BOOK REVIEWS

The Rights of Strangers. Theories of International Hospitality, the Global Community, and Political Justice since Vitoria, by Georg Cavallar, Ashgate Publishing, Aldershot/Burlington, 2002, ISBN 0-7546-0632-5, vii + 421 pp., including Index and Bibliography, US$ 89.95

The world that we find ourselves in is far from that envisioned by Jeremy Bentham and J.L. Austin when they outlined their positivist visions (and criticisms) of international law. Political leaders, regardless of their relative strength find themselves continually forced to deal with a fractious and cumbersome United Nations, human rights affect both the construction and execution of foreign policy around the world (great strides for "nonsense upon stilts"), and heads of state are being hauled before international criminal tribunals to answer for their behavior. Obligations *erga omnes* and *jus cogens* norms have positioned themselves comfortably in the hierarchy of international legal sources. Clearly, while positivism is not dead, the era where it served as a *complete* account of international norms in general and international law in particular is long gone. The question that political philosophers, historians, and legal theorists have struggled with in the face of this is whether or not this marks a turning back to older views of the normative basis of global politics or something entirely unprecedented. Georg Cavallar's *The Rights of Strangers* is an articulate and insightful attempt to make a case for returning to the natural law tradition of the modern period, although a tradition reconceived in light of modern liberal political philosophy.

The central aims of *The Rights of Strangers* are three-fold: first, it is to explain the history of normative thinking about international relations in general and the rights of foreigners to some form of hospitality (what Kant refers to as "Cosmopolitan Right") in particular. Second, Cavallar seeks to show that the reflections of Vitoria, Grotius, and Kant (among others) on international relations are relevant for contemporary political and philosophical debates on international law in a post-Westphalian international system. Finally, the governing concern of the study is to outline and advocate a particular conception of the normative basis for international law, what he calls a "thin" theory of justice – that he believes exists in many of the thinkers that he has selected for study. While his overall account is compelling and well-argued, each element has some weaknesses. In this brief study, I will deal with each of these aims in reverse order.

The central texts against which *The Rights of Strangers* may be contrasted are Richard Tuck's recent study, *The Rights of War and Peace*, Leo Strauss' much older *Natural Right and History* and Jerome Schneewind's more philosophical *The Invention of Autonomy*. Each of these texts, seeks to interpret the transition to modern normative theory as either a continuation of or a radical departure from its medieval predecessors emphasis

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on natural law. For Strauss, for example, the transition to the Hobbesian political world-view transposed the older language of natural law and natural rights onto a modern, mechanistic conception of nature. Tuck, on the other hand focused specifically on conceptualizing the international dimension of natural law as a crucial dimension for historical theories. Finally, Schneewind's genealogy of the Kantian notion of autonomy traces the development of normative theory from Groatian natural law to the forbearer of Enlightenment rationalism.

The particularly original contributions of Cavallar's study are two-fold: First, he seeks to place these historical figures within a new, more contemporary conception of natural law discussed in terms of modern moral philosophy. This philosophical foundation gives Cavallar's historical research a relevance beyond simply providing a report on the development of natural law and seeks to make their ideas relevant for contemporary political and legal controversies. Second, he seeks to focus his discussion of natural law on the notion of hospitality rights as "a plausible compromise between the extremes of a splendid isolation of independent states on the one hand and a world government on the other" (p. 3). This emphasis nicely combines the tradition of natural law with some of the concerns of the modern human rights regime. Thus, while a number of the figures Cavallar studies and the broad themes of his text have been dealt with by others, his approach adds unique features to these historical debates.

The philosophical basis for his approach to international relations and the guide for his historical studies is a unique spin on traditional liberalism. Building on the ideas of Michael Walzer, Cavallar distinguishes between "thick" and "thin" conceptions of justice. The former expresses the belief that justice is rooted in a broader conception of the nature and purpose of human existence, such as is found in cultural traditions and religious doctrines. Under the heading of a "thin" conception of justice on the other hand lies a belief system he sees as better suited to the current international political climate where disagreements about deeply held values are the rule rather than the exception. By "thin" he means a notion of justice divorced from the metaphysical and theological contexts which have given birth to notions of justice, based instead on what he believes "any rational being" could perceive as valid norms for structuring international relations. From this position, Cavallar seeks to ground a broader conception of justice where radically different conceptions of the good can each feel at home – thereby giving his principles of a kind of universality. He believes this moral minimalism is better suited to handle the nuances of international politics where pluralism and ideological conflict prevent the development of any strong universal ideology.

Cavallar does not argue for the universality of this conception of justice through any systematic deduction or definitive proof, but instead rests his views on an intuitive sort of foundation. He argues that it is simply a fact of reason (to use Kant's terminology) that universality, equality, and

consent match with commonly shared principles of justice. As he puts it: "A limited form of ethical universalism, or thin concept of justice corresponds with our moral intuitions of average justice" (p. 49). Citing cases like the rejection of communism in Eastern Europe in the name of liberal principles and the universal moral outrage expressed over atrocities committed in the Balkans in the 1990s, he concludes that there are indeed shared moral structures that can serve as the basis for a universal natural law.

> The central criteria or features of political justice are universalizability, impartiality, the idea of free and universal consent, and equality. Principles which are universalizable are followable by all in the relevant domain, or 'could coherently be adopted by all' (p. 56).[1]

For Cavallar, then, the basic thin principles of justice are rooted in commonly shared aspects of moral reasoning that transcend cultural, historical, and religious differences.

