

Brad R. Roth. *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order*. Oxford University Press, 2011. Pp. 290. £39.95. ISBN: 9780195342666.

Professor Roth's book addresses what – if it were new, as he suggests – would be an extremely alarming development: namely, the tendency of 'strong' states to intervene in the affairs of their materially 'weak' but formally equal counterparts. Because such interventionism is invariably justified as necessary in order to defend the core principles of a supposedly universal morality (usually, in the UN era, associated with human rights), Roth argues that this practice must be discouraged if the Charter system's commitment to 'moral pluralism' is not to be undermined. As he sees it:

The post-World War II order, as constructively amended in the era of decolonization, established the priority of peace and respectful cooperation among judicially equal states; the ethos was one of ideological pluralism and forbearance, qualified only by a Security Council mechanism requiring an extraordinary cross-cutting consensus. That the system leaves unredressed all but the most extraordinary injustices occurring within state boundaries is not an aberrant consequence; the system, mindful that great-power predation has typically flown the flag of righteousness, prioritizes the impeding of impositions (at 284).

On a continuum he sets up, running from 'transcendental justice' to moral relativism, Roth therefore argues that the morally correct position to take is one of 'bounded pluralism'. Such a position is 'pluralistic' in that it respects the right to non-intervention even of states ruled by 'ruthless' governments on the grounds that '[w]hat appears "disproportionate" to someone else's cause, however just, frequently appears exigent in the service of one's own' (at 120). Such a position is 'bounded', however, in that this respect is limited by the existence of a few clearly universal moral standards. It is clear to Roth, for example, that '[t]he duty to refrain from coercive interference' can legitimately be 'overcome in some class of unambiguously catastrophic cases' (at 107). It is important, however, that 'the exceptions should not be allowed to swallow the rule' (at 130).

It will be evident that two justifications lie behind Roth's spirited defence of the *status quo* – one normative (or 'moral'); the other descriptive (or 'legal', relating to the way in which Roth views international law as operating, objectively, both in theory and in practice).

Regarding the first, Roth argues that there are '*prima facie* moral reasons to support an efficacious and generally beneficent political order wherever one is found' (at 44). The current international order's efficaciousness and beneficence are understood to lie in its ability to reconcile 'the long-term policy interests of its participants, strong and weak' (at 30) by means of the principle of sovereign equality. This is necessary because 'there persist sharply conflicting conceptions of what counts as legitimate and just internal public order' (at 24). A different international order, one *not* based on sovereign states, 'could be imagined, but it would require rethinking much that is currently taken for granted, and pondering measures that are currently almost never considered' (at 48). In his view, then, we owe allegiance to the existing system both because it provides people with what they want when they want it, and because the struggle to find an alternative would require embarking on an unusual, and therefore an impractical, project of 'rethinking' international law.

Regarding the second, descriptive/legal justification for his argument, Roth insists that the 'currently predominant' image of sovereignty as 'a realm of lawlessness that incrementally diminishes as international legality advances' is incorrect (at 3). This is because 'domestic authority, while subject to international law, is not – even as a matter of international law – strictly subordinate to international authority' (at 91). Paradoxically, therefore, '[t]he same act can be lawful and unlawful simultaneously: valid within the domestic legal order, but in breach

of international legal obligation' (at 91). 'Human rights norms', for example, 'are, as a matter of legal presumption, *obligatory but not compulsory*. States are, at once, legally bound by obligations and legally protected from the very coercion that may be required to assure their compliance' (my emphasis, at 80). Carl Schmitt is here enlisted to support Roth's thesis: 'Schmitt's maxim, "sovereign is he who decides on the exception", however questionable as a claim that a single such official or body must or ought to exist within any particular domestic regime, is [therefore] accurately descriptive of a territorial political community's sovereignty on the international plane' (at 72).

While Roth's anxieties about the risk of totalitarianism inherent in any claim to moral universalism are certainly valid,¹ it is submitted that his faith in the capacity of an international legal system based on sovereign equality to deflect this risk is misplaced.

