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Review: A Philosophy of International Law

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ing the eventual success or failure of a regime" (p. 60). This is an important endeavor, but one which is not as fully realized as the reader might like.

With the exception of the Aaland Islands, the cases pre-dating World War II, especially the earliest cases, seem principally of historical interest and appear to have little bearing on the kinds of problems referenced in the book's introduction—Chechnya, Yugoslavia, and the Kurds. Many of the other cases, by virtue of their singularity and the unusual conditions contributing to the viability of the successful regimes, seem to offer only modest guidance as models for more complicated cases. Three of the success stories—the Aaland Islands, the Faroe Islands, and Greenland—involve very small populations on territory geographically separate from the rest of the state. A fourth success story—the South Tyrol—also involves a small population and other unusual circumstances. Cases that appear closer to the circumstances confronting current policy makers seem to involve failed efforts at autonomy (e.g., Eritrea) or ongoing but unresolved attempts (e.g., the Palestinians). Nonetheless, Lapidoth's review of these cases is careful, informative and balanced.

Part IV of the book is titled "Conclusions." It begins with a chapter that describes some of the factors that induce members of ethnic groups to seek autonomy, and the reasons why there is not an international legal entitlement to autonomy. The discussion is useful, although it does not break new ground and might have been better placed at the beginning of the book.

The next chapter may be the most useful to those looking for practical policy guidance. It provides the equivalent of an annotated checklist of issues, drawn from the prior case studies, to be considered by anyone attempting to construct an autonomy regime. The discussion is largely descriptive, but represents a valuable distillation of the issues to be resolved and the competences that must be allocated between a central government and an autonomous entity, as well as the various options available for dealing with each question. The topics covered include the modes of establishing autonomy, the institutions to be established, the specific powers to be allocated, citizenship, dispute settlement and many others.

The final two chapters, each under three pages, could profitably have been substantially expanded. The penultimate chapter articulates the factors that may increase the prospects for a successful autonomy regime. The factors are drawn in substantial part from the case studies and are already implicit in Lapidoth's analysis of those cases. Some will appear self-evident but nonetheless warrant mention; others provide important cautionary notes. The final chapter appropriately recognizes both the potential benefits of autonomy regimes and their weakness as compromise solutions that often satisfy no one.

On balance, readers looking for an introductory treatment of the theoretical issues associated with autonomy regimes and a useful set of short case studies will find this book of considerable benefit. Those more interested in detailed theoretical treatment of the relevant issues will have to look elsewhere, in the increasingly sophisticated literature on political arrangements conducive to ameliorating ethnic tensions.

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A Philosophy of International Law. By Fernando R. Tesón. Boulder CO: Westview Press, 1998. Pp. viii, 187. Index. $52, cloth; $25, paper.

This book, by Fernando Tesón, a professor at the Arizona State University College of Law who also teaches at the Universidad Torcuato Di Tella in Buenos Aires, provides an overview and permits an assessment of some of the author's principal contributions to the literature of international legal theory, which are considerable. In this book, his exploration relates principally to what has come to be called "the Kantian thesis"—namely, that the normative status of the individual is at the center of international law.

Traditionally, international law has been understood as established upon the state as the fundamental normative unit, yielding an international law concerned only with the rights and duties of states, without regard to a state's own domestic political system or treatment of its citizens. In this view, international sovereignty and legitimacy are solely a function of whether a government controls its people, not how it treats them; the latter would be a question of domestic justice, not international law. Tesón squarely challenges the statist position. Although he acknowledges that the postwar human rights movement has moderated this traditional statist view in practice and continues to exert pressure on its theoretical underpinnings, Tesón believes that democratic liberalism, if it is to prevail, requires a more radical reconfiguration of international legal theory.

Liberal theory holds that the purpose of the state is to protect and serve its people, and that the state derives its legitimacy from its efforts to serve this purpose. Thus, liberal theory is committed to the normative priority of the individual. According to Tesón, statism, or any theory of international law that separates international legitimacy from domestic justice, is "illiberal and authoritarian" (p. 1) because it confers legitimacy on the de facto exercise of power without adequate regard for the political consent and human rights of those subject to that power on the domestic level. "International law thus conceived . . . is incapable of serving as the normative framework for present international relations" (p. 1).

