

Recent Publications

International Legal Theory

Sovereignty: Organized Hypocrisy. By Stephen D. Krasner. Princeton, NJ: Princeton University Press, 1999. Pp. 264. Price: \$16.95 (Paperback).
Reviewed by Lars Kirchhoff.

The word “sovereignty” captures within its intellectual history the developments of several centuries. The quest for sovereignty has changed national and international landscapes and, at times, has allowed rulers to hide substantial atrocities behind its mask. The expression has also led to a good deal of academic confusion. In his latest book, Stephen D. Krasner, professor of international relations at Stanford University, argues that considerable parts of the discussion on sovereignty are out of touch with historical reality.

Krasner begins his analysis by distinguishing four forms of sovereignty. These forms—domestic, interdependent, international legal, and Westphalian—are neither logically coupled, nor have they cohered in practice. The primary focus of Krasner’s study is to deal with the persistent discrepancies between Westphalian sovereignty (referring to political organization based on the exclusion of external actors from domestic authority structures) and international legal sovereignty (the principle that international recognition should be accorded only to juridically independent territorial entities).

Krasner disentangles the complex relationship between these concepts. The international legal sovereignty of a state says little about the existence *vel non* of its Westphalian sovereignty because international recognition has not kept rulers from attempts to alter domestic authority structures, policies, or even personnel of other states. State autonomy has clashed with competing principles and disparate interests in an environment of asymmetrical power, allowing strong rulers to follow a logic of expected consequences rather than a logic of appropriateness. Accordingly, Krasner argues, powerful states have been unlikely to lose Westphalian sovereignty, unless by means of conventions or contractual arrangements, whereas weaker states have constantly been targets of intervention through coercion or imposition. Observers have been blinded to this by the lip service of elites to the sanctity of sovereignty. Illustrating the proportions of his thesis, Krasner goes so far as to say that arguably half of the countries of Europe have never enjoyed Westphalian sovereignty for a single moment of their existence as international legal sovereigns.

In constructing the analytical framework to prove his thesis, Krasner investigates the appropriateness of diverse theories of institutions and international politics. He states that none of the best-known approaches to

institutions provides an adequate understanding of Westphalian or international legal sovereignty. Instead, both are better described as *organized hypocrisy*, the presence of long-standing norms that are frequently violated. Krasner sees hypocrisy, frequent in domestic political settings, to be even more prevalent in the international environment, where rulers rhetorically accept Westphalian principles and at the same time endorse contradictory norms. Subsequently, Krasner considers a whole spectrum of fields in which the Westphalian model, although rhetorically invoked, provides limited understanding of actual practice.

The following chapters deal with minority rights and human rights, which Krasner sees as two different incarnations of a coherent international concern. Accordingly, he considers the perception of human rights as a recent, revolutionary development as historically misleading, disregarding the extent to which international actors constantly directed their attention to the relations between rulers and ruled. The major peace treaties of the last four centuries—Westphalia, Vienna, Versailles—as well as the Peace of Paris and the Dayton Accords all included provisions related to minority rights.

The method of coercion most commonly used has been to make new states' international recognition dependent on their acceptance of minority rights. Krasner uncovers a double standard: Due to power asymmetries, victors could impose their views on rulers or would-be rulers of weaker states while accepting no provisions for the protection of minorities within their own societies, such as the Welsh and Irish in Britain, or Blacks and Asians in the United States. Krasner rediscovers the same pattern when analyzing minority issues in the 1990s: The end of the Cold War, accompanied by and sometimes causing a renewal of ethnic strife, led the European Community to explicitly include adherence to minority rights in the conditions for recognition of the successor states of Yugoslavia. The consistency with which the same agreements endorse principles resonant of Westphalian sovereignty illustrates Krasner's central idea of organized hypocrisy: mutually inconsistent principles along with imperfect implementation.

The book then addresses the interrelation between sovereignty and the human rights movement. Whereas no human rights accord violates international legal sovereignty, Westphalian sovereignty can be compromised by the creation of authoritative supranational institutions or the purposeful alteration of conceptions of legitimate behavior. Further complicating the analysis, a number of human rights conventions have been endorsed not because rulers had the intention or even the ability to implement their precepts, but because such agreements were part of a cognitive script that defined appropriate behavior for a modern state in the late twentieth century. Again, in this respect, words and deeds have been decoupled.

The next focus lies on sovereign lending as another form of violating the Westphalian norm. Due to a traditionally high default rate in repayment of international loans, the lenders' motivational pattern cannot be explained by the prospect of an economically secure enterprise. Instead, the borrowers,

attracted by the loan, violate their own domestic autonomy by inviting lenders to exercise authority over fiscal or other activities within their own borders, eventually leading to direct changes in policies, personnel, or institutions. Thus, lending to a sovereign becomes a vehicle through which the domestic autonomy of weaker polities is compromised. Although this mechanism was already operative throughout the nineteenth century, Krasner considers its modern protagonists to be the International Financial Institutions (IFIs), initiated by the creation of the World Bank and the International Monetary Fund. Despite the principle that the respective charters of the IFIs generally prohibit political conditionality, Krasner empirically supports his assumption that they are becoming more expansive about conditions accompanying their loans. After the collapse of the Soviet Union, with states in need no longer able to play off West against East, violations of domestic policies and thereby of Westphalian principles have become more apparent and intrusive.

The final chapters denote a shift to the question as to what extent constitutional structures of states created in the nineteenth and twentieth century have been subject to external authority. Krasner contrasts two scenarios: the Western Hemisphere as opposed to the Balkans in the nineteenth century, and the successor states of the European empires as opposed to Eastern and Western Europe in the course of the twentieth century.

States that secured their independence from Britain, Spain, France, and Portugal at the end of the eighteenth and the first part of the nineteenth century, Krasner argues, possessed Westphalian as well as international legal sovereignty until the United States created its sphere of influence. In the Balkans, however, developments constantly were at variance with the Westphalian model because the power and manifest interests of the major states in Europe provoked them to acts of intervention.

In the twentieth century, postcolonial developments in the British and French successor states, which had only limited economic and strategic value, generally conformed with the Westphalian model; domestic regime structures that emerged out of European colonial empires in Asia and Africa were largely the result of indigenous decisions. In contrast, violations of autonomy were extensive in Europe, especially after the Second World War, when the United States and the Soviet Union were determined to reproduce their preferred political structures in the states within their respective spheres of influence. Krasner highlights the difference in methods employed. The United States primarily sought to influence through contracts and the support of actors whose preferences were complementary to their own. The Soviet Union's way of penetrating the domestic polities of the satellite states, eminently illustrated by the Brezhnev Doctrine, was characterized by imposition or coercion. Krasner points out that, in a Westphalian world, powerful rulers, instead of finding ways to influence the domestic structures of target states, would have tried to change their respective foreign policies. In an anarchic system, however, nothing—in particular, no notion of

sovereignty—prevented powerful states from embracing more intrusive strategies.

In a concluding remark, Krasner states that the international system is “not like a game of chess” (p. 237): Its constitutive rules never exclude alternatives. Granting international legal sovereignty and at the same time violating the Westphalian sovereignty of the weaker state has allowed the powerful states to follow their interests without at the same time bearing the direct costs of governance; therefore, it has been more attractive than other institutional options. Krasner’s thesis clearly contradicts the idea that the recent process of globalization has been responsible for systematically undermining state sovereignty. As Krasner sees it, rulers have always operated in a transnational environment, and there has never been some ideal time when most political entities conformed with all the characteristics associated with sovereignty.

The attempt to expose the patent discrepancy between words and deeds in the domain of history and international relations is not new. Neither is the observation that power in the form of economic wealth, effective enforcement mechanisms, or sheer force of arms has always played a decisive role in dividing lip service from reality. Depending on the discipline and perspective of the scholar, this phenomenon has been referred to as the persistent gap between norm-formulation and implementation, between the myth system and the operational code, or between official and quiet diplomacy. The question remains whether a world more openly dealing with its actual power structure would be more peaceful.

