonial or racist domination.' Chapters Five and Six. Roth does not make clear why such cases do not pose the empirical obstacles that he so prominently identifies elsewhere as precluding assessments of popular will.

standard indeed to require the citizenry openly to confront a well-armed ruling apparatus in order for the bona fides of that apparatus to be called into question at international level — all the more difficult when the citizenry is locked in a day-to-day struggle to meet its own basic economic needs. What is it fair to read from quiescence?

Yet insulation of internal governance from external scrutiny was widely reported to be a basic assumption of the United Nations system at its advent. Roth writes, '[W]hat counts as an articulation of [the will of the people] has generally been thought to be a matter "essentially within the domestic jurisdiction," to be resolved by the political community itself, free from external interference' (at 27). This is in reference to the Universal Declaration of Human Rights.[20] It may well be a point with relevance beyond that instrument and questions of popular governance.

A question of general relevance to the progressive development of international law is how legal principles can be accommodated in a system that often admits reserves of discretion. I have noted this in connection with observed movement in state practice toward a requirement that recognition of new states take place within a collective framework. States during debate over whether and when to recognize new states in the space of the former Yugoslavia tended to agree publicly that recognition should be a collective action. Yet individual states also indicated that they retained the discretion to decide how many partners were required to participate in the action before it could be called 'collective'.[21] Does it erode collective recognition to allow states to decide how many states are necessary before their decision is 'collective'? Does it erode government by popular will to allow states to decide 'what counts as an articulation of that will'? (at 27) At first blush, it may appear that such discretion is erosive of legal norms. But it could also be that such discretion gives the state, ever jealous of its 'sovereignty', a device by which it can simultaneously support the emergence of a new area of international governance and protect itself from an over-rapid removal of authority from its own ambit. The state may support the development of the law at its own pace. Absent such a device, the state might well hesitate to subscribe even in part to the newly emergent principles. Many treaty systems permit states reservations, even of comparatively important parts of a treaty text. The availability of this option can help win parties to a treaty. The device noted by Roth and others may well be thought of as an analogue to treaty reservation, developed for the distinctive context of customary law formation. Just as without reservations states would have no choice but either to reject or to accept a treaty in whole, without the device, states would be left an 'all or nothing' choice as to endorsing newly emergent customary norms. With it, they may endorse such norms yet protect values critical to their social and political systems that might not yet be ready to accommodate the norms in full force. Roth concludes that sovereign equality has indeed been revised by a principle of governmental illegitimacy, unclear in its specifics but real enough in practice. But he denies that that principle has liberal-democratic content. A liberal-democratic legitimism, he concludes, does not yet exist as a developed norm in international law, but, rather, remains an aspiration (at 412). Proposing further an ongoing need to 'bolster' the 'credibility' of international law (at 420), Roth cautions against a wishful thinking that might lead writers to characterize that aspiration prematurely as an accomplished fact. It may well be in the context of a developing norm such as governmental illegitimacy that reserves of domestic discretion such as these are at their most useful.

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[20] GA Res 217(A), UN Doc. A/810, at 71 (1948).

[21] Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Westport: Praeger, 1999) 188–193.

Ulrich Gassner and Heinrich Triepel. ***Leben und Werk, Tübinger Schriften zum Staats- und Verwaltungsrecht***, No. 51. Berlin: 1999.

The work of Hans Triepel (1868–1946) has been overshadowed by the political antagonists, Hermann Heller and Carl Schmitt. Nevertheless, it was probably this relative lack of prominence, combined with his political neutrality and his great reputation, that enabled him in 1922 to establish the influential association of German public law teachers and to become their first chairman. This new biography, written by Ulrich Gassner, fills a historiographical lacuna and provides a thorough investigation of the man and his work.

The first one-third of this well-written book reveals the life of an especially successful German public lawyer. The author's thorough research has enabled him to give a deep insight into academic life in the imperial, the inter-war, and the Nazi periods. Here and in the second part of the book, where Triepel's publications are presented, the book gives innumerable interesting and revealing details without being verbose or irrelevant. After a discussion of Triepel's work, the author examines the impact on Triepel's evolving theory and the science. The author has studied closely the reaction of Triepel's contemporaries as well as of later legal and historical writings, and this research has led the author into the heart of dogmatic and political reasoning of the period. The author examines topics individually and presents Triepel's thoughts in chronological order. Despite the exceedingly large number of Triepel's publications, they are all carefully analysed and considered together with a substantial amount of secondary literature. Because of the depth of the author's scholarship, characteristic of a true German *Habilitationsschrift*, Gassner's book will serve as a reference tool for German public law scholars for many years to come.

The book is a storehouse of ideas and subjects: public lawyers as well as historians will find much inspiration here. As a public lawyer, the author stresses Triepel's importance for the foundation of the present German Constitution. More evident is Triepel's impact on the Weimar Constitution, as a member of the *Verein 'Recht und Wirtschaft'* (Society of 'Law and Economy'), created as a pressure group to influence the constitution-making process. Triepel's writings on public international law are also presented in context with some contemporary authors. The investigation of Triepel's methodological approach is given due importance, from which it is clear that Triepel adapted the approach of his colleagues at Tübingen, such as Philipp Heck and Max von Ruemelin, and first applied 'jurisprudence according to interests' to public law. Research has been done on public law methodologies in the nineteenth century and during the Weimar era, and this book fills the gap by covering the later imperial period. The author's suggestion regarding the influence of the philosophers Scheler and Hartmann in the subsequent years is entirely convincing.

It is particularly difficult to assess to what extent Triepel was involved in the Nazi period. He was more a conservative than a national socialist, and his writing in 1925 on the Germanic legal tradition of leadership (p. 329) has to be seen in this light. But his famous notion of the 'legal revolution' in 1933 helped to legitimate the new regime and shows at least a considerable inclination by Triepel in the regime's favour. Although Triepel retired in 1935, he nevertheless published a book on hegemony in 1938, in which he tried to define the legal role of the *Führer* and hegemonic countries. He, along with other writers of his time, characterized leadership as something voluntarily accepted by the people, which imperialism could impose only by force. Such critical remarks on imperialism were quite common and thus cannot be regarded as bold opposition to the regime (p. 340). In a period in which public lawyers vied for official recognition and favours, critical remarks on the method and the orthodoxy of legal research were widespread. It may be possible, therefore, to call Triepel's book on hegemony an outstanding scholarly achievement (p. 350), but only if the same accolade is given to the

writings of Carl Schmitt. This point deserves further research.

The above criticisms show again that writing a biography is a thankless task, as generally too many topics are raised which cannot all be dealt with equally successfully. The criticism, however, only proves the inspiration of such exhaustive research for which we must thank the author.

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