In his essay, *Perpetual Peace*,[1] Kant suggests that a morally legitimate international law is founded upon an alliance of separate free nations, united by their moral commitment to individual freedom, by their allegiance to the international rule of law, and by the mutual advantages derived from peaceful intercourse.[2] In chapter 1, Tesón offers a modern reconstruction of this view, redefining sovereignty as depending upon the state's domestic legitimacy, and holding that the international legitimacy of states derives from their consistency with liberal moral principles. Thus, he maintains, international justice is closely related to domestic justice.

The balance of the book consists of Tesón's application of this thesis to discrete areas of international law, thereby illustrating how the Kantian thesis challenges the traditional statist view, and addressing certain theoretical concerns raised by the Kantian thesis. In his second chapter, Tesón identifies two related corollaries of statism—the principle of nonintervention and the presumption that established governments necessarily represent the people they govern. In his view, these corollaries together form the essence of the principle of sovereignty both in its negative and positive forms, namely that states are to be free from the coercion and armed aggression of other states, and they are to be free to adopt any form of social organization. Tesón rejects, however, the view that sovereignty is an autonomous moral principle and that all states are equally sovereign. Instead, he advances two counter-principles: (1) that sovereignty is an instrumental value, honored because of its utility in achieving underlying noninstrumental values such as human rights and individual autonomy; and (2) that there are degrees of sovereignty such that claims of sovereignty may, therefore, be weighed against other claims in deciding intervention questions. Consequently, only just states deserve the shield of sovereignty, but only to the degree that they are just.

This view of sovereignty is open to two criticisms. First, Tesón and others sharing his view[3] interpret Kant as supporting humanitarian intervention (read broadly to include nonmilitary coercion) in the case of human rights violations by illiberal states. However, it is not clear from *Perpetual Peace* that Kant himself was an interventionist. Second, Tesón's theory of the conditional legitimacy of states can be seen as undermining the basis for a global international law, in that it de-legitimizes the consent of illiberal states to such a global legal order. Tesón maintains, however, that while on moral grounds such consent must be held as invalid, consequential reasoning might justify acting as if the consent were valid, since to do so may be useful for the achievement of other deontological values.

The Kantian thesis also has serious implications for positivism. In the third chapter, Tesón challenges the claim that the formation and observance of international law can be explained by a theory of states' interest-based consent to rules, using game theory as an illustration of modern positivist attempts to explain such consensual rule making. Tesón criticizes the resulting account of international law on meta-ethical grounds for failing to explain the phenomenon of obligation, arguing that, if obligation rests solely on a voluntary interest-based consent by states, the concept of obligation will no longer exert any restraining force. Thus, he argues, such doctrines as *pacta sunt servanda*, *opinio juris* and *jus cogens* cannot be explained as consent-based rules, but are in fact moral principles that operate as checks on otherwise prudential self-interested conduct.

Tesón also criticizes positivism for giving effect to states' consent to immoral acts or rules, and conflating consent by a government with consent by its people. These last two criticisms suggest an

[1] Immanuel Kant, *To Perpetual Peace, in* PERPETUAL PEACE, AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107 (Ted Humphrey trans., 1983).

[2] This is a restatement of Kant's three Definitive Articles, which set out the basic principles of his peace program. These are supplemented by six Preliminary Articles, comparable in function to standstill and rollback commitments in a trade agreement, establishing a framework for the implementation of the full program. Tesón discusses the structure of *Perpetual Peace* on pages 22–25.

[3] *See, e.g.*, Richard B. Lillich, *Kant and the Current Debate over Humanitarian Intervention*, 6 J. TRANSNAT'L L. & POL'Y 397 (1997).

underlying critique of positivism as bearing a disguised instrumental relationship to statism. In other words, positivism is an attempt to cloak statism with a neutral operating principle, while in fact facilitating the implementation of a statist agenda and deflecting the direct moral critique of statism as a normative principle.