Firstly, from the normative/moral perspective, it is not obvious to anyone living either outside the West, or on what one might call its 'inner peripheries', that the current international order is as 'efficacious and generally beneficent' as Roth supposes. Indeed, as soon as one dispenses with Roth's tendency to assume that the project of international law was initiated in 1945 and perfected with decolonization (see, e.g., at 54), his understanding of the interventionism of 'strong' states as a harmful *new* development, attacking the system *from outside*, becomes rather less plausible than an alternative view which sees such interventionism as an intrinsic part of the 'sovereign state' system itself, if not its *raison d'être*. Whether or not one accepts Antony Anghie's argument that the very concept of sovereign equality was born, in the late nineteenth century, of international lawyers' 'struggle to define, subordinate, and exclude the uncivilized native', such that sovereignty must therefore be seen as the creature of, rather than the solution to, colonialism,² it is indisputable that the supposedly standard set of international rights and duties known as international personality has always been experienced differently by different states.

One important reason for the 'unequally equal' legal traction of sovereignty/international personality concerns the nature of the international legal process through which international rights and duties are attained by non-original members of the 'Family of Nations' – that is, by the 'standard takers' as opposed to the 'standard setters' of the 'sovereign state' system.³ When discussing this process, Roth focuses squarely on the problems associated with the 'doctrine of effective control', which he sees as ensuring that '[t]he international order's attribution of sovereign independence to established territorial political communities ... has traditionally entailed ... *the right of each to fight its civil war in peace and to be ruled by its own thugs*' (my emphasis, at 170). Be that as it may, this focus leads Roth to swallow whole the 'Montevideo' conception of the criteria for statehood as 'non-discretionary and ideologically neutral' standards (at 175) designed to assess the 'simple fact of [a state's] existence as a person under international law'.⁴ Yet statehood is far from being a 'simple fact' for the vast majority of the world's sovereigns, not least because

¹ This was precisely the point made by Martti Koskenniemi in *From Apology to Utopia: the Structure of International Legal Argument* (2nd edn, 1995). However, Roth rejects Koskenniemi's argument both categorically and specifically (at 39).

² Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', 40 *Harvard Int'l LJ* (1999) 1, at 6–7.

³ Note the distinction made by Thomas Lawrence between those states which are assumed to have been subjects of international law 'since time immemorial', and therefore to have obtained their sovereignty 'before the great majority of [international legal] rules came into being', and, on the other hand, those states which entered into the 'Family of Nations' after the main corpus of international law had already been formed: T. Lawrence, *The Principles of International Law* (1895), at 84.

⁴ Convention on the Rights and Duties of States (inter-American), Montevideo, 26 Dec. 1933, *LNTS* 165 (1934) 19 (Montevideo Convention), Art. 4.

of the transformations entailed in meeting the ‘standards of statehood’, even after the emergence of the right of (colonial) peoples to (external) self-determination. The criterion of ‘government’ for example, which Roth applauds for its alleged lack of substance, and which he seeks to defend against any ‘emerging right to democratic governance’ (at 275 ff), has rarely been as substantively empty as he assumes. From the ‘civilized government’ demanded of China and other ‘semi-sovereigns’ in the late 19th century, to the institutions of ‘self-government’ imposed on ‘national states’ and ‘mandated territories’ during the League period, to the controlled ‘informal empire’-to-formal decolonization process responsible, during the mid-20th century, for the creation of independent states with dependent economies in much of Asia, Africa, and the Pacific, to the ‘good governance’ criteria deployed more recently during the process of ‘statebuilding’ in post-Communist Eastern Europe, the Middle East, and elsewhere, the establishment of a liberal domestic legal order – complete with constitutional protections for individual civil, and especially foreign property rights – has invariably been taken to be the most important ‘indicator’ that a certain form of political organization constitutes a ‘government’ for the purposes of statehood. Though more research remains to be done on this question,⁵ it remains a plausible hypothesis that the objective of the institutional pre-programming inherent in the concept of statehood functions not so much to ensure that the ‘international community’ is populated solely by *democratic* states as to ensure that the economies of new states remain open to transnational capital or face disciplinary action. Such disciplinary action, designed to bring about political and economic ‘regime change’ under the banner of the ‘rule-of-law’, has taken many forms. However, since history ‘ended’ in 1989, ‘merely’ economic coercion (from ‘tied’ aid to ‘structural adjustment’ loans) of the kind currently being experienced by Greece, among others, has no longer been the only lawful tool in the box – as forcibly disciplined states from Haiti to Iraq to Libya can testify.⁶