Though initially plausible, Cavallar's thesis regarding the universalism of justice rings somewhat hollow when placed in the context of his own historical research. His historical studies are rooted *entirely* in Western Europe with only passing reference to the values of non-Western thinkers and cultures.[2] In order to vindicate his assertion that these ideas are shared beyond the borders of what Richard Rorty has referred to as "the rich, North Atlantic states," Cavallar would have to cast his net much wider than he does.[3] Rather than focusing on developments in Western Europe, he should be looking at philosophical reflections from Asia, Africa, and Latin America (both historical and contemporary) in order to validate his views about the nature of justice.[4] This observation does not refute his claims about the legitimacy of certain international legal norms, he might find exactly what he is looking for when he looks beyond the European frontier, but his failure to do so makes his well-meaning universalism somewhat suspect. Many relativist critics of Western conceptions of justice do not object to the conclusions drawn by Western universalism *per se*, but rather they reject the means by which the West reach these conclusions, keeping non-Western ideas outside of the conversation.

All of this leads to the conclusion that his thin theory of justice is not thin enough. It secretly contains many of the metaphysical assumptions that recent political philosophy has rendered suspect. The Kantian conception of individual autonomy, as well as his version of universality (the

1. Internal quote is from O. O'Neill, Towards Justice and Virtue. A Constructive Account of Practical Reasoning (1996).
2. A point that he concedes in his conclusion.
3. R. Rorty, *Human Rights, Rationality, and Sentimentality*, *in* S. Shute & S. Hurley (Eds.), On Human Rights. The Oxford Amnesty Lectures 112 (1993).
4. For an example of such an approach in relation to the Islamic world view, *see* A. An-Na'im, Toward an Islamic Reformation (1990).

famous "categorical imperative") have been the subject of deep criticisms by many thinkers with whom Cavallar claims kinship. For Habermas, Kant is mistaken in assuming that individual reason dictating *a priori* principles of law is the route to a just society.[5] Rather, for him the principles of justice towards which we strive for are what *actual groups* in *actual dialogues* agree upon. It is only through real world discussions with others (including those who do not share our assumptions) that we can hope to achieve any morally defensible legal and political system. Similarly, Rawls' Kant-inspired theory of justice as fairness eschews Kant's metaphysical commitments for being unnecessarily bound up with the presuppositions of German Idealism and instead roots justice in the self-understanding of democratic cultures.[6] Thin conceptions of international society and the liberal principles to which Cavallar refers are shorn of the metaphysical and philosophical commitments that are the root of Vitoria, Grotius, and even Kant. Both Habermas and Rawls' versions of thin justice take into account the values of those who may come from different cultural and moral environments and thereby make a Kantian conception of justice more truly universal than simply asserting that certain principles are (or should be) accepted by all.[7] By asserting that Kant is thin enough for modern needs (as Cavallar's arguments seem to entail) is to ignore Kants own metaphysical thickness.

Regardless of the philosophical weaknesses of Cavallar's conception of international justice, it serves as an effective touchstone for studying the history of the natural law approach to international relations. The historical analyses develops nicely along the lines of his theoretical commitments, showing that "thin justice and moral minimalism […] are reiterated in different times and places" (p. 117). According to Cavallar's history of modern international law, Vitoria and Grotius articulate a conception of an international community that stresses the rights of non-Europeans (and most importantly, non-Christians) to a great extent, in keeping with his minimalist normative theory. He dutifully contrasts these ideas with thicker conceptions of the law of nations, such as in Solórzano and shows where each natural law thinker contributes to the developing discourse. The stories Cavallar tells are not unambiguous, and he is explicit that he is studying literature that is open to numerous interpretations, but nonetheless a pattern appears: the development of moral minimalism starts with Vitoria's consideration of the native Americans and reaches its zenith with

5. *See* J. Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, *in* J. Habermas, Moral Consciousness and Communicative Action (1990).
6. This is why Rawls' own liberal conception of the law of peoples suffices itself to delineate what a liberal society is willing to accept from non-liberal states. As he states his project, he is attempting to "work out the ideals and principles of the *foreign policy* of a reasonably just *liberal* people." *See* J. Rawls, The Law of Peoples (1999) (emphasis added).
7. It should be pointed out that Cavallar does at times discuss justice in purely procedural terms. That said, Habermas and Rawls' critiques of traditional Kantianism nonetheless stand in sharp contrast to Cavallar's virtually wholesale endorsement of Kant.

the Kantian conception of a perpetual peace situated within a world federation.

As a historical theme, the right to hospitality takes on three primary dimensions in this study: the duty of states to perform humanitarian interventions, the right to travel and stay in foreign lands (including immigration), and the right of governments to restrict or prevent foreign trade. The first is viewed primarily in terms of Vitoria's discussions regarding the rights of native American peoples to defend themselves. Here, Cavallar does an excellent job in situating Vitoria's views in relation to spiritual, political, and intellectual developments at the time – especially in relation to the spiritual missionary Las Casas and to Cortés' imperialist efforts. Surprisingly however, humanitarian intervention largely drops out of his discussion of some of the later writers, despite the fact that Kant has been cited by numerous authors as one of the most systematic defenders of a right to humanitarian intervention.[8] His analysis of hospitality would have been much stronger had he devoted more effort to expound on the later development of this doctrine, unquestionably the most controversial inheritance from natural law.

Of course, humanitarian intervention as a form of international relation is a rarity in history when contrasted with the ceaseless economic expansion characteristic of the modern era. Even the most cursory examination of the history of the law of nations shows that the rights of foreigners to engage in trade (along with the moral legitimacy of trade monopolies and the freedom of the high seas) has been a central motive for the articulation of international law throughout its history. Most of the thinkers Cavallar analyzes place trade into a larger narrative of social progress, such as in Kant's well-known "unsocial sociability" and Smith's better known "invisible hand." Here, he offers a compelling analysis of the theme as it has been linked with European colonialism, and debunks some traditional myths about European hegemony in international law. This history of economic theory culminates with a discussion of Asian isolationism and the reciprocal relationship between western ideas and eastern policies. As Western thinkers grappled with the idea of a closed society that refused the natural benefits of commerce with outsiders, Eastern leaders cited Vattel in developing and defending their respective policies. In his study, Cavallar admirably avoids the pitfalls of both materialism (reducing the history of international law to economics) and idealism (treating legal theory apart from the economic forces and interests that impel it). His analysis of European colonialism and the philosophical, legal, and economic theories that underlie it is subtle and multi-faceted.