Tesón's criticism of positivism's difficulties is well taken. However, positivism may be better able to explain the phenomenon of obligation than Tesón is willing to concede, at least if that phenomenon is considered in the legally relevant sense of compliance against immediate self-interest. Anthony D'Amato's reciprocal entitlements theory,[4] for example, would seem a useful way of explaining why a state with an incentive to breach a particular rule might nevertheless comply, based on its interest in the preservation of an international rule system which confers upon it all the valuable accouterments of statehood.

This view would not satisfy Tesón, since it does not account for obligation as a moral duty—why one *ought* to obey a rule regardless of the consequences for one's interests. However, it may be unfair to fault tools such as game theory, which express *legal* obligation in terms of interest-based compliance, for being unable to explain *moral* obligation. The fact that consent may not adequately explain a moral obligation to comply independent of self-interest, does not necessarily mean that theories of self-interest cannot explain legal obligation—only that legal obligation may not be the same as moral obligation.

Tesón wrestles with the problem of pluralism in his fourth chapter, which discusses Rawl's "The Law of Peoples."[5] Tesón acknowledges that Rawls works within the same deontological liberal tradition as Kant, but considers Rawls to have fallen short of a rational reconstruction of modern international law. In "The Law of Peoples," Rawls argues for the inclusion of hierarchical/communal states within the international legal system as legitimate, albeit not liberal, states. In so arguing, Rawls makes two key assumptions: (1) hierarchical/communal states are legitimate because they represent the preferences of their citizens, and (2) while such societies are not built on liberal principles, their principles are, nevertheless, rational. Therefore, many core human rights must be treated as contingent Western liberal rights that are not enforceable against hierarchical/communal states under the agreed-upon principles of international justice. Similarly, liberal states are not justified in coercing, by force or other means, hierarchical states, but only tyrannical states. Tesón rejects these assumptions, arguing that to treat hierarchical/communal regimes as both reasonable and legitimate abandons key tenets of liberal justice. This results in a reconstruction of international human rights law that falls short of what Tesón considers to be the accepted, enforceable core of existing rights.

This debate is, I believe, at the heart of the book. One attraction of positivism is that it purports to sidestep the normative dilemma of pluralism by substituting formal criteria in the place of contentious, incommensurable normative criteria of the sort at the heart of the Tesón-Rawls debate. Tesón correctly points out, however, that positivism involves certain assumptions about human nature, such as self-interested opportunism. In unmasking positivism's latent normativity, and in illustrating the role of moral principles in a comprehensive account of international law, Tesón inevitably thrusts the larger dilemma squarely before us: how to respond through international law to the incommensurability of the normative principles at play in the world.

One approach, Tesón's Kantianism, is to assert the superiority of Western liberalism and construct international law accordingly.[6] Teson rejects Rawls' attempt to wrestle with the problem of incommensurable universalist views, based on Tesón's confidence that rationality is adequate to demonstrate the invalidity of all universalist conceptions of human nature, except those of Western liberalism. Thus, in *A Philosophy of International Law*, Tesón confronts a central paradox of liberalism: the logic of the liberal position inevitably pushes one toward the adoption of an "intolerant" stance in the face of illiberal societies, what Bielefeldt terms a "fighting liberalism."[7] Tesón's analyses of the law of self-determination and the feminist critiques of international law in

[4] ANTHONY A. D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 16–25 (1987).

[5] John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36 (1993).

[6] Another approach, resulting in a view of international law more like Rawls' but based on an entirely different methodology, is Surya P. Sinha's legal polycentrist critique of international law, in particular of modern human rights law. *See* SURYA P. SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW (1996); *see also*, Frank J. Garcia, *Book Review*, 36 VA. J. INT'L L. 1085 (1996) (*reviewing Surya P. Sinha, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW (1996)*).