It is therefore difficult to accept Roth’s depiction of the state as a neutral, a-cultural, value-and-interest-reconciling apparatus – ‘the only community in the name of which the ineluctably contentious decisions needed to structure social life can be effectively made and enforced’, as he puts it (at 93). Instead, when looked at through the long telescope of history two things are clear: first, that the state is, in fact, *imbued* with culture – specifically, the European political and economic culture of liberalism; and secondly, that the spread of this culture can hardly be understood as a ‘natural’ response to ‘the presence of the economic, political, and social circumstances of

⁵ See Parfitt, ‘Are Some Sovereigns More Equal than Others? The Concept of Peripheral Personality’, paper presented at the ‘International Law and the Periphery’ conference, hosted by the American University in Cairo and Sydney University, Cairo, Feb. 2012, and at the Annual Junior Faculty Forum for International Law, hosted by the Jean Monnet Centre for International and Regional Economic Law and Justice, NYU Law School, New York, May 2012.

⁶ On the relationship between forcible international intervention and economic ‘reconstruction’ in Haiti, Iraq, and Libya see, e.g., respectively, SC Res. 1529, 29 Feb. 2003; Miéville, ‘Multilateralism and Terror: International Law, Haiti and Imperialism’, 18 *Finnish Yrbk Int’lL* (2007) 63; SC Res. 1483, 22 May 2003 (legitimizing the ‘reconstruction’ of Iraq, if not the intervention itself); Report of the Secretary-General pursuant to Paragraph 24 of Security Council Resolution 1483 (2003), 17 July 2003, S/2003/715; M. Likosky, *Law, Infrastructure and Human Rights* (2006), at 69–89; SC Res. 1973, 17 Mar. 2011; IMF, *Libya Beyond the Revolution: Challenges and Opportunities* (2012); Milne, ‘If the Libyan War was about Saving Lives, it was a Catastrophic Failure’, *Guardian*, 26 Oct. 2011, available at: www.guardian.co.uk/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure (accessed 25 Sept. 2012). For a general critique of the contemporary one-size-fits-all model of economic and political ‘reconstruction’ (the ‘comprehensive development framework’) employed by ‘international institutions’ such as the World Bank, IMF, and UN, based on the establishment of the ‘rule-of-law’, fiscal ‘discipline’ (including public sector lay-offs and wage cuts) and ‘private sector-led growth’ see Rittich, ‘The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social’, in D.M. Trubek and A. Santos (eds), *The New Law and Economic Development* (2006), at 203–252.

liberalism – [i.e. to the emergence of] the conditions that produce questions to which liberalism is a plausible answer' (at 101). Instead, the *domestic* institutions of liberalism, protecting and reproducing political and economic individualism through the legal separation of social life into 'public' and 'private' spheres, have historically been imposed beyond the borders of Western Europe by the *international* institutions of liberalism – either directly, by means of colonization, and/or indirectly, *via the concept of sovereign equality and its practical embodiment in the 'sovereign state'*.

I suggest, therefore, that Roth's central distinction between 'non-intervention', when 'the right of territorial populations to be ruled by their own thugs and to fight their civil wars in peace' (at 81) should be respected, and 'intervention' designed – when violence gets *exceptionally* bad – to rescue foreign citizens from those 'thugs' and 'civil wars', is fallacious. For this distinction masks a more fundamental conceptual dichotomy between the 'domestic' realm of irrational ('thug-gish') violence and the 'international' realm of rational ('legal') violence. Once the *conditional* nature of 'equal' sovereignty, as experienced by most of the world's states (the 'standard-takers'), is recognized, together with the inextricable link between the right to be politically 'closed' and the duty to be economically 'open', it is arguable that the 'sovereign state' system exists precisely to perpetuate the inequalities of power and wealth which it claims to rectify (or at least neutralize). However, although 'ethno-nationalist bloodletting' (at 139) is certainly related, in Roth's argument, to 'control over economic activity and natural resources' (at 129), the possibility that the principle of sovereign equality might *itself* be responsible for the chronically unequal distribution of power and wealth within and between states, and hence that the principle of sovereign equality might *itself* be the source of the very 'extreme' situations of humanitarian emergency which are routinely used to justify that principle's transgression, is nowhere to be found.⁷