The central weakness of his historiography parallels the philosophical shortcoming to which I have already referred. Throughout the text he fails to adequately define what he means by natural law and such ambiguity leads him to miss crucial philosophical differences between the different

8. *See* F. Teson, The Philosophy of International Law (1998).

thinkers he studies. While he adequately discusses their respective philosophical backgrounds, he underemphasizes the dramatic metaphysical and methodological differences existing between them. Scholastic Thomism and Groatian humanism and their different philosophical assumptions remain largely undistinguished by Cavallar who prefers to focus on their reasoning about particular issues and their respective doctrinal developments.[9] Hobbes' mechanistic psychology and Kant's transcendental turn away from traditional metaphysics receive only a superficial treatment in his approach despite the fact that they are *central* to their overall views on political philosophy as well as to their conceptions of natural law (most Kant scholars would raise their eyebrows at the claim that these two thinkers stand in any close relationship with each other without more discussion about their respective philosophical assumptions). This means that he is looking at a number of theories each of which produces some similar ideas but not necessarily for the same reasons. In and of itself, this is not a problem, but his claim that there is some continuity between these figures requires deeper insights into the philosophical traditions from which they each originated, along with a more precisely defined conception of natural law under which they may be subsumed.

Despite his historical rigor and clear presentation, there are some definite stylistic weaknesses in his writing. While he is both scholarly and well-researched, he spends far too much time responding to critics such as Michel Foucault, Quentin Skinner, and David Kennedy and engaging in unnecessary methodological self-critique. While these critics of traditional historiography are worth considering, they are largely tangential to Cavallar's overall concerns and do nothing for his interpretation of the natural law tradition. His preoccupation with their insights leads him into the historian's vice of burying any generalizations he makes under a mountain of qualification and nuance. Cavallar explicitly asserts that he is offering *a* possible reading of the history of ideas, and not a final, totalizing analysis that would admit of other possible interpretations, rendering such a constant self-critique unnecessary. He is equally explicit when he is adopting a controversial interpretation of Kant, Grotius, or Hobbes and is quick to present other possible readings – the mark of a fair-minded scholar. Any reader of *The Rights of Strangers* is most likely sophisticated enough to critically evaluate Cavallar's claims on their own and recognize that the text is neither an oversimplified "metanarrative" (to adopt the postmodern idiom) or a naïve reconstruction of the history of international

9. This point was made by Tuck who asserted that the healthy regard for skepticism characteristic of humanism underlies Grotius' transition to a moral minimalism, which is quite different from Vitoria's "descending explanation" from an Aristotlean conception of the good (p. 93). While there certainly are similarities between the two thinkers, the assumptions through which they achieve their views are different enough to require more analysis on Cavallar's part.

thought. His constant concerns that he is transgressing postmodern orthodoxy are unnecessary given the excellence of his scholarship.

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War, Aggression and Self-Defence, by Yoram Dinstein, Cambridge University Press, Cambridge, 2001, Third Edition, ISBN 0521793440 (hardback), 300 pp., UK£ 75

The book under review is the third edition of a standard work on the use of force (*jus ad bellum*) which has finally come out. The book was originally published in 1988 and revised in 1994. This new edition is completely updated, taking into account important and far-reaching developments in this field of international law. It includes the growing importance of the humanitarian intervention after the Kosovo air campaign in 1998, the relevant jurisprudence of the International Criminal Tribunal for the former Yugoslavia ('ICTY') as well as of the International Court of Justice ('ICJ'). Further on, the Statute of the International Criminal Court ('ICC'), which has entered into force on 1 July 2002, is integrated into the new edition. The present study is a manual for students in international law as well as for practitioners of international law and it is a rewarding lecture for anyone interested in the field of the *jus ad bellum*.

The book is – according to its title – divided into three main parts. In the first part, the author gives an excellent and easily understood introduction into the legal nature of war. Besides a definition of war, he also provides an overview on the existing theories about the *status mixtus*, *i.e.* the intermediate state between war and peace characterized by the simultaneous operation of the laws of war and the laws of peace. It is clearly stated that solely inter-state armed conflicts are the object of this study. This limitation of the scope of the study, however, might not be adequate to recent developments in waging war or to newer forms of unstructured armed conflicts. In the same subpart of Part One, the author furthermore describes the territorial scope of war and the basic principles of neutrality exemplified by some specific rules. The second sub-part of Part One is dedicated to the course of war. The author indicates rightly that nowadays declarations of war are an exception to precede hostilities. He shows different modes how to end or suspend hostilities, illustrating it by many examples throughout history, mainly out of history of the 20th century.