What is innovative about Krasner’s approach is the ruthless and convincing analysis of a whole spectrum of mechanisms of intervention made use of by the major powers throughout history. His construct of ideas is coherent and sharp-minded, and the illustrations are so numerous and comprehensive that they leave little room for the criticism of selection bias. After the extensive definition and presentation of the basic argument in the first chapter, however, the considerable amount of repetitive definitions and references to his initial thesis throughout the book are not necessary to make the argument.

The static understanding of the notion of “Westphalian” sovereignty deserves more explanation. Interpreting complex political events that occurred over several centuries necessitates proceeding in a non-mechanical fashion, even with regard to the conceptional framework employed. Sovereignty is a relative concept in international affairs that has changed immensely through time. Envisaging the shift of international concern from the rulers to the ruled, and reflecting on alternative conceptions in the sense of the *people’s* sovereignty rather than the *sovereign’s* sovereignty would not only affect what Krasner calls “domestic” sovereignty, but also his central topic of Westphalian sovereignty. Monitoring the transformation and election processes in states of the former Eastern Bloc, as well as preventing a despot from the unrestricted exercise of his personal perception of national

sovereignty, might be labeled as an intervention. It can, however, be the framework for an unfolding of the domestic authority structure in its truest sense.

Krasner's book inspires a critical rethinking of historical events and their scientific classification. It will not fail to provide the academic discussion of sovereignty with new impetus.

Governmental Illegitimacy in International Law. By Brad R. Roth. New York: Oxford University Press, 1999. Pp. xxx, 439. Price: \$115.00 (Hardcover). Reviewed by Chimène Keitner.

Brad R. Roth's *Governmental Illegitimacy in International Law* probes the principles and practices underlying the collective non-recognition of governments. Set against the backdrop of contemporary affirmations of an "emerging right to democratic governance" and even "the end of history," this study cautions against the premature proclamation of the demise of substantive ideological pluralism in the international realm. It focuses on the process by which the international community accepts a given government as the legitimate and authoritative agent of a sovereign people, embodied in a state. Through a discussion of political theory, international treaties, and an impressive array of historical case studies of U.N. practice from its origins to the present day, Roth concludes that recent decades have indeed witnessed an increased (though far from consistent) emphasis on internal factors as valid considerations in granting or withholding external recognition of a government's legitimacy, though not nearly to the degree that some scholars suggest. Furthermore, Roth affirms that the endurance of diverse governmental systems and standards should in fact reassure, not disturb, those genuinely committed to the principles of sovereignty and self-determination—and even those committed to the idea of democracy itself.

As a work of international legal scholarship, Roth's analysis is relatively insulated from the "power-political" concerns that may in fact guide many, if not most, decisions about whether or not to accord international recognition to a putative government. His central concern is recognition in the "legal," not the "political" sense: that is, a collective decision on the part of the international community to act as though a particular government is or is not the "true" voice of the sovereign people it claims to represent. Roth acknowledges that "[r]ecognition and non-recognition continue to be spoken of as political acts within the sovereign discretion of individual states, and a regime's legal capacity to assert rights, incur obligations and authorize acts on behalf of a state is subject to no systematic process of authoritative determination" (p. 253). However, unless some sort of collective decision manifests itself as to whether or not to treat a given government as a bona fide international actor, the international legal order will have little if any coherence. As such, Roth undertakes to identify the criteria which have in fact

been used as the basis for granting or withholding recognition as a matter of positive international law. The apparent lack of consistent standards leads Roth to discredit the current trend of liberal-democratic wishful thinking, but it does not preclude him from exploring the normative and aspirational implications of the idea of democratic legitimacy and its connection to a more pervasive and enduring emphasis on popular sovereignty as the basis for state governments.

It has frequently been observed that the dual notions of sovereignty and inviolability (leading to the principle of non-intervention) stand in tension with ideals of self-determination and a more recent emphasis on individual human rights. Roth brackets the question of secession and focuses instead on what to do when the government of a given state is either installed undemocratically (through a coup or other such usurpation) or contested (in the case of rival factions or belligerency). As a general rule, the test of "effective control" has been upheld as the dominant standard, both for pragmatic and, Roth suggests, moral reasons. On the pragmatic level, it is fairly clear that interstate relations depend upon the ability of a government to secure compliance at the domestic level in order to follow through on its international commitments. Indeed, two of the core criteria for statehood as enumerated in the 1933 Montevideo Convention are (1) a government and (2) the capacity to enter into relations with other states. While Roth reminds us that "[t]he government does not define the state any more than the tail wags the dog" (p. 132), part of what it is to be recognizable as a dog is to have a tail. The pragmatic justification for the "effective control" standard relies on this functional requirement.

The moral justification, on the other hand, opens the crack through which theories of democratic legitimacy begin to seep—and the possibility for external intervention to enforce a democratic standard along with them. According to this logic, effective control operates as the best evidence that the government is in fact representative of the popular will because a government can only exert control over a people that has developed habits of obedience and acquiescence that serve as negative proof of its support. As the study progresses both chronologically and thematically, the importance of this second justification comes to overshadow that of the first. The U.N.-authorized intervention in Haiti to restore the popularly-elected but subsequently ousted President Jean-Bertrand Aristide offers the paradigm case for this kind of argument and its implications, which Roth highlights in the introduction and analyzes in the final chapter of his book. He devotes the intervening 400 pages to a philosophical and historical journey through political theory and international practice to trace the contours of the idea of an international norm of domestic democratic governance, ultimately concluding that there cannot be much substance to such a standard in a world still populated by so many diverse systems, including authoritarian and even dictatorial regimes.

This does not mean that no standards for the legitimacy of domestic governments exist. At particular moments, international consensus has emerged, most notably in condemnation of the apartheid regime in South Africa in the early 1980s. Yet, even then, the United States and the United Kingdom (in the unusual position of highlighting hypocrisy) voiced their discomfort with holding one government to the standards of the Universal Declaration of Human Rights while ignoring violations on the part of others. As long as dissensus persists on such matters, the international system is unlikely to witness substantive normative change beyond what it has already experienced. This observation constitutes the crux of Roth's corrective to the proclamation of the impending triumph of liberal democracy worldwide. But the question of when and why such moments of consensus may occur remains understudied. In order to make analytic progress on this issue, Roth would ultimately have to examine the domestic and international political interests of the *recognizing* states to account for the apparent inconsistencies and double standards that a principled international legal theory of recognition, even if one did exist, probably still could not explain.

Comparative Studies

Blood Feuds: AIDS, Blood, and the Politics of Medical Disaster. Edited by Eric A. Feldman and Ronald Bayer. New York: Oxford University Press, 1999. Pp. xiii, 375. Price: \$29.95 (Paperback). Reviewed by Tammany Kramer.

In June 1981, the first case of AIDS was documented in the United States. In July 1982, the Center for Disease Control reported that three hemophiliacs had died of AIDS, a prelude to the high HIV-infection rate within the hemophiliac population. In *Blood Feuds*, Eric A. Feldman and Ronald Bayer have put together a collection of essays that looks at the AIDS epidemic from the perspective of the hemophiliac population. The essays in this book examine the ways in which health, economic, political, social, moral, and legal elements of this tragedy play out across a variety of nations. What is interesting about this volume is the way that recurring themes emerge from the various descriptions of how different nations handled this crisis. What is equally interesting are the concomitant large and small differences between countries, accounted for by a variety of factors such as the political climate, the ability of hemophiliacs to form an effective community, and the specific structures of the blood collection/distribution systems.