[7] Heiner Bielefeldt, *Autonomy and Republicanism: Immanuel Kant's Philosophy of Freedom*, 25 POL. THEORY 524, 547–48 (1997).

the final two chapters of the book are heavily influenced by this sort of liberalism. The doctrine of group rights receives only qualified support because it conflicts with the individualist tenets of liberalism and, although Tesón accepts certain features of the liberal feminist critique of international law, he rejects the radical feminist critique on the basis of its "illiberal" epistemological and metaphysical assumptions.

The fundamental strength of Tesón's book is its argument for the centrality of moral principles to any comprehensive liberal account of international law. Certain readers may take issue with Tesón's assertion of Kantian liberalism as *the* correct form of international morality, perhaps leaning more in favor of the vision presented by Rawls. Even for such readers, Tesón's book remains a powerful meditation on the implications for international law if, indeed, people are moral agents.

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The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice. Edited by David G. Victor, Kal Raustiala and Eugene B. Skolnikoff. Cambridge MA, London: The MIT Press, 1998. Pp. xviii, 707. Index. $27.50.

The extraordinary growth in the number of international environmental law treaty obligations over the past twenty years prompts the obvious question: how effective have they been? This question can be asked and answered in a number of different ways. Do states comply with the international environmental obligations they undertake? Are the obligations designed in a way that actually addresses the problems the treaties were intended to solve, and, more fundamentally, has the treaty actually prompted behavioral changes in those "target groups"—not just governments, but a wide range of actors including individuals, firms and agencies—it was intended to affect. The volume under review primarily seeks to address this last question. This concern to understand the ways in which institutions influence social behavior places the work within a broader scholarly endeavor known as the "new institutionalism." However, the fourteen case studies and the editors' analysis inevitably provide pointers, if not answers, to many other fascinating questions as well.

This book is the result of a major international research project conducted at the prestigious International Institute for Applied Systems Analysis (IIASA), in Laxenburg, Austria. The three editors are political scientists: David Victor directed the research team from IIASA; Kal Raustiala is law student at Harvard and, more pertinently, a former Professor of Politics at Brandeis University; and Eugene B. Skolnikoff is Professor of Political Science at the Massachusetts Institute of Technology.

The book is divided into two sections which reflect the two limbs of the case studies. Part I considers Systems for Implementation Review (SIRs)—not only formal treaty procedures like the well-known noncompliance procedure of the 1987 Montreal Protocol (to the 1985 Vienna Convention) on Substances that Deplete the Ozone Layer,[1] but informal systems as well. Part II comprises eight studies which examine the issues involved in domestic implementation—looking particularly at the influence that participation has on behavior of economies in transition, especially Russia, and the problems that arise.

The SIR studies, which comprise Part I of the book, are truly innovative. Although a great deal has been written about the Montreal Protocol Non-Compliance Procedure,[2] the "system approach" taken by the IIASA team really does seem to provide new insights, demonstrating vividly how SIR functions are performed by a wide variety of actors and procedures. Jon Lanchbery's opening study of the more than thirty international wildlife agreements is particularly interesting. He shows how, in some key agree-

[1] Victor's essay is a short version of his better-known IIASA study. *See* THE EARLY OPERATION AND EFFECTIVENESS OF THE MONTREAL PROTOCOL'S NON-COMPLIANCE PROCEDURE (1996).

[2] *See e.g.*, Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123 (1992); Patrick Széll, *The Development of Multilateral Mechanisms for Monitoring Compliance, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 97 (Winfried Laing, ed., 1995); H. M. Schally, *The Role and Importance of Implementation Monitoring and Noncompliance Procedures in International Environmental Regimes, in* THE OZONE TREATIES AND THEIR INFLUENCE ON THE BUILDING OF INTERNATIONAL ENVIRONMENTAL REGIMES 82 (Winfried Laing, ed., 1997); Patrick Széll, *Implementation Control: Non-Compliance Procedure and Dispute Settlement in the Ozone Regime, in id.* at 43; David G. Victor, *The Montreal Protocol's Non-Compliance Procedure: Lessons for Making Other Environmental Regimes More Effective, in id.* at 58; Jacob Werksman, *Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime*, 56 ZEITSCHRIFT FÜR AUSÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 750 (1996).