The second part deals with illegality of war as such and it starts with an outline of the history of the legal status of war. The historical outline includes doctrines on *bellum justum* from the Roman epoch on. Out of

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more recent theories on this subject, Kelsen's concept about war as a sanction is presented and criticized. The historical outline makes clear the changing perception of war, which was first considered a legal means until there were developed exceptions to its legality in the Hague Conventions and the Covenant of the League of Nations. The Kellogg-Briand Pact in 1928 as a milestone marks the beginning of contemporary prohibition of the use of inter-state force. Prof. Dinstein then treats the relevant provisions of the UN Charter. Besides treaty law, the author also takes into account customary law. He emphasizes the *jus cogens* nature of the prohibition of the use of force not without stating some general remarks on the concept of *jus cogens*. In the discussion on the modification of *jus cogens* and opinions of several scholars thereon, Prof. Dinstein makes clear that in his view such a modification could only be valid if the support of the international community for this modification was manifested by their ratification of the respective international instrument. This viewpoint of the author is to be welcomed as it entails the strengthening of the norms of public international law by requiring a full support of the international community to those norms. After having discussed the awkward subject of *jus cogens*, the author shortly touches on the question of state responsibility – an important subject which probably might have been dealt with more thoroughly. A further chapter concerns the criminal aspects of the war of aggression. The individual responsibility for crimes against peace is dealt with in detail. The starting point is given by Article 6(a) of the London Charter. Prof. Dinstein takes account of the discussion about the theoretical lacks in the jurisdiction of the Nuremberg trials which took the assumption that war is a *malum in se* and as a consequence declared wars of aggression as a grave crime, even if their illegality had only been pronounced – as already stated – in 1928 with the Kellogg-Briand Pact. The author then describes the historical development of aggression as a crime until recent times. In particular, he discusses the elements of this crime and its defence pleas within the 1998 Statute of the ICC (entered into force on 1 July 2002). At the eve of the origin of the Rome Statute, it had not been possible to find a common definition of aggression, why it has only been included into the Statute as a future crime (Article 5(2) of the Rome Statute). The author emphasizes that the Rome Conference was above all divided about the question whether the ICC would exercise jurisdiction on an act of aggression without a previous decision of the Security Council. He concludes that nevertheless aggression is not viewed by the states as an "anachronistic concept," because of the numerous manifestations of support to this concept by the international community, above all in UN General Assembly Resolutions. The author's view is supported by the fact that on 12 July 2002 the Preparatory Commission adopted its report containing the text of a draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression.

Part Two of the book under review ends with a synthesis on the con-

sequences of the change in the legal status of war, *i.e.* on the impact of the prohibition of the use of force on one hand and the criminalization of the war of aggression on the other hand. The first aspect concerns the implication on war just in a technical, but not in a material sense. The author supports implicitly the elimination of this state of war, because it might be abused by governments to curtail individual rights. Further on, Prof. Dinstein discusses the question whether it suffices that a United Nations force, taking the role of an internal police force, limits its task to put an aggressor in his place and comes to the conclusion that the United Nations forces will have to demand the unconditional surrender of the aggressor as a consequence of the criminalization of the aggressor. The author moreover touches a very delicate question, namely whether there is an equal application of the *jus in bello* to the parties of war in cases of war of aggression. Essentially it concerns the question of "blindness" of the *jus in bello* – its equal application to any armed conflict independent of the reason why the armed conflict broke out. This thought hints back very far in history and was expressed by Rousseau who stated a clear difference between the state which is waging war and the soldiers as human beings who fight for their state and therefore merit respect as a person. In fact, the sharp separation between the *jus in bello* and the *jus ad bellum* is a principle which has been underpinning international humanitarian law for a long time. In the view of Prof. Dinstein, the Advisory Opinion on the Legality of Nuclear Weapons in 1996 by the ICJ could have led to an alarming questioning of this principle. In its famous conclusion – which bears a *non liquet* in the view of Prof. Dinstein and many other scholars – the ICJ stated the following:

> […] the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake

(*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Section 105(2)(E)). Prof. Dinstein tends towards an interpretation of the ICJ's conclusion in that a recourse to nuclear weapons is not *per se* forbidden by international humanitarian law, but is reserved to states in extreme cases of self-defence. This interpretation indeed leads to the conclusion that the ICJ is prone to mix *jus in bello* and *jus ad bellum* in very special circumstances where nuclear weapons are involved. The author is perfectly right in indicating that this precedent is alarming. At the end of Part Two of Dinstein's study he puts some remarks on neutrality and on territorial changes in the light of the prohibition of the use of force.

Part Three of the book under review contains an analysis of the exceptions to the prohibition of the use of inter-state force, namely the individual and collective self-defence as well as the concept of collective security. In the author's point of view the essence of self-defence is self-help and "self-help is a characteristic feature of all primitive legal systems, but in international law it has been honed to art form" (p. 159). Prof.

Dinstein gives an excellent and systematic introduction to the concept of self-defence as a right in positive international law. Following the requirement of an armed attack in Article 51 of the UN Charter, the author limits the cases of the armed attack. To start an armed attack it seems to be sufficient for Prof. Dinstein that a state has prepared for the attack and is trying to fulfill it. This point of view goes quite far as it would lead to a very low threshold for a state to claim its right of self-defence and it might lead to abuse the right of self-defence of a state.

The author then examines the modalities of individual self-defence under two different circumstances: in the case that a response to an armed attack by a state takes place and in the case that an armed attack takes place from the territory of a foreign state but not by this state itself. Finally, the third part concludes with the chapters on collective self-defence and on collective security. Both concepts share the fundamental idea that defence by use of force ought not to be exercised by the victim state itself. While collective self-defence is held under the discretion of a group of states, collective security relies on an authoritative decision by an organ of the international community. It has to be stressed, however, that collective self-defence is limited by the frame given by the UN Charter and that the same conditions as in the case of individual self-defence have to be met: necessity, proportionality and immediacy. As recent developments have shown, the exclusive competence of the Security Council to permit operations of collective security might be doubtful in certain cases. Prof. Dinstein examines alternatives to the Security Council, namely the General Assembly and the ICJ. He is in favour of the idea that the ICJ is competent to declare invalid a (binding) decision of the Security Council if the latter breaks the law on the level of *jus cogens*.