The book opens with a useful introduction by the editors, who sketch out some key questions and factors that drive the investigation into how HIV and AIDS impacted the hemophiliac community and what resulted. The rest of the book is divided into two sections. Part I, "National Encounters with Blood and AIDS," constitutes the bulk of the volume and surveys the impact of and

response to HIV/AIDS in a range of countries: the United States, Japan, France, Canada, Denmark, Germany, Italy, and Australia.

The writers in this collection examine several key problems. The shortcomings of national blood systems, with respect to whole blood and blood products, and their slow responses led to greater HIV-infection rates than would have resulted with quicker action. This sluggishness stemmed from institutional stagnation, competition between economic and health system interests, political dynamics, and, on occasion, division within the hemophiliac community. One effect of this tragedy was the shift from conceptualizing blood donations as a "gift of life" to a more commercial/manufacturing understanding of the blood supply system. Once safety measures were in place by mid-1985—carefully screening donors and heat-treating blood to eliminate the risk of HIV contamination—the future blood supply was secured, but the vast number of hemophiliacs and transfusion recipients who were already infected were left to deal with the consequences.

Hemophiliac activism grew in force during the late 1980s and 1990s, shifting the narrative from one of inevitability and tragedy to one of blame and accountability. In addition to lobbying governments for compensation packages, hemophiliacs looked to the legal system for redress by bringing civil suits as well as petitioning for criminal trials. (In France, this last method was particularly successful, resulting in blood officials being sent to prison.) Actions were brought against responsible politicians, pharmaceutical companies, blood banks, doctors, hospitals, and health system officials, generating important questions. Were these cases of medical malpractice or product liability? Why should compensation be limited to the hemophiliac community? What role did hindsight play in the accusations launched against various parties? At what point should blood system officials have acted?

In all nations, those infected sought apologies, acknowledgment of culpability by those responsible, and financial compensation. However, the burden of proof was often heavy: Information was sketchy at the time that many hemophiliacs and transfusion recipients were infected, tracing infection to specific treatment dates and products was impossible, and negligence was difficult to establish. Thus, in a number of countries, legal recourse proved less than satisfactory. In Italy, for example, there were few lawsuits because of structural difficulties with the Italian legal system. Often there was a tension between lobbying for governmental responsibility and compensation on the one hand and litigation of the matter in court on the other. While all countries eventually came to offer hemophiliacs compensation packages, most governments predicated these on an understanding that the compensation packages were humanitarian aid, not a concession of culpability. In some instances, this compensation required waiving the right to sue. Some countries managed to distribute liability costs among the government, insurance funds, and pharmaceutical companies. Umberto Izzo reports that Italy took years to disburse the promised compensation, the treasury bearing the sole burden.

Many of the authors raise questions about cost-benefit analysis and what relation that has to social concerns about health safety.

In some instances hemophiliacs successfully used the media in savvy ways. Erik Albæk describes what happened in Denmark, where extreme media criticism, fueled by political animus, targeted the Interior Minister (labeling her "Blood Britta"). He notes that the Danish Hemophiliac Society shrewdly framed the plight of hemophiliacs as living proof of the danger for the entire population, thus garnering public sympathy and support.

However, this strategy of alliance had its flip side. Attempts to draw the highly problematic distinction between "innocent" victims of HIV infection and other groups (such as gays and intravenous drug users) created political and cultural tensions. Another divisive conflict that arose, perhaps even more important, was the one between doctors and patients. While patients had trusted and depended on the medical community, this same community betrayed them and put them in harm's way. The United States, in particular, as the largest supplier of blood products and therefore of initial HIV-infected blood, bears a heavy burden of responsibility. Nationalism factored heavily into these events as well—the notion of "ours" and "theirs," the heightened desirability of a self-sufficient blood supply.

Japan provides a paradigmatic example. Feldman spends a large portion of his chapter on Japan tracing out the path of the litigation against the Ministry of Health and Welfare and the five pharmaceutical companies involved in supplying Japan with blood products. The parties eventually reached a settlement, with apologies and acknowledgments made by key players, and several arrests were also made. However, as Feldman points out, the structural change necessary is probably not forthcoming, as the rhetoric tended to focus on the impurity of "foreign blood," an ideological rather than a pragmatic approach.

Part II of *Blood Feuds*, "Comparative Perspectives on the Politics of Medical Disaster," contains a trio of essays. Dorothy Nelkin writes on the cultural perspectives of blood, its symbolism and significance in a variety of contexts. David Kirp's essay offers an extremely interesting examination of the relationship between the gay and hemophiliac communities and the similarities and differences in their activism. He points to the importance of identity formation for hemophiliac activism. Sherry Glied, in the final chapter, and Theodore R. Marmor, Patricia A. Dillon, and Stephen Scher, in the Conclusion, pull together information from across the various countries and summarize some of the conceptual and factual information to form an overall picture. Indeed, readers looking only for a broad overview may consider reading just the Introduction, Part II, and the Conclusion of this volume, particularly since there is some small degree of repetition among the chapters due to the similarities in the series of events being described. Alternatively, those readers who want a more detailed, in-depth discussion of the way these events played out in particular arenas should look to the essays in Part I as well. This collection will appeal to a wide range of readers whose interests

include law, public policy, health systems, social movements, patient advocacy, hemophilia, and HIV. The thoughtful examination of the ways these threads intersect and coalesce makes this volume provocative and valuable.

Comparative Constitutional Law. Edited by Vicki C. Jackson and Mark Tushnet. New York: Foundation Press, 1999. Pp. xiii, 1507. Price: \$60.00 (Hardcover). Reviewed by David Fontana.

In denying petitions for writs of certiorari in *Knight v. Florida* and *Moore v. Nebraska*, the U.S. Supreme Court on November 8, 1999, engaged in what is sure to be an ongoing debate about the relevance of constitutional traditions in other countries to American constitutional jurisprudence. The petitions for certiorari dealt with the contention that the Eighth Amendment prohibits the execution of prisoners who have spent an inordinate amount of time on death row. Justice Stephen Breyer, dissenting from the denial of certiorari, cited the constitutional experiences of Jamaica, India, Zimbabwe, the European Court of Human Rights, and Canada in support of the notion that unduly long delays following conviction may invalidate a death sentence. Concurring in the denial of certiorari, Justice Clarence Thomas argued that a glance abroad was only used because there is no "such support in our own jurisprudence" for the petitioners' arguments about the Eighth Amendment.

This episode is only the latest in a series of events which mark the onset of a new American interest in the constitutional regimes of other countries around the world. This comparativist spirit finds its place in Vicki C. Jackson and Mark Tushnet's masterful new textbook, *Comparative Constitutional Law*. Jackson, a Professor of Law at Georgetown University Law Center, and Tushnet, the Carmack Waterhouse Professor of Constitutional Law at Georgetown University Law Center, use their background as observers of the American constitutional scene to provide a rich new perspective on the study of comparative constitutional law.

Jackson and Tushnet's book can be divided up into two main sections. The first consists of Chapters I–V and deals with some of the theoretical issues facing comparative constitutional law as a distinctive area of legal scholarship. Jackson and Tushnet begin the book with an interesting comparison of abortion decisions from the United States, Canada, and Germany, and they use this area of doctrine as an introduction to the main themes of comparative constitutional scholarship. Chapter II addresses the issues of the utility and permissibility of constitutional borrowing. Jackson and Tushnet present excerpts from a wide range of texts, from law review articles to U.S. Supreme Court decisions to decisions of the European Court of Human Rights. Chapters III, IV, and V all delve into more general issues of constitutionalism, looking at writings and cases on constitutional change and the concept of a written constitution.

