Book Reviews / Recensions de livres

Treaties in Motion: The Evolution of Treaties from Formation to Termination. By Malgosia Fitzmaurice & Panos Merkouris. Cambridge: Cambridge University Press, 2020. 384 + xlii pages.

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The law of treaties is a frequently studied topic within the field of public international law, and, yet, a new book on *Treaties in Motion* by Malgosia Fitzmaurice (Queen Mary University of London) and Panos Merkouris (University of Groningen) brings us new insights.[1] Using the idea of motion, or *kinesis*, as their chosen leitmotif, the authors challenge the assumption held by many scholars and practitioners that the remit of the law of treaties has become set in stone since the adoption of the *Vienna Convention on the Law of Treaties* (*VCLT*).[2] Their study of motion in both treaties and the governing legal framework also proves useful to understanding the whys and wherefores of the provisions of the *VCLT* through constructive historical hindsight. Indeed, the authors focus on six types of motion, as defined by Aristotle: generation (*genesis*), destruction (*phtora*), increase (*auxesis*), diminution (*meiosis*), alteration (*alloiosis*), and change of place and time (*kata topon kai chronon metavole*).[3] Ultimately, the crux of the book lies in-between this idea of *kinesis* and *stasis*, with the authors aiming to show that "[i]mmutability is a false hypothesis" as far as the life of treaties, including treaty law, is concerned.[4]

[1] Malgosia Fitzmaurice & Panos Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (Cambridge: Cambridge University Press, 2020).

[2] 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980).

[3] The authors acknowledge that they have expanded Aristole's last category of movement from a change in place (*kata topon metavole*) to a change in time and place. Fitzmaurice & Merkouris, *supra* note 1 at 336.

[4] *Ibid* at 339.

With this aim in mind, the authors explore many facets of the life cycle of treaties. In Chapter 1 of *Treaties in Motion*, the authors begin by explaining the relevance of motion and how it affects our understanding of this core field of international law. They develop their analytical framework by explicating the concept of motion "as a notion" and by showing its usefulness in regard to the law of treaties. Notably, they posit that motion in treaties, as in physics, occurs in space and through time, leading to change. After an introduction to the book's key concepts, the contents exhibit a logical structure, with the authors providing an analysis of the genesis of treaties in Chapter 2, followed by an examination of the evolution of the requirement for "consent to be bound" in both theory and practice. The chapter on genesis is more descriptive, considering the conditions of form and substance for an agreement to be considered a treaty while also including sections on treaty-related instruments such as gentlemen's agreements as well as the topics of unilateral acts and soft law instruments. Chapter 3 on the consent of states to be bound also pertains to the genesis motion with consent being the requirement or "force behind the motion of treaties." This chapter considers the theoretical underpinnings of consent and manifestations of it through reservations.

The book then goes on to consider the domain of treaty interpretation, which might at first seem surprising considering the ongoing study of the vicissitudes belonging to the life of treaties, but it is ultimately a level-headed decision, considering the impact that interpretation can exert over treaties. As a result, Chapter 4 focuses on the motions affecting treaty interpretation — and, specifically, the rules of interpretation found within the *VCLT* — rather than on the motion of treaties as such. Accordingly, the authors examine various interpretative issues, such as the shifts between contemporaneous and evolutive interpretation, the doctrine of intertemporal law, and, of course, the effect of time on the interpretation rule embodied in Article 31 of the *VCLT*. The authors also consider the canons of interpretation that can be found outside the *VCLT*, which the authors refer to as the "*praeter-VCLT*" canons, with two examples being the principles of interpretation reflected in the Latin maxims of *in dubio mitius* and *contra proferentem*.[5]

Chapter 5 deals specifically with the amendment and modification of treaties,[6] first by examining Articles 39–41 of the *VCLT* and thereafter the "trends and issues" relating to amendment and modification procedures, such as the use of tacit acceptance procedures, amendments by Conferences of the Parties, and the effect of customary law on treaty regimes. Finally, Chapter 6 tackles the terminal phase in the life of a treaty, including

[5] *Ibid* at 169.

[6] The authors also address revision, although they indicate that the International Law Commission (ILC) considered the difference between amendment and revision to be "artificial." *Ibid* at 187.

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withdrawal procedures for treaties that do not contain express withdrawal provisions. This chapter also examines current examples of bringing a treaty relationship to an end, such as the United Kingdom's recent withdrawal from the European Union. The authors subsequently assess the effect of time on the grounds for termination that are enshrined in the *VCLT*, such as a fundamental change of circumstances, as well as grounds found outside the *VCLT*, such as desuetude. The authors also analyze the nexus between the grounds found within and beyond the *VCLT*. In addition, the final chapter addresses the various grounds for the suspension of a treaty and provides an analysis of the relationship between the law of treaties, as embodied by the *VCLT*, and the law of state responsibility, as embodied in the 2001 *Articles on Responsibility of States for Internationally Wrongful Acts* crafted by the International Law Commission (ILC).[7]

By way of conclusion, Fitzmaurice and Merkouris surmise that there is no such thing as stasis in the life cycle of treaties, which they view as necessarily undergoing change through at least one of Aristotle's six types of motion. With respect to the cardinal notion of motion, Chapters 2 and 3 mainly focus on the genesis of treaties, while Chapters 4 and 5 deal with the motions ongoing through a treaty's lifetime — that is, their increase, diminution, and alteration[8] — notably through interpretation.[9] Chapter 6, the last chapter, is then dedicated to the motion of destruction (*phtora*) as it concerns the death of treaties or interludes in their life cycle. This focus on the types of motion is, at the same time, refreshing and didactic, enabling the reader to (re) discover various aspects of the law of treaties through a creative and time-oriented frame.