Prof. Dinstein draws a rather sober conclusion at the end of his study on war, aggression and self-defence: "One may say, in a combination of cynicism and realism, that so far the legal abolition of war has stamped out not wars but declarations of war" (p. 283). In his view, the concept of collective security has seemingly not yet been implemented properly, but individual and collective self-defence is still the remedy against armed attacks. This study is therefore to be welcomed not only as a manual, but as a contribution to the controversial discussion on humanitarian intervention, too.

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Democratic Governance and International Law, edited by Gregory H. Fox and Brad R. Roth, Cambridge University Press, Cambridge, 2000, ISBN 0-521-66796-8 (paperback), 585 pp., UK£ 24.95

For this publication the editors have put together a collection of essays by a number of eminent scholars on the growing international attention to democratic governance and its implications for international law. Hence, the central question of the book: is there something such as a democratic entitlement in international law? Some of the assertions around which this collection is constructed are not new but based on seminal ideas developed over the last decade or more in a variety of scholarly works.

The different responses to this question are divided into five themes. In Part I the normative foundations of the right to political participation is traced with reference to developments underlying the legitimacy of national governments and the international validation of legitimacy (Thomas M. Franck); the institutionalization of participatory rights in international human rights instruments (Gregory H. Fox), and democracy as a principle or value in international affairs (James Crawford). Part II is devoted to the role of democracy in some specific inter-state relations and addresses changes in international law with reference to the recognition of states and governments (Sean D. Murphy); the affirmation of democracy and human rights in the Inter-American system (Stephen J. Schnably); and the rise of transnational government networks based on liberal democratic principles (Anne-Marie Slaughter). In Part III the debate is moved from principle to application and enforcement. The five chapters of this Part respectively provide insight into the failures of and inconsistencies in international responses to undemocratic practices even under a fundamentally different concept of state sovereignty (W.M. Reisman); consider the argument that one state, or a coalition of states, may lawfully intervene to promote democracy in another with or without Security Council authorisation (M. Byers & S. Chesterman); analyse the legal effect of consent to intervention in support of democracy (D. Wippman); question the legality in international law of pro-democratic invasion pacts (Brad R. Roth); and review theories of 'liberal peace' and the foreign policy ideology they are capable of producing (John M. Owen).

Should democratic governments tolerate anti-democratic forces or exclude them from the political process is the central question of the subject-matter in Part IV. The first chapter (Gregory H. Fox & G. Nolte) finds support in comparative constitutional law and in international human rights law for the proposition that some form of party prohibition is not uncommon in democratic systems of government, a view the authors find rooted in both procedural and substantive forms of democracy as generally understood in liberal or constitutional systems of government. In the following chapter (M. Koskenniemi) procedural and substantive democracy as justification for the democratic intolerance theory is challenged as unhelpful in explaining the different shades of opposition struggles

against incumbent governments and is dismissed as an ill-conceived universal value of democracy which inadequately takes care of the historical, moral and political core of struggles for change. In a not entirely dissimilar charge the third chapter (Brad R. Roth) of this Part also casts doubt on the international democratic entitlement theory to plausibly counter the legitimacy of intolerance towards threats to substantive political virtues which do not fit the procedural and substantive democracy charge of Fox and Nolte. These critical remarks provoked a rejoinder from the latter two authors accusing Koskenniemi and Roth of 'legal agnosticism' and denying the propriety of normative approaches to issues of democracy. In concluding this debate they observed (at p. 448) that –

> International law is no longer blind to the nature of national political systems. […] Now that such a consensus (on the minimum requirements of genuine elections) is emerging, the discussion among international lawyers must change its level of abstraction. It is still inappropriate to claim a universally applicable blueprint of democracy. But certain essential elements of what a 'democracy' may or may not do have begun to emerge. We are now in a period of transition. Such periods are disquieting and often provoke demands for radical simplification in the form of too much or too little law. In our view, the more appropriate response to a process of gradual change is to ground any generalizations or prescriptions firmly in international practice.

Another vexing issue is dealt with by Steven Ratner in the last chapter of Part IV, namely the tension between amnesty claims in the quest for the democratisation of formerly authoritarian states and the accountability of members of the previous regime for atrocities committed against certain members or sectors of the population. The chapter first considers the state of international law on the issue of accountability and then appraises the existence of a causal relationship between accountability and democracy.

The last three chapters of the book (Part V) comprise some critical approaches to the concept of democracy. In evaluating the democratic process, Roth expresses dissatisfaction with the current discourse which he sees as focussing too narrowly

> on the increasingly widespread adoption of a familiar set of institutions, ascribing to that phenomenon the moral weight that comes with the use of the word 'democracy', without exploring the extent to which the events in question actually serve the purposes that underlie democracy's moral significance (p. 494).

Democratic progress, Roth argues, does not follow the same route or occur in the same fashion on all fronts. While substantive democracy, embodying moral core values, has, according to Roth, not been greatly furthered by recent developments, and in some instances even suffered setbacks, popular sovereignty, with its link between legitimate government and popular consent, has been strengthened. On the other hand constitutionalism, he argues, presents yet another gauge of progress. Where this has taken root,

> the constitution is not merely descriptive (reflecting the transitory configuration of the *de facto* power structure) or programmatic (reciting high-minded aspirations), but operative, effectively setting the perimeters of the permissible actions of State organs and officials. […] Wherever, and to whatever extent constitutionalism is absent, little beyond personalistic loyalty or habits of obedience stands to prevent an unmediated clash of social forces, i.e. politics as war by other means, at best (p. 513).