The second main part of the book deals with a more doctrine-oriented comparison of Western-style constitutional regimes. Particularly insightful is the initial discussion of the role that “foundational cases” from different countries have played in shaping later legal doctrine and a rule-of-law culture. Jackson and Tushnet discuss Germany’s *Southwest Case*, France’s 1971 *Decision on Associations*, a series of decisions from Israel, and Hungarian and South African decisions on the death penalty. After this introduction to the second part of the book, Jackson and Tushnet discuss the different approaches adopted by countries with regard to justiciability, separation of powers, federalism, pluralism, religious freedom, freedom of expression and association, and social welfare rights. The mix of law review articles and cases from national and supranational bodies provides a helpful commentary on the issues.

The most original contribution in the book, however, lies in the more theoretical first section. Jackson and Tushnet are not the first to address comparative constitutional doctrine. Indeed, in the late 1970s two helpful casebooks—one by Walter F. Murphy and Joseph Tanenhaus, and another by Mauro Cappelletti and William Cohen—provided a broad analysis of comparative constitutional doctrine. The latter section of the Jackson and Tushnet book merely updates and supplements these earlier casebooks. The first section, however, heads into new academic territory. Jackson and Tushnet provide a theoretical agenda for comparative constitutionalists, presenting the two main theoretical issues that address the discipline: Are constitutional borrowings *helpful*, and are they *permissible*?

The casebook excerpts debates between Justices Antonin Scalia and Breyer in *Stanford v. Kentucky*, a 1989 death penalty case, and the recent *Printz v. United States*, a 1997 case dealing with federalism. Justice Scalia argues for what Jackson and Tushnet term a version of “American exceptionalism”: “Such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one” (p. 168). Justice Breyer, clearly the Court’s leading “comparativist,” argues that the experience of other countries may “cast an empirical light on the consequences of different solutions to a common legal problem” (p. 168). This fascinating dialogue, and a wealth of scholarly literature addressing the same general issue, provides a welcome addition to the past, purely doctrine-oriented comparative constitutional law casebooks.

The sole problems with the Jackson and Tushnet book are really inherent in the nature of the enterprise. Any examination of constitutional systems of the world must leave out some systems and issues. The casebook could be further enhanced by the inclusion of even more discussion of non-Western constitutional regimes. These other countries could at least provide an intellectual contrast to the solutions adopted by countries that Jackson and Tushnet do discuss. For instance, how do Islamic countries deal with religious liberty? How do countries in Asia and Latin America deal with affirmative action and other programs of economic inclusion? As the authors themselves

admit, the book would benefit from discussion of "constitutionalism and Islamic cultures, and . . . constitutional developments in Latin America, Asia and Africa" (p. ix).

This textbook will clearly serve as the foundational text for the emergence of comparative constitutional law as a distinctively new and rich discipline within legal academia. Its discussion of constitutional doctrine from abroad is thoroughly up to date and provides a solid basis to help understand different approaches to common constitutional issues facing countries around the world. The theoretical chapters provide an interesting point of departure for legal comparativists, or indeed anyone interested in "borrowing" the insights of one country and applying them to the dilemmas facing another country. The book serves a vital purpose both for those interested in the domestic debate about the uses of comparative constitutionalism and for those who seek to better appreciate the emergence of sophisticated and insightful constitutional regimes around the world.

Legal History

Roman Law in European History. By Peter Stein. Cambridge: Cambridge University Press, 1999. Pp. ix, 137. Price: \$18.95 (Paperback).
Reviewed by John A. Houlihan.

More than fifty years after its publication, Paul Koschaker's *Europa und das römische Recht* remains the definitive work on its subject, and, as Peter Stein notes in his introduction to *Roman Law in European History*, "[t]his book does not purport to rival that of Koschaker" (p. 2). However, for the non-specialist reader who seeks a succinct and accurate introduction to the long and complex history of Roman law in Europe, Stein's book is invaluable. Originally published in German in 1996 under the title *Römisches Recht und Europa*, this English version will satisfy an especially great need for readers to whom Koschaker's German is inaccessible.

Stein, the Emeritus Regius Professor of Civil Law at Cambridge University, divides his subject chronologically into four chapters, which follow a brief introduction designated as Chapter 1. Chapter 2 covers Roman law from its beginnings through Justinian's codification. Stein's account of the origins of Roman law is the traditional one: The Twelve Tables, modeled on Solon's Athenian law code, were promulgated in 451 B.C. in response to plebeian demands for a written law as a check on patrician magistrates. In 367 B.C., the story goes, the office of praetor was established to administer justice more efficiently. If the praetor found that a remedy existed for the claim before him, he would set out the issue in hypothetical terms known as a formula; the facts of the case would then be tried by a single jurymen, the *iudex*. (Stein notes the familiar comparison to the English system of writs.) Each year, the newly-elected praetor would issue an edict detailing the

circumstances in which a formula would be granted. As Roman society became more complex, praetors and *iudices*, as well as litigants, came to rely on the opinions of legal experts known as jurists. The juristic tradition flourished under the early Empire, but waned in the third century A.D. *Iudices*, by then professional judges who would decide both law and facts, simply counted the opinions of earlier jurists and ruled with the majority view.

In the sixth century, the Eastern Emperor Justinian revived legal scholarship by publishing a Digest of excerpts from the opinions of the jurists, a new Code of imperial legislation, and a legal text-book known as the Institutes: together, the *Corpus Iuris Civilis*. The Digest did not come to Western Europe's attention until the eleventh century. Once it did, however, its influence was profound, as Stein describes in Chapter 3. Bologna became a center of legal scholarship, and the scholar Accursius's glosses on the Digest came to be regarded as more authoritative than the Digest itself. By the fourteenth century, canon law had been compiled into a body comparable to Justinian's compilation of the civil law, and canon and civil law together formed a *ius commune* taught at universities throughout Europe. The extent to which courts applied this *ius commune*, as opposed to local customary law, varied from country to country; in England, Stein notes, custom was particularly strong.

The fourteenth century also saw the rise of a new generation of commentators on the civil law; the most famous of these was Bartolus, whose commentaries were more practically oriented than the work of the earlier glossators had been. Chapter 4 traces Bartolus's efforts and those of the Renaissance humanists, who were chiefly interested in "recovering the true Roman law from the obfuscations of the glossators and Commentators" (p. 78). In doing so, however, the humanists weakened the authority of Roman law by pointing out that it was designed for a very different world from that in which they were living. Meanwhile, in France, local customary law was put in written form; this meant that there was relatively little use for Roman law in French courts. The same was true of English common-law courts, but less true for the Court of Chancery. In German courts, which were run by laymen, the practice arose of seeking advice from the law faculty of the local university. These professors generally applied Roman law. Moreover, the Holy Roman Empire saw Roman law as a means of unifying the disparate German states. In the Netherlands, the influence of Roman law was so great that the country's law became known as "Roman-Dutch."

In the seventeenth century, the Dutch scholar Hugo Grotius applied Roman legal principles to international and natural law, as did Samuel Pufendorf, though with a more explicitly Christian emphasis. Pufendorf's work is described in Stein's last chapter, as are eighteenth- and nineteenth-century attempts, under the influence of Montesquieu, to rationalize and codify the laws of various states. The most significant of these was the French *Code civil*, issued by Napoleon in 1804 and still in force (though much amended); it sought to combine the best elements of both Roman and

customary law. In Germany, debate between “Romanists” and “Germanists” delayed the adoption of a code until 1900. In England, the study of Roman law had less direct influence; it crept occasionally into the case law, but its larger impact was on historical and anthropological scholarship such as that of Sir Henry Maine. In the twentieth century, the humanist emphasis on textual criticism and ancient legal studies has predominated. This has led to a widening schism between scholars of Roman law and those of modern civil law. Stein hints that the beginning of a new *ius commune* in the European Union may help to bridge this gap.