Globally, the work of Fitzmaurice and Merkouris exhibits great quality and can be useful, and even entertaining, for both practitioners and students. Their approach is simultaneously traditional and innovative. First, in order to capture the motion of treaties, they identify key steps in the development

[7] See "Draft Articles on Responsibility of States for Internationally Wrongful Acts" in *Report of the International Law Commission*, UN GAOR, 56th Sess, Supp No 10, UN Doc. A/56/10 (2001) at 26–30.

[8] To clearly distinguish alteration from increase and diminution, one might think of the dictum attributed (apocryphally) to Lavoisier: "Rien ne se perd, rien ne se crée, tout se transforme" ("nothing is lost, nothing is created, everything is transformed"). This is in fact a paraphrase of a longer passage found in Antoine-Laurent de Lavoisier, *Traité élémentaire de chimie* (Paris: Cuchet, 1789) at 140–41.

[9] The motion of alteration seems to be the epitome of interpretation, a process through which the parties' obligations should neither be increased nor diminished. See e.g. *Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization)*, 15 April 1994, 1869 UNTS 401, art 3(2) (entered into force 1 January 1995), which states that Dispute Settlement Body recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."

of treaty rules, notably through the work of the ILC, the Institut de droit international, and the preparatory works leading to the adoption of the *VCLT*. They then proceed to show how these rules have since evolved. Second, in regard to the motions of treaties *per se,* they identify and comment on both state practice and case law. The body of judgments highlighted in the book ranges from the arbitral award in the *Island of Palmas Case,*[10] to decisions of the Permanent Court of International Justice and the International Court of Justice, to more recent awards issued in the domain of international investment law. They thus inform the readers of the historical evolution of the law of treaties, with a command of the historical background being a critical element for mastering the rules now found codified in the *VCLT*.

As to the sources relied upon by Fitzmaurice and Merkouris, their work is fine-grained, with the bibliography including fundamental works of scholarship in English, French, and German. The expertise of the authors in the fields of environmental law and the law of the sea is also evident, with the book making use of numerous examples from these fields. Issues such as the blurred dividing line between treaty interpretation and modification, and the role for subsequent practice, are also addressed. This coverage gives the work added value, with its treatment of topical issues likely to retain the attention of the readership and also to resonate in an audience of students.

The book, nonetheless, suffers from minor drawbacks that may sometimes hinder a reader's full appreciation of the work. On the one hand, the concept of motion is in itself interesting, and the use of the six types of motion and references to mythology is creative. This approach also brings additional pedagogy to the field of the law of treaties. On the other hand, the frequent use of Greek words may confuse the reader and leads to constant cross-referencing or the use of a translator to discern their meaning. Some Greek expressions are accompanied by a translation in brackets, but not all of them, and a standardized approach that emphasizes the plain English translation would have been beneficial. The connections made at various times by the authors between some fields of natural sciences, such as physics and the law, may also appear artificial and sometimes superfluous, and, in some cases, the statistics and data set forth in the book make for a cumbersome read, although the authors' analysis of this raw data is always relevant. An example of note is the empirical analysis of amendments and modification procedures found in Chapter 5. The book also provides a useful typology in regard to the analysis of tacit acceptance procedures — for example, "TA/NO" for tacit acceptance / no objection; "TA/RO" for tacit acceptance / regular objection; "TA/SO" for tacit acceptance / strong objection; and "TA/WO" for tacit acceptance / weak objection.

[10] *Island of Palmas Case (Netherlands v United States)* (1928), 2 RIAA 829.

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This book does not reinvent the wheel and nor should it, given the abundant scholarship on the law of treaties. However, it does provide a useful analysis of matters needing further exploration, including such issues as the lines between treaty amendment, modification and revision, and interpretation.[11] As such, the book is well suited for both seasoned practitioners, who could make great use of the book's extensive bibliography and its analysis of state practice, and law students, whose studies would benefit from the historical background and treaty-law explanations conveyed by the authors. The creative framework used by the authors also has interesting pedagogical potential, with the theme of motion being a useful way to understand the quintessential elements of the law of treaties.

André-Philippe Ouellet
MA Candidate, Graduate Institute of International and Development Studies, Geneva

Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example. By Odile Ammann. Leiden: Brill / Nijhoff, 2019. 383 + xviii pages.

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In *De l'esprit des lois*, Montesquieu laid down the famous definition of a judge as the mouthpiece of the law.[1] Nowadays, this paradigm is outdated. Most now agree that, "with or without the interpreter's awareness, some degree of creativity and discretion is inherent in any kind of interpretation."[2] This situation is even more the case for contemporary judges, who enjoy a wider margin of discretion than in the past given the development of human rights law. Bills of rights and international human rights instruments, by their nature, embrace vague principles whose contours are to be defined through jurisprudence.[3] However, to ensure respect for the rule of law, there is also a need to restrain a judge's discretionary power. Odile Ammann's book *Domestic Courts and the Interpretation of International Law: Methods and*

[11] Fitzmaurice & Merkouris, *supra* note 1 at 193.

[1] Montesquieu, *De l'esprit des lois* (Paris: Garnier frères, 1868) at 149.

[2] Mauro Cappelletti, *The Judicial Review Process in Comparative Perspective* (Oxford: Clarendon Press, 1989) at 5.

[3] *Ibid* at 29–30. See also François Rigaux, *La loi des juges* (Paris: Éditions Odile Jacob, 1997) at 253–54; Gustavo Zagrebelsky, *Il diritto mite* (Torino: Einaudi, 1992) at 149.