When reflecting on transitions from authoritarian to democratic governance, perhaps the most sobering contribution is the essay by Jan Knippers Black on the question about the kind of democracy the democratic entitlement thesis entails, especially when considering developments in South American (and other developing) countries that went through latter-day processes of democratization. Black draws our attention to and builds his arguments around three occurrences in this context. Firstly, while official violence has diminished in the countries under investigation, freelance or private criminal violence has exploded leaving ordinary citizens battered once again and subverting democratic prospects no less than the tyranny of the deposed autocratic rulers. Secondly, new free market and privatization frenzies have neither eased the cost of living nor succeeded in rendering better or cheaper services to the public whose inflation-diminished incomes further dashed hopes that the ideal of democracy also ought to mean greater economic prosperity for a greater number of citizens. Thirdly, in a globalized capitalist system in which economic competitors mainly seek to either increase and protect assets or oppose state regulation of economic activities, the power of control over political decision-making and economic policy-making is no longer solely or even mainly located in the institutions of national governments, but in locations elsewhere with constituencies that seek different objectives than those who participated in UN monitored elections for a better government. The question then is to what extent the creditability of elections could also become subjected to considerations that will bring prosperity to those whose only or main interest in the politics of the national state is whether it holds the promise of a good economic partnership.

The issues raised by Black also carry an important message for the current initiatives under the New Partnership for Africa's Development ('NEPAD') which, in essence, is also about the reconstruction of the African state in the interest of establishing real democracies, the protection of human rights, and accountable and responsible government in accordance with the rule of law. These elements of proper statehood were not characteristic of the post-independence experimentation with political power on the African continent. As recent events have shown, even in more hopeful examples such as Zimbabwe wholesale destruction of state and society followed quickly on the first dances of freedom around the ballot box. In South Africa too, the euphoria that followed in the wake of the relatively peaceful transition to democratic rule in 1994 has largely obscured a number of disconcerting developments with enough potential

to seriously undermine an already fragile political stability. Since 1994 individual income has dropped below the levels of the eighties according to the latest UN report on human development. Unemployment has risen sharply and the privatization initiatives of the government have met with growing militancy amongst the ranks of the powerful labour movement and communist party. What has started off as a vibrant multi-party democracy now more closely resembles a one-party state with effective parliamentary control over the executive becoming increasingly questionable. Centralist control and a growing intolerance towards criticism have entered the political landscape once again. Most alarming though, since it touches on one of the constitutive elements of statehood, is the incapacity of the new rulers to execute their most fundamental responsibility, *i.e.* the protection of the country's citizens against the anarchy of criminal violence. The new rulers, to use one of Black's phrases, seem to have taken power, but not office. Put differently: the quest for legitimate authority has ended in more legitimacy than authority. With law enforcement a national embarrassment, wide-spread corruption in the police and prison service, and a largely dysfunctional army, criminal activities have long seized to be a phenomenon at the fringes of society. South Africa now boasts the highest number of violent crime cases of countries not at war, while the number of successful prosecutions paints a dismal picture. Referring to a country as a constitutional democracy under such circumstances is perhaps overambitious, if by that term, more than the mere formal trappings of a constitutional democracy are meant.

The rescue operations the NEPAD initiatives have in mind will probably also give an indication of the kind of democracies that are intended to develop on the African continent and what 'democratic entitlement' will mean in that part of the world. At least there is recognition that past attempts have failed, partly because of what is euphemistically referred to as, 'questionable leadership' (NEPAD, para. 42), and that in the aftermath of the Cold War democracy and state legitimacy have been redefined to include "accountable government, a culture of human rights and popular participation" (*id.*, at para. 43). Perhaps one should also be encouraged by the startling realisation that "development is impossible in the absence of true democracy, respect for human rights, peace and good governance" (*id.*, at para. 79). These nice-sounding concepts are even given some substance by an undertaking, almost in the same breath, to

> respect the global standards of democracy, which core components include political pluralism, allowing for the existence of several political parties and worker's unions, fair, open, free and democratic elections periodically organised to enable the populace to choose their leaders freely (*id.*).

This is as close as one could get to an acceptance of liberal democracy's core principles. Whether these acceptances signify a turning away from empty utterances and from elections as feel-good rituals performed for the benefit of a corrupt, self-serving elite or for the conscience of some donor

countries eagerly holding on to lucrative government concessions, will depend on two factors. The first is the effectiveness of the monitoring and enforcement mechanisms envisaged by NEPAD. Monitoring and enforcement will be the function of the Heads of State Forum (*id.*, at paras. 84, 202 and 203) that will periodically monitor and assess the progress made by African states in meeting their commitments towards achieving good governance and social reform. Forum candidates that measure up to the principles spelled out in the NEPAD document are few and far between with the result that monitoring will have to involve a great deal of introspection and self-analysis too. Moreover, the past record of African organizations acting against delinquent members is rather shameful. The latest example is the obsequious responses by most African leaders to the built-up of fascist rule in Zimbabwe.

The second factor is a successful conjoining of democratization, state-building and institutional strengthening in the public and the private spheres. The failure of past efforts to have the meaning of democracy still linger on after the first cabinet meeting was in part due to the institutional void in which the whole process was taking place. Quite often this void was not filled with leadership elites committed to state-building and institutional strengthening, but to the expansion of patronage networks that thrived on the economic rewards of disorder. The Jekyll and Hyde state came into being with the one part performing the ceremonies of standard-setting and enforcement promises in international and regional organisations while the other was assumed under a form of personal rule with an authority, not based on written laws and procedures, but on the decisions and interest of an individual or group of individuals. Fortunately, the NEPAD document is not oblivious to these underlying problems. To achieve the objectives of NEPAD, it is specifically acknowledged that one of the factors African leaders will have to take joint responsibility for is the building of the capacity of states in Africa to "set and enforce the legal framework, as well as maintaining law and order" (*id.*, at para. 49). Targeted capacity-building initiatives and institutional reforms in the interest of strengthening political governance are also foreseen in areas such as the state administration and civil service, parliamentary oversight, participatory decision-making, the combating of corruption, and the judiciary (*id.*, at para. 83). At the level of civil society, whose institutional weakness has contributed to the weakness of democracy itself, an appeal is made to the citizenry of the various countries to mobilise support for the NEPAD initiatives and to set up structures for organisation, mobilisation and action (*id.*, at para. 56).