Stein’s book is concise and easily accessible to the general reader; that is its great virtue, but it is not without its costs. Some of Stein’s assertions are open to question and demand more explanation than the book’s scope affords: For example, his claim that the views of the Spanish neo-Scholastics had “very little effect on the actual practice of the colonists in the New World” (p. 95) is an oversimplification at best. There are no footnotes, but each chapter is followed by well-chosen suggestions for further reading. Within its constraints, *Roman Law in European History* is a succinct and elegant retelling of a complicated tale, and a work for which English-speaking readers will be grateful.

Foundations of World Order: The Legalist Approach to International Relations, 1898–1922. By Francis Anthony Boyle. Durham, NC: Duke University Press, 1999. Pp. ix, 220. Price: \$18.95 (Paperback). Reviewed by Philip Chen.

One of the most discussed debates in the study of international affairs has been that between international lawyers and scholars of international relations. The latter criticize the former for paying too little attention to the basic concepts of power and security, while the former, in return, suggest that the latter are insensitive to notions of norms and justice. The historical battlegrounds for this debate have been the major international crises of our time—the two world wars and the Cold War.

The pre-World War I generation of international lawyers, which is the focus of *Foundations of World Order*, has most often been the target of attack by realists of international affairs. The prominent lawyers of that era who held leading foreign policy positions have frequently stood accused of naively relying upon unenforceable international law, rather than power and deterrence, to police the actions of powerful, predatory states. The critique suggests that the institutional legacies of this generation—the League of Nations and the World Court, to name only two—raised false hopes and ultimately planted the seeds of the Second World War.

Francis Anthony Boyle, a professor of international law at the University of Illinois, aims to blunt this critique through a chronological discussion of early twentieth-century American attempts to inject notions of international

law into the practice of international relations. He describes the early U.S. legalists not as starry-eyed, naive diplomats but as savvy, hard-nosed men, such as Elihu Root, who made their mark in the worlds of both law and politics. They were aware of the Austinian, legal positivist critique of international affairs and the limits of international law. Moreover, they were men who did not shy away from the use of military force, and they routinely applied it in regions such as Latin America and East Asia. Rather, Boyle suggests, this generation of international lawyers developed a sophisticated, realistic approach to regulating international conflict, which eventually formed the foundation of the international legal system we have today.

The heart of the "legalist approach," according to Boyle, was the notion that power politics could be contained through an ever-expanding set of legal institutions, which states would join in order to receive the benefits of interstate cooperation. Failure to observe the rules of the international society would be policed by some notion of public opinion, as well as ostracism from the system by other states. The fundamental struts for this conception of world order were (1) mandatory international arbitration; (2) establishment of an International Court of Justice; (3) continued codification of international law; (4) creation of treaty regimes to limit arms; and (5) institutionalization of international peace conferences to resolve disputes.

In the minds of this generation of American international lawyers, the components worked together to promote stability. International arbitration helped de-politicize conflict and provided mechanisms through which compromises could be worked out. American international lawyers advocated the codification of customary international law because they believed that codification would make states more willing to bring their cases before judicial tribunals. These processes would eventually lead to arms reduction, as states realized that their security was not as threatened as before. This virtuous circle could contain and regulate international conflict.

Nevertheless, Boyle concedes that inconsistencies were rife within this vision of international politics. In particular, American military intervention in Latin America and East Asia undercut the legitimacy of American international lawyers to proffer a coherent legal vision. Frequently, the persons advocating the peaceful resolution of disputes through arbitration also were, at the same time, in the forefront of rejecting those policies in Latin America. Boyle cites as an example the American rejection of arbitration over the issue of the Panama Canal by Theodore Roosevelt's administration. American policy in Latin America was governed more by the Monroe Doctrine, which declared an American sphere of influence in the region, than by the notions of world order that its representatives may have articulated in the Hague.

Foundations of World Order provides a good summary and explanation of early American attempts to fashion a modern international legal order. Throughout the book, Boyle insightfully shows the reader how ideas that were generated in this period, 1898–1922, were eventually picked up again and

reshaped in the post-1945 era, when American foreign policy specialists returned to the question of setting up a system for regulating international conflict. However, the book, while historical in tone and style, tends to be episodic and case-study driven. This, at times, weakens the flow and continuity of the narrative. On substantive matters, although Boyle provides clear and concise discussion of the relevant international agreements and their technical legal machinery, readers may desire more background and analysis on how this generation of lawyers, through their writings and actions, struggled with the competing concepts of "power" and "law." Nevertheless, *Foundations of World Order* is a helpful addition to this continuing dialogue between international law and politics.

United Nations

The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers. By Danesh Sarooshi. Oxford: Clarendon Press, 1999. Pp. xxii, 311. Price \$105.00 (Hardcover). Reviewed by Paul Rohrer.

Danesh Sarooshi's *The United Nations and the Development of Collective Security* enters the legal and political landscape at a time of increased international reliance on the U.N. Security Council's Chapter VII powers. The use of these powers is not only fast expanding; it is concomitantly altering to include new international and regional entities operating semi-independently within the U.N.-authorized collective security rubric. An obvious example of this trend is the North Atlantic Treaty Organization (NATO) action in Kosovo. This action postdates even Sarooshi's very recent publication and highlights the salience of his subject. As the use of U.N. collective security measures expands in scope and context beyond the bounds of previously established action, an understanding of the legal underpinnings is necessary to assure the very legitimization that this use presupposes. The example of Kosovo is informative, as the action was controversial and closely linked to the goals of NATO.

A revised and updated doctoral thesis, *The United Nations and the Development of Collective Security* meticulously and successfully describes the mechanisms by which the Security Council may legally delegate its security powers to other entities acting on its behalf. This descriptive task takes up the first four chapters of his six-chapter work. In the final two chapters, Sarooshi attempts to fit recent security actions within his self-explicated legal matrix.

Sarooshi begins by noting that the Security Council was given the "primary responsibility for the maintenance of international peace and security" by Chapter VII of the U.N. Charter (p. 3). He defines the Security Council's powers as "the sole authority to determine when a threat to, or

breach of, the peace has occurred; the authority to order provisional measures; and the authority to order enforcement measures to be taken against a State” (p. 3). This authority, according to Sarooshi, is delegable to “other UN principle organs. However, in practice the Council has mostly delegated such powers to the UN Secretary-General” (p. 50). The power to delegate is not specifically included in the U.N. Charter, but Sarooshi makes clear in Chapter Two that it can be extrapolated from the Charter and surrounding documents.

In turn, Chapter Three deals with how the Secretary-General may delegate some of these powers to U.N. subsidiary organs as long as those powers remain under the supervision and control of the delegating principle organ. This is where the mechanism of delegation becomes more controversial. Because the United Nations does not maintain its own security forces, it must delegate some military enforcement duties to member states or regional alliances. This creates a command-and-control conflict as member states perform military operations under the general control of the Secretary-General but under the specific command structure of the member states. Certain command functions, though, are exclusively reserved for the Security Council and its representative, the Secretary-General. In the second half of the book, Sarooshi addresses the resulting problems, including the potential of extralegal deployments.

Sarooshi breaks down the use of delegated collective security powers by member states and regional security alliances, by mission objectives, and by actual geopolitical events. He states that, although in the first few instances of delegated use of collective force such delegation was seen as an anomaly, it is now known as the rule.

Sarooshi enumerates the circumstances under which the delegation of Chapter VII powers has become common:

The Council has delegated its Chapter VII powers to Member States for the attainment of the following five objectives: to counter a use of force by a State or entities within a State; to carry out a naval interdiction; to achieve humanitarian objectives; to enforce a Council declared no-fly zone; and to ensure implementation by parties of an agreement which the Council has deemed is necessary for the maintenance or restoration of peace. (p. 167).

Once he has delineated the types of forceful interventions that member states may undertake under the mandate of the Secretary-General, Sarooshi gives examples of each. Sarooshi effectively explicates the basic legality of these actions, though he also suggests that some authorized member states have engaged in extra-legal excesses.