Secondly, there seems to be an inconsistency in the way in which Roth accepts international law's core domestic/international dichotomy when defending the normative/moral worth of 'sovereignty equality', but rejects it when he comes to insist upon the continued descriptive/legal plausibility of 'sovereignty' in the face of recent developments in international human rights law, the *jus ad bellum* and international criminal law. Here, Roth appears to have misunderstood Schmitt, and hence to have misconstrued the relationship between internal and external sovereignty accepted by the orthodox approach to international law upon which he relies. For Schmitt did not intend, in his discussion of the 'exception', to defend the 'sovereignty' of the *domestic* legal order from the encroachment of *international* law. On the contrary, Schmitt's point (analytical rather than descriptive) was that sovereignty necessarily lies *beyond* the law: that '[I]ike every other order, the legal order rests on a decision and not on a norm'.⁸ That the exception 'swallows the rule', in other words, is precisely the point: it is the former which constitutes the latter. Schmitt's observation is therefore far from useful to Roth. On the contrary, it throws into relief his argument's primary weakness: namely, its failure to offer any response whatsoever to the question of who *does*, in fact, 'decide the exception' when it comes to the coercive transgression of sovereignty – and on what (normative) basis. At the time of writing, the 'international community' has been struggling for well over a year with the question of whether or not to intervene forcibly to attempt to stop the violence in Syria, where the death toll may already be as high as 15,800.⁹ This struggle

⁷ I am drawing here on the work of Anne Orford, among others. See especially Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', 10 *EJIL* (1999) 679.

⁸ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922, trans. George Schwab, 2005), at 10.

⁹ 'Death toll in Syria tops 15800', *Ya Libnan*, 27 Jun. 2012, available at: www.yalibnan.com/2012/06/27/death-toll-in-syria-tops-15800-activists/ (accessed 1 July 2012). This estimation belongs to the Syrian Observatory for Human Rights. On the relationship between international law, intervention, and imperial rivalry in this context see Knox, 'Civilizing Interventions: Race, War and International Law', *Cambridge Rev Int'l Affairs* (forthcoming).

takes place in the wake of the unquestionably 'legal',¹⁰ Security Council-authorized intervention into Libya, which began in March 2011 following the deaths of between 300 and 2,000 individuals during the Libyan uprising – and *causing* the deaths of another 25,000 to 50,000.¹¹ By contrast, it is almost banal to point out that the question of military intervention in Russia, where at least 160,000 have been killed in Chechnya since 1994, has never been on the international table – let alone that of intervening in the United States or the United Kingdom, despite these states' responsibility for the extraterritorial killing of many thousands of civilians in Iraq, Afghanistan, Pakistan, Yemen, and, of course, Libya.¹² In such a context, the possibility of drawing an unbroken line between 'ruthless' and 'unambiguously catastrophic' acts, between 'sovereignty' and 'intervention', and between 'moral' and 'legal' diminishes to its vanishing point. At the same time, the *non*-appearance in Roth's argument (as in international law more generally) of any distinction between different experiences, on the part of differently 'equal' sovereigns, of the right to non-intervention is just as problematic. Roth's description of colonialism as 'the international system's original sin' (at 85), in other words, is infinitely more pertinent than he seems to imagine.

Roth has dismissed critical approaches to international law in the past, and does so again in this monograph, for conflating law with politics and hence for making 'an elemental error' in failing to understand that 'legal discourse is not capable of legitimating unless it simultaneously constrains' (at 39).¹³ Yet this assertion sits uneasily with the main thrust of his book, which insists that the international legal order 'constrains' the 'weak' far more than it does the 'strong' (see, e.g., at 268). Roth admits that 'the strong have disproportionate bargaining power in setting the legal rules', but argues that since they 'have reason to prefer orderly processes and clear baselines to the chaos and costliness of *ad hoc* exertions', they *should* thus resist the temptation ... to have their cake and eat it too' (my emphasis, at 127). However, that the 'strong' cannot be relied upon to resist this 'temptation' is the very problem he sets out to rectify with his 'zealous defence, not of the international legal order's furtherance of human rights, justice, and democracy, but rather of that order's continued resistance to *many efforts* undertaken in the name of those goals' (my emphasis, at 6). Roth's attempts to bridge the ensuing gap between the normative and descriptive elements of his argument by casting virtually all of his examples of transcendental-justice-inspired interventionism, from Sierra Leone to Haiti to Kosovo, as 'exceptional cases' (see, e.g., at 213) are therefore unconvincing. On the other hand, as we have seen, Roth insists as a

¹⁰ See Orford, 'What Kind of Law is This?', *LRB Blog*, 29 Mar. 2011, available at: www.lrb.co.uk/blog/2011/03/29/anne-orford/what-kind-of-law-is-this/ (accessed 3 July 2012)..