Whether one follows Fukuyama's version of liberal millenarianism, in the sense that history's *telos* is taken as liberal democracy along with a market oriented economy, or believes that the options are more diverse (*see* last chapter by Susan Marks), the question remains about the consequences political leaders in violation of the right to democratic governance will suffer. As international and regional responses to developments before

and after the recent sham elections in Zimbabwe have once again demonstrated, the victims of oppressive and dysfunctional regimes have all the reason to be cynical about international and regional enforcement of the rights that are so easily conjured up by the intellectual community.

Whatever one's perspective on the central theme of the book, it must be said that the editors have succeeded well in capturing the state of the debate with their selection of contributions as well as their own commentaries. The critical analyses and interpretations of both the adherents and skeptics of the democratic entitlement thesis not only provide very useful source material, but the contours of the debate are now more easily ascertainable. However, what could have even further enhanced the quality of the contents is a chapter or two, mapping out, in a comparative mode, regional disparities or idiosyncrasies in patterns of democratic decline or improvement.

*Hennie Strydom**

The Riddle of all Constitutions – International Law, Democracy, and the Critique of Ideology, by Susan Marks, Oxford University Press, Oxford, 2000, ISBN 0-19-826798-3 (hardback), 164 pp., UK£ 35

Democracy, in Karl Marx' famous formulation, is the "solved riddle of all constitutions." It is no coincidence that Susan Marks has chosen this phrase as the title of her book on democracy and international law. Her work is deeply influenced by Marx' analysis of critique as an action-oriented approach; an approach that has been taken up and refined by the *Frankfurter Schule* as well as by contemporary scholars like McCarthy and Thompson. It is, however, neither a coincidence that the title of Marks' book contains only a part of Marx' characterization of democracy. Marks agrees that democracy constitutes a riddle to constitutions as it constantly challenges relations of domination protected by those constitutions. Still, Marks holds, democracy cannot be regarded as the solution to that riddle. By contrast to Marx' 'closure' of democracy, Marks regards democracy as an unsolved riddle; as a "promise that retains permanently executory, never to be fully fulfilled" (p. 150). After all, the ideal of democracy too can be used as an instrument for sustaining relations of domination. One of the aims of Marks' book is to show exactly this: how an alleged right to democratic governance in international law has helped to legitimise quasi- or undemocratic exercises of power. The second aim of the book is to propose an alternative to the democratic norm thesis in international

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law; to articulate a principle of democratic entitlement which has emancipatory potential and mobilizes the critical, contra-factual aspects of liberal ideology.

The idea of democracy as a permanently executory promise lies at the heart of Marks' book and illustrates both the strength and the vulnerability of her approach. The strength is that Marks prevents the pitfalls of both the uncritical embracement of the right to democratic governance and the sceptical rejection thereof as a hegemonic, imperialistic project. In order to formulate her critical commitment to democracy, Marks regards liberalism – of which the right to democratic governance in international law is an exponent – as an "ideology" in the meaning given to that term by Thompson, that is: as a "way in which meaning serves to establish and sustain relations of domination" (p. 10). Subsequently, she attempts to formulate a critique on liberalism and the democratic norm thesis. Characteristic of a critique is that it does not stand outside its object, while criticizing it for not living up to an external standard, but that it locates itself *within* an ideology. A critique attempts to explicate the internal contradictions of an ideology as well as the ways in which an ideology can be used to achieve ends that contradict its own object and purpose. The point of formulating such a critique is to sharpen the awareness that (liberal) ideology has the potential for both sustaining and transforming relations of domination. By pointing out the ways in which ideology can be used as means of oppression and by pointing out the potentials for change inherent in liberal ideology, this could eventually lead to emancipatory action. Just like Adorno and Horkheimer committed themselves to the values of the Enlightenment in times where these values were perverted by the political regime in power, Marks calls for a stronger commitment to democracy in a time when democratic values are sometimes used to justify and mystify authoritarian rule. Marks invites us to adopt a "principle of democratic inclusion" which transcends the limited conceptions of democracy adopted by international law. This call for a commitment to the ideal of democratic inclusion, however, also illustrates the vulnerability of Marks' approach. The articulation of the democratic ideal may very well end up in a utopian, programmatic project lacking awareness of the element of moral tragedy inherent in national and international politics. Or, even worse, it may turn out to be another ideology legitimising oppression (as Marks herself frankly recognizes). This vulnerability and danger constitutes one of the unresolved riddles of Marks' critical theory.

On the basis of insights borrowed from Adorno, Horkheimer and contemporary critical theory Marks formulates a critique on the thesis that a right to democratic governance has emerged (or is emerging) in international law; a thesis defended by leading proponents of the liberal school like Franck and Slaughter.[1] As may be recalled, the democratic norm thesis

1. *See* for a discussion of this thesis also H. Strydom's review of G.H. Fox & B.R. Roth (Eds.),

was developed in the aftermath of the end of the Cold War and the liberal revolution. Developments in recent international practice would point at the emergence or existence of a right to democratic governance. The right to democratic governance would be the latest point in a history of political emancipation, starting with the recognition of the right to self-determination and the recognition of human rights like the right to freedom of expression, the right to religious freedom etc. In order to retain a fit between international law and international (political) practice, doctrine should now recognize the (emergence of the) right to democratic governance. This also means that doctrine should rethink some of the foundations of international law and incorporate the move from state sovereignty to popular sovereignty as well as the move from the principle of effectiveness to the principle of the consent of the governed. The acceptance of the democratic norms thesis, however, does not mean that international law has committed itself to a very substantive or model of democracy. Until now, international practice would have given rise to a rather thin entitlement to democratic governance only. As Franck puts it:

> The term 'democracy', as used in international parlance, is intended to connote the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of *consent to the process by which the populace is consulted* by its government (quoted at p. 40).