In the end, Sarooshi’s accomplishment is to have meticulously graphed the legal basis for collective security action by U.N.-authorized member states (acting alone or in self-selected groupings) on to the geopolitical map of the modern era. The text shows the ultimate legality of these collective security actions while beginning to expose their legal limits and practical complications. As a strictly legal treatise, Sarooshi’s text will disappoint those more interested in tracing the historic development of collective security than

in establishing formal legality. However, Sarooshi should be congratulated for his strong scholarship and research. This text will be greatly appreciated by scholars and practitioners working within the legal rubric of collective security action authorized by the U.N. Security Council.

Human Rights

The Universal Declaration of Human Rights: Origins, Drafting, and Intent.
By Johannes Morsink. Philadelphia, PA: University of Pennsylvania Press, 1999. Pp. xiv, 378. Price: \$49.95 (Hardcover). Reviewed by Eric A. Friedman.

The reader of Johannes Morsink's *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* may well come to view article 26 of the Universal Declaration of Human Rights as a microcosm of the whole thirty-article Declaration that the United Nations General Assembly adopted on December 10, 1948. This article is more than a simple statement of the right to education. Its second paragraph in particular captures several central themes of Morsink's book, including the very purpose of the Declaration and the degree to which the Declaration was a reaction to the horrors of Nazi Germany. The second paragraph of article 26 states: "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship . . . and shall further the activities of the United Nations for the maintenance of peace" (p. 335).

Morsink, a professor of political philosophy at Drew University, gives an excellent general overview of the seven-stage, two-year drafting process of the Declaration. But it is the second chapter—delineating the influence of World War II on the Declaration—and the final chapter, which deals with the fundamental purpose of the Declaration, that merit special note. These two features of the Declaration—its reaction to the horrors of the Holocaust and its global purpose—form the bookends within which Morsink explores the various sections of the Declaration. In the five chapters in between, the author takes the reader on a thematic tour of the various provisions of the Declaration. He focuses on the strong nondiscrimination aspect of the Declaration, the right to privacy, and the heavy influence of the Latin American socialist countries that pushed hard for the inclusion of right-to-work provisions in the Declaration.

In the second chapter, Morsink demonstrates how the influence of World War II and the Holocaust is embedded in most of the articles in the Declaration. For instance, the drafters understood that it was not enough for them to declare that education is a right and is compulsory, two of the key elements of article 26(1). There was, after all, compulsory education in Nazi Germany. Yet to say that Nazi Germany had provided its people the human

right to education would be absurd because education often took the form of brainwashing people in theories of inequality and hatred. Hence the inclusion of the language of human rights, peace, and tolerance as the purpose of education. That article 5 of the Declaration goes beyond forbidding torture to also forbid “cruel, inhuman or degrading treatment or punishment” (p. 42) is also a response to the Holocaust, specifically the horrendous pseudo-scientific experiments that the Nazis conducted on death camp prisoners. And still, some U.N. members felt that the Declaration did not go far enough in addressing the evil of the Axis Powers; the United Nations’ six Communist countries abstained in the General Assembly vote on the Declaration (the Declaration passed 48-0-8) because they could not give their full support to a document that did not explicitly condemn Nazism and fascism.

Throughout the book, Morsink discusses how the drafters made a very conscious effort to keep abstract principles distinct from the implementation language that would come in a binding human rights covenant. (Such a covenant would eventually take the form of the International Covenants for Civil and Political Rights and for Economic, Social and Cultural Rights.) Therefore, rather than stating within the Declaration that its purpose was to serve as a standard for legislation, a very plausible option, the Declaration declares “that every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms” (p. 330). Because of this emphasis, the drafters were quite mindful that the Declaration should be accessible to the common person, and consequently they sought to make the document clear and concise.

According to Morsink, the rights to food, clothing, housing, and medical care were included in the early drafts of the Declaration largely because of the Latin American influence. And one learns that these rights would likely have been cut out of the final draft—near-victims of the delegates’ zeal for brevity—were it not for the weight of the Soviet and Chinese delegations. Morsink is also keenly aware of those provisions that did not make it into the Declaration; the penultimate chapter examines a special minority rights article that failed to be included into the Declaration’s final version. The eighth and final chapter, which discusses the Preamble and Article 1 of the Declaration, as well as the purpose of the Declaration, brings education back to the forefront.

Morsink succeeds in integrating into his analysis of the Declaration both its words and phrases and its all-embracing principles of universality and the unity of all human rights. The book’s analysis of one of humanity’s most noble statements is admirably thorough, though in one case—its examination of the right to property—perhaps tediously so. As much of the book is about how the particular articles came to be drafted, the reader gains a deeper understanding of how the drafters intended the various rights to be understood.

From our more jaded contemporary perspective, it is exhilarating to take an inside look at the process whereby delegates of nations around the globe

came together with tremendous idealism, and no lack of chutzpah, to dare to draft a Declaration of Human Rights that they termed Universal. Morsink shows how the Declaration's message emerged out of intense negotiations at a distinct period of history between individuals of different nations, worldviews, and alliances. This Universal Declaration set into motion a human rights movement that has brought some of humankind's most cherished ideals nearer to reality. And yet, to borrow from the Preamble, "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want[,] . . . the highest aspiration of the common people," (p. 329) remains a distant star for which we must continue to reach.

War Crimes: The Legacy of Nuremberg. Edited by Belinda Cooper. New York: TV Books, 1999. Pp. 350. Price: \$29.95 (Hardcover). Reviewed by Youngjin Jung.

The Rome Conference held in June 1998 was a landmark event in the development of international human rights. It laid the foundation for establishing a permanent International Criminal Court (ICC) and constituted a major step forward in the movement to create truly international mechanisms for punishing human rights abusers. With the implementation of the ICC, the protection of individual human dignity will no longer be left solely in the hands of sovereign states. This change in paradigm has deep roots in another historic event with a legacy crucial to the contemporary history of human rights, namely the creation of the Nuremberg International Military Tribunal after World War II.

Against this backdrop, *War Crimes: The Legacy of Nuremberg* was released in conjunction with a 1996 Court TV documentary commemorating the fiftieth anniversary of the groundbreaking adjudicative body. What distinguishes this book from others on the subject is that it features the opinions of a broad spectrum of professionals, not only of lawyers, but also of historians, journalists, and policy experts. These various perspectives help us understand why world public opinion has come to accept the fairness and legitimacy of the Nuremberg Tribunal even in the face of well-documented procedural and theoretical defects. The collected essays—edited by Belinda Cooper—also show us that the phenomenon of international law cannot be understood in isolation from its historical background and context.

The book is composed of three parts which cover in sequence the past, present and future of the idea of an international criminal court. Part I addresses the Nuremberg Tribunal itself, its achievements and its weaknesses. The authors generally reiterate the conventional wisdom on the Nuremberg Tribunal. On the positive side, Nuremberg introduced the revolutionary legal principle that following orders was not a defense, and it changed the focus of international accountability from sovereign states to individuals. On the other hand, Nuremberg clearly smacked of victors' justice: "The accused came only

from the ranks of the defeated; . . . the judges came only from the victors' side" (p. 295), and the common law system was applied unilaterally.

Most of the writers line up where one would expect. Bernard Meltzer and Benjamin Ferencz, two of the American prosecutors at Nuremberg, describe the trials as fair and just given the circumstances of the time. On the other hand, Jörg Friedrich, a German historian and journalist, argues that, while "on paper and in theory the Nuremberg Tribunal appeared to be a pioneering use of international justice; in fact, . . . it was an instrument of a successor regime that had taken power in a revolutionary coup in the form of a world war" (p. 90).

More intriguing comments on Nuremberg come from law professors Ruti Teitel and Edward M. Wise and American historian Peter Maguire. In assessing the ultimate influence of Nuremberg, Teitel argues that

the Nuremberg paradigm created fundamental alterations in our view of the rule of law as accountability; in the reconceptualization and shift of responsibility from the collective to the individual; in the reconceptualization of jurisdiction, from national to international; and finally, in the reconceptualization of humanitarian law violations pertaining to the law of armed conflict to include persecution even in times of peace (p. 53).

Wise notes that the history of war crimes dates back to even before the Hague Convention of 1899. Consequently, he concludes that it was the concepts of crimes against peace and crimes against humanity—as defined in articles 6(a) and 6(c) of the Tribunal's Charter respectively—that constituted the true innovation of Nuremberg. Still from another perspective, Maguire's fascinating article describes how public outrage over war crimes quickly yielded to the political exigencies of the Cold War.

Part II focuses on the Tribunal's legacy today as the international community confronts ongoing war crimes and crimes against humanity. The first section of this part deals mainly with the background, contexts, and ongoing adjudications of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These courts were established in 1993 and 1994 by the United Nations Security Council in accordance with its U.N. Charter Chapter VII powers.

William W. Horne, former editor of *The American Lawyer*, traces the ICTY's development and details the trial of one of its most notorious defendants, Dusko Tadic. Law professor Diane F. Orentlicher argues that the ruling rendered by the Appeals Chamber of ICTY in the Tadic case is one of the most important since Nuremberg because it extended humanitarian protection to those caught in the crossfire of internal (i.e., domestic or "civil") armed conflicts. Patricia Viseur Sellers, legal advisor to the prosecutor of gender-related crimes at the ICTY, thoroughly traces international law related to rape, including the issue of so-called comfort women. Whereas the Nuremberg Tribunal regarded rape neither as a war crime nor as a crime against humanity, it is today recognized as both in international instruments such as the Statutes of the ICTY and the ICC.

The second section of this part considers possible alternatives to tribunals and supplementary methods of addressing massive human rights violations. American legal scholars Neil J. Kritz and Madeline H. Morris both argue that prosecution of war crimes before domestic courts can perform some important functions apart from those served in international courts. Morris touches upon the tricky issue of complementarity (or concurrent jurisdiction) between international and national courts and argues that international tribunals should not be assumed to be superior to national courts. Timothy Phillips and Mary Albon, both of the Project on Justice in Times of Transition, emphasize the importance of alternatives to prosecution, such as truth commissions, in situations where prosecutions may not be possible or desirable. Lastly, Beth Stephens and Jennifer Green discuss the American civil suit filed against the Bosnian Serb leader Radovan Karadzic. The right to file such a lawsuit against de facto regimes was upheld by the U.S. Court of Appeals for the Second Circuit, and the authors—both of whom acted as attorneys for the plaintiffs in the Karadzic case—conclude that “civil litigation in domestic courts can play an important role in the struggle to protect human rights” (p. 269).

Part III of *War Crimes*, which focuses on the future of international tribunals, reflects the general feeling that the permanent International Criminal Court represents the culmination of a process begun at Nuremberg. Donna K. Axel of the New School for Social Research describes the process leading up to the historic 1998 conference in Rome, and the Epilogue expounds major contents of the Statute of the ICC adopted in that conference.

This book carries a diverse array of perspectives on the legacy of Nuremberg and shows in detail the efforts, intentions, and accomplishments of the international community to criminalize and punish perpetrators of human rights violations. However, the editor also seems to place too much emphasis upon the bright side of the institutionalization of the ICC and does not convey its limitations. For instance, the editor’s Epilogue simply criticizes the United States for not signing on to the ICC but does not elaborate on some legitimate criticisms of the ICC—for example, its claim to jurisdiction (in some instances) over nationals of non-member states.

All in all, this book is very informative. It is an indispensable guide for readers who are interested in tracing the legacy of the Nuremberg Tribunal and subsequent historical developments in international human rights.

Religious Fundamentalisms and the Human Rights of Women. Edited by Courtney W. Howland. New York: St. Martin's Press, 1999. Pp. xxv, 326. Price \$45.00 (Hardcover). Reviewed by Jana King.

In *Religious Fundamentalisms and the Human Rights of Women*, Courtney Howland, a visiting scholar at the International Women's Rights Center at Georgetown University Law Center, addresses the challenges religious fundamentalist movements pose for women's rights and equality. Although the editor brings together authors from various religions, academic disciplines (including anthropology, law, theology, and education), and geographic regions, these authors share the view of religious fundamentalism as a worldwide movement tied to legal issues and international human rights. While fundamentalism takes different forms within Christianity, Islam, Hinduism, Judaism, and Buddhism, all of these fundamentalist movements are detrimental to women's rights by upholding gender roles that enforce the subordination of women. The fundamentalist movements that the authors highlight range from minority movements within a country to fundamentalist national governments. Law and legal rights are key issues in these movements, which attempt to build law upon religious doctrine.

The authors of the book focus on three main themes: women's sexuality, legal and nonlegal remedies, and the collusion of the West with fundamentalism. Viewing women's sexuality as a threat to society, religious fundamentalists seek to control reproduction and sexuality. They promote a patriarchal view of the family that confines women's roles to wife and mother and limits their involvement in the public sphere. Seeking strategies of resistance to religious fundamentalists, the authors propose legal solutions at the international and national levels, as well as nonlegal approaches. Finally, the authors challenge the West in its implicit and explicit collusion with religious fundamentalism. They claim that, in an effort to promote multiculturalism and respect for other cultures, many people in the West choose not to condemn religious fundamentalism's violations of women's human rights.

These three themes recur throughout the book, which is divided into seven sections. The sections contain three to four short essays. Each essay is approximately ten pages. The first section employs a social and political science analysis to address the impact of religious fundamentalism on women. John Hawley puts forward the definition of fundamentalism foundational to the book. Although there are difficulties in using this term—it is pejorative and associated with its American Protestant origins—Hawley argues that no term is fully adequate for comparative purposes among groups. He chooses to use the word "fundamentalism," contending that it upholds the ideas of many "militantly conservative religious groups" (p. 7). These groups, regardless of ethnicity, religion, or nationality all seek to restore core values (fundamentals) that are divinely sanctioned and overridden by modernity. One of their major concerns is to place and keep women in a position subordinate to men. The

remaining three essays in this section provide sociological and political descriptions of fundamentalism in the three major monotheistic religions: Christianity, Islam, and Judaism.

Cultural relativism, the focus of the second section, poses a unique problem for women's rights. Contending that there are no universal standards by which cultures may be evaluated and compared, cultural relativist arguments often accept religious fundamentalists' treatment of women. The essays in this section explore the claims of cultural relativism, its nexus with international law, and fundamentalists' employment of cultural relativist claims to justify their patriarchal structures in the name of culture and religion. Finally, asserting that cultural relativism and religious extremism pose the greatest threat to international human rights, author Radhika Coomaraswamy proposes three approaches to bridge the gap between cultural relativism and a universal standard of human rights.

Section Three examines the issues religious fundamentalism and women's rights raise in the international legal system. The theme underlying this section is the legality of rules based on religious norms that discriminate against women. These essays evaluate religious fundamentalist norms of obedience and modesty in the face of the International Covenant on Civil and Political Rights and the politically-motivated, but religion-cloaked, reservations of Muslim countries entering the Convention on the Elimination of All Forms of Discrimination Against Women. Following an examination of women's rights to freedom of religion or belief under human rights treaties, this section concludes with an exploration of girls' rights to education. Many girls are denied this fundamental human right, due to socioeconomic, cultural, and religious factors. Authors Geraldine Van Bueren and Deirdre Fottrell examine the power of international law to prohibit this discrimination.