Franck admits that the concentration on elections is based on a rather unambitious conception of democracy. However, although he would prefer a 'thicker' model of democracy, it is only this unambitious conception of democracy that has, until now, proven to be acceptable in international practice.

Ever since its formulation, the democratic norm thesis has been criticized on empirical-positivistic grounds (does international practice indeed warrant the conclusion that a right to democratic governance exists?), on moral grounds (the democratic norm thesis as a hegemonical project) as well as on analytical grounds (the indeterminacy of the democratic right thesis). Although Marks shares some important points with the critics, her aim is to go beyond this type of criticism by questioning the method used and interests (in the sense of Habermas' '*Erkenntnisinteressen*') involved in the formulation of the democratic norm thesis. Marks attempts to relate the democratic norm thesis to possibilities of action by setting out both the potentials for suppression and the potentials for emancipatory action inherent in the right to democratic governance in international law. In this context, it is a pity that the book does not extend the critique of ideology to one of the central notions in legal doctrine: the notion of legal validity (and the related question of what counts as a valid legal argument).

Democratic Governance and International Law elsewhere in this section; *see also* F. Hoffmann's review of T.M. Franck, *The Empowered Self*, *in* 15 LJIL 729 (2002).

A discussion of this notion would have shed more light on the fundamentally different methodology and '*Erkenntnisinteressen*' of critical theory as well as on the specific role of international law in sustaining relations of domination.

How does the promotion of a limited conception of democracy contribute to the sustainment of relations of domination? In order to answer this question, Marks analyses two situations: the so-called low intensity democracies and the lack of democracy in the international arena. The term 'low intensity democracy' refers to the minimalistic models of democracy that can be found in several post-communist and developing countries. In these countries, the existence of periodic elections goes hand in hand with quasi- or undemocratic practices like military control over legislation, curtailment of social and participatory rights etc. In her analysis of low intensity democracies, Marks heavily (perhaps too heavily) relies on studies by Gills and Robertson on 'real existing democracies' in Asia and Latin America. The studies by Gills and Robertson indicate that the existence of a thin, 'low-intensity' model of democracy is linked to attempts to block more fundamental social and political reforms (attempts which have a greater chance of success since the regime has a formal legitimacy). Moreover, these studies conclude, the existence of such low intensity democracies is linked to attempts to promote the ideology of the global market: governments enjoying formal democratic legitimacy would be in a better position to foster the agenda of economic liberalization as demanded by certain powerful states and international organizations. As Gills states: "the new formal democratisation is the political corollary of economic liberalisation and internationalisation" (quoted at p. 57). A minimalistic concept of democracy might thus function as an ideology that helps to sustain quasi- or undemocratic practices.

The second aspect of the democratic norm thesis discussed by Marks is its pan-national bias. To illustrate the existence and working of this bias, Marks focuses on Slaughters' theory of transgovernmentalism as a means of democratisation as well as on Franck's programme to promote democracy at the international level set out in his *Fairness in International Law and Institutions* (1995). Both authors, Marks claims, still consider national democracy as the rule and regard global democracy as the universalization or sum of national democracies. This national bias in theories of democracy would hinder in several ways the formulation of conceptions of democracy which are not state-bound. Unfortunately, Marks confines her analysis of the impact of a pan-national interpretation of democracy to the academic writings of Franck and Slaughter. Since, as Marks states, "the question is always how systems of meaning operate in a specific context" (p. 118), the reader would also expect an extensive analysis of the way in which a pan-national interpretation of democracy works out in national and international practice. Such an analysis of actual practice would have provided a firmer basis for Marks' conclusions on the dangers of adopting a thin right to democratic entitlement in international law.

After having shown the ways in which the promotion of the minimalistic democratic norm thesis may contribute to the sustainment of quasi- or undemocratic practices, Marks formulates an alternative conception of democracy. Building on insights of Held, Beetham and Falk, she pleads for a 'principle of democratic inclusion': a conception of democracy that goes beyond the holding of elections and that entails "an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalize some citizens while empowering others" (p. 109). Marks consciously uses the term 'principle' to differentiate it from the 'norm' of democratic governance. Although Marks nowhere refers to the legal theory of Ronald Dworkin, the principle of democratic inclusion has much in common with Dworkin's notions of 'principles' in law. The point of the principle of democratic inclusion is not to formulate a set of rights and duties that would exhaustively define the meaning of the concept. Rather, the point of the principle is to guide the interpretation, elaboration, application and invocation of international law. For traditional positivism, which equates validity with binding force, such a principle would perhaps be too vague and underdetermined to have any legal value at all. In (international) legal practice, however, general concepts like sovereignty, non-interference, good faith etc. already play a significant role in structuring legal discourse. In this respect, Mark's approach to democracy fits with approaches like legal semiotics, institutional theory and the interpretative theory of law. As these approaches indicate, it is unrealistic and undesirable to demand that all legal concepts should be reducible to sets of rights and duties. It is beyond doubt that Marks' principle of democratic inclusion raises many questions and leaves room for very different – and perhaps mutually exclusive – interpretations of its meaning in concrete circumstances. However, this does not disqualify the principle. On the contrary: it is only in this form that democracy can be saved from attempts to reduce its meaning to a series of rights or procedures; that it can retain its character of an executory promise. Marks invitation to take up the principle of democratic inclusion and to subject it to a permanent critique deserves to be taken seriously.

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