The fourth section focuses on the national level, addressing the issues raised in this context by religious fundamentalism and its treatment of women. One of the major debates at the national level is which laws should be applicable to religious and secular groups within the same country. The authors highlight this debate through their analyses of India's Hindu Right, religion and patriarchal politics in Israel, and the conflict between European family laws and immigrants' male-biased foreign laws.

Women's sexuality and reproduction is the theme of Section Five. Religious fundamentalists generally desire to control women's sexuality because they view it as a threat to society. The authors in this section explore the effects of fundamentalism on women's sexuality and reproductive health and discuss how fundamentalists hinder women's autonomy by preserving the power of men and controlling women. In addition, fundamentalist scholars interpret women's sexuality as the key factor determining women's rights and duties. Women are viewed as lustful creatures who obstruct the duty of men. Although such views are not limited to one religion, in the case of Thai Buddhism this conception underlies prostitution. The authors propose alternatives to traditional interpretations of women's sexuality and criticize

the international human rights discourse for failing to address the role of culture and religion in depriving women of their rights.

Section Six examines how women resist fundamentalism. The authors in this section are not academicians, but rather work directly in the trenches fighting for women's rights. They utilize their experiences to discuss current effective modes of resistance and suggest alternative methods. Education has been an especially important battleground in this arena. Sakena Yacoobi discusses the efforts of Afghan women to educate other Afghan women and girls in the Diaspora through the Afghan Institute of Learning, founded by Yacoobi and colleagues in 1995. Cecile Richards examines the Religious Right in the United States. She discusses the Texas Freedom Network—a non-partisan grassroots organization founded to provide an alternative to the Religious Right—and demonstrates how one can counterbalance the activities of fundamentalism. Paul Nejeski, a United States Immigration Judge explores the extent to which women seeking freedom from religious fundamentalism can find refuge in the United States. He states that asylum based on violence from religious fundamentalism has been granted to some individuals. Finally, Azar Nafisi examines the ways in which women challenge fundamentalism in the Islamic Republic of Iran.

The last section of the book explores challenges to religious fundamentalism made by religious interpretation. The authors in this section either provide their own or lay forth others' alternative interpretations to fundamentalism. Their essays propose theological alternatives to religious fundamentalism in Judaism, Buddhism, Catholicism, and Islam. The authors recognize that efforts to enhance the status and rights of women must not neglect religion in their task because this would alienate those for whom religion is a vital part of life.

The goal of *Religious Fundamentalisms and the Human Rights of Women* is to address the challenges religious fundamentalist movements pose for women's rights. This goal is accomplished in the book's thoughtfully organized presentation of a rich variety of topics and themes and through its incorporation of writers from a wide range of backgrounds, religions, and experiences. The pieces must unfortunately be kept short to present this variety. Section Six is particularly noteworthy as it contains the essays of people working directly in the field for women's rights, adding a fresh counterbalance to the other more academic chapters. Although a few other essays offer solutions to the problems they pose, most fail to be prescriptive. Still, the editor should be applauded for collecting an impressive array of essays that probe the interconnections of religious fundamentalism, law, and the human rights of women.

Obedying Orders: Atrocity, Military Discipline and the Law of War. By Mark J. Osiel. New Brunswick, NJ: Transaction Publishers, 1999. Pp. viii, 398. Price \$34.95 (Hardcover). By Jeannette A. Vargas.

Perhaps the topic *du jour* in international law circles has been the question of how to deal with those individuals responsible for the commission of war crimes and atrocities. Efforts to address this issue have proceeded on the international stage, with the adoption of the Rome Statute of the International Criminal Court, in transnational forums, with the push to extradite Chilean Senator Augusto Pinochet to Spain, and in the domestic arena, with the trials of members of the Argentine junta involved in that country's dirty war. Yet even with the flurry of activity in this field over the last decade, few recent scholarly works have considered these questions with the sophistication and even-handedness of Mark J. Osiel's latest contribution to the ongoing debate.

In *Obedying Orders: Atrocity, Military Discipline and the Law of War*, Osiel, a law professor at the University of Iowa, tackles the troubling question of who should be held criminally liable for war crimes and under what circumstances. This book functions on many levels, as a work of applied ethics, legal theory, and military strategy. The nominal focus of this inquiry is the superior order's defense, which immunizes soldiers from liability when their criminal actions are taken pursuant to a command from a superior. Yet in the course of his examination of this problematic feature of military and international law, Osiel also offers an in-depth analysis of the causes of atrocities, the psychology of soldiers, and the institutional design of the modern military.

The argument begins with a critique of current legal doctrine in the area of the superior order's defense. The sole exception to this defense is the manifest illegality rule—a subordinate must resolve all doubts about the legality of an order by presuming its legitimacy, unless the order is *prima facie* illegal. This narrow exception applies only to a few of the gravest of crimes, with no consideration of the particular circumstances faced by the soldier, such as the opportunity to consult legal counsel or to get clarification of the orders. Traditionally, this rule has been premised on an argument stressing military necessity:

It is designed entirely in anticipation of a single, worst-case situation which has become increasingly rare due to the changes in the nature of modern war. In this situation, an ill-informed subordinate must instantly obey his superior's orders to use deadly force without a moment's reflection, or else all (i.e. the decisive battle) will be lost (p. 157).

Yet Osiel convincingly refutes this notion of the paradigmatic military encounter. Through a socio-historical review of military engagements, this book argues that the modern military no longer values unthinking subordinates and centralized command. Rather, situational judgment and initiative among the lower ranks are highly valued as part of an effective

military force. The antiquated approach of the superior order's defense does not recognize the realities of combat, and thus is a danger both to the redesign of a more efficient military and to humanitarian goals.

This book argues for a reform of the doctrine, for a greater reliance on general standards rather than bright-line rules. According to this premise, imposing criminal liability on soldiers who have followed orders that they should have reasonably known were illegal would simultaneously decrease the occurrence of atrocities while encouraging the type of independent and critical judgment that leads to operational success. One obvious side effect of such a change would be to allow a greater number of soldiers to be found guilty of war crimes. Yet the real benefits would come at a deeper level of deterrence than mere penal sanctions. Osiel's ambitious thesis is that a reliance on general standards would foster the incorporation of ethics into the *nomos* of the military profession. Professional soldiers would be trained to think of moral consequences, their humanitarian instincts as much a part of their identity as martial honor and other military virtues.

With a multi-disciplinary approach, this book ably argues from the perspectives of the soldier, the prosecutor, the military commander, and the human rights activist. The author avoids the tendency that has cropped up in too many recent works in this area to demonize one side of the debate. Rather, Osiel proceeds from the assumption that military and humanitarian objectives are not inherently in tension, that they can be simultaneously pursued once a common ground has been established. Indeed, it would not be too much of an exaggeration to say that, with his optimistic vision of the ethical soldier, Osiel envisions that the military can be the heroes of the story—the common infantryman as human rights activist.

With such a breadth of scope, it is almost inevitable that some micro-level flaws should emerge. For example, the deliberate creation of the military culture proposed here presupposes a fairly organized military structure with rigorous training and indoctrination. Yet in many parts of the world, including some areas where the problem of responsibility for atrocities has been most keenly felt, these preconditions are not in place. This objection is brusquely dealt with in the book, as it is suggested that international law should maintain the manifest illegality rule as a floor, since less educated soldiers should be regulated by strict rules rather than standards. Thus, although the argument draws upon examples of war crimes and military structures from various nations and time periods, the proposed solution is limited in its applicability.

Despite this caveat, *Obeying Orders* is a lively read, with much to recommend it. The author draws upon a wealth of knowledge, both empirical and theoretical, to make a cogent and nuanced argument. Through a welcome focus on the *ex ante* effects of legal rules on the military culture, he straddles the line between pure legal formalism and political science realism. Osiel has written a tract that is of equal concern to philosophers, international lawyers, human rights activists, and military personnel.