¹¹ The exact figures for casualties are difficult to come by. Seumas Milne gives the '2,000' and '50,000' figures as coming, respectively, from the UN and the Transitional National Council. See Milne, *supra* note 6. The figure of '300–400' comes from the International Federation for Human Rights, but this figure accounts only for deaths between 15 and 23 Feb. 2011 (the intervention began on 19 Mar. and ended officially on 31 Oct.). See 'Massacres in Libya: The African Commission on Human and Peoples' Rights must refer the situation to the African Court on Human and Peoples' Rights', FIDH.org, available at: www.fidh.org/Massacres-in-Libya-The-African (accessed 2 July 2012). The TNC figure of 50,000 deaths used by Milne, in particular, has been disputed. See 'Libya Counts more Martyrs than Bodies', *New York Times*, 16 Sept. 2011, available at: www.nytimes.com/2011/09/17/world/africa/skirmishes-flare-around-qaddafi-strongholds.html?pagewanted=all&_moc.semityn.www (accessed 25 Sept. 2012). The TNC revised this figure down to 25,000, according to US Senator John McCain. See 'Residents Flee Gaddafi Hometown', *Sydney Morning Herald*, 2 Oct. 2011, available at: <http://news.smh.com.au/breaking-news-world/residents-flee-gaddafi-hometown-20111003-1149x.html> (accessed 25 Sept. 2012).

¹² 'Chechen official puts death toll for 2 wars at up to 160,000', *New York Times*, 16 Aug. 2005, available at: www.nytimes.com/2005/08/15/world/europe/15iht-chech.html (accessed 25 Sept. 2012). This is an official estimate from the Russian government. It includes both ethnic Chechnyans and ethnic Russian soldiers and civilians.

¹³ Roth, 'Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii,' 98 *Michigan L Rev.* (2000) 2058.

descriptive/legal matter that international law does not 'constrain' sovereigns domestically, and hence that international norms are 'obligatory but not compulsory' at the domestic level. Yet this argument, too, involves a fundamental contradiction. For it is axiomatic to the orthodox understanding of international law upon which Roth bases his argument that the juridical force of a norm is unrelated to the issue of its enforceability. To insist on the inseparability of the normative and coercive aspects of law would be to make a powerful legal realist argument.¹⁴ But Roth categorically rejects 'all variants of extreme legal realism' as misguided (at 39).

Although Roth takes a good deal of trouble to distinguish acts of governmental 'ruthlessness', which the 'international community' may condemn but ought not to respond to with force, from acts of 'exceptional' brutality, which 'suggest, by their very nature, either rogue activity or ends that the international community has authoritatively repudiated' (at 269) and which trigger a legitimate right of forcible humanitarian intervention, universal jurisdiction, or some other type of intervention, depending on the circumstances, it is upon this distinction-without-a-difference that his argument flounders. For to posit such a distinction is simply to beg Schmitt's question: in the supposedly horizontal international legal system, 'who decides' where the line between 'ruthless' and 'rogue' activity is to be drawn? Can we really take the 'repudiation' of certain practices by the so-called 'international community' as 'authoritative' when we *know* that 'the strong' have 'disproportionate bargaining power in setting the legal rules'? Or are the 'standard-setters', in this sense, the true, supra-legal sovereigns of the international legal order?¹⁵ If they are, as Schmitt's argument carried in this context to its logical conclusion would imply, and as the history of international intervention would indeed seem to indicate, then the Charter system of 'sovereign equals' must be understood as predicated, no less than its predecessors, on the very extra-legal violence that Roth congratulates it on having banished. In the current international order, in other words, there is no escaping 'transcendental justice' – least of all by means of 'sovereign equality'.¹⁶ It is hard to avoid the conclusion that the very difficulties involved in 'rethinking much that is currently taken for granted' in international law are what make such an undertaking all the more necessary, and all the more urgent.¹⁷

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¹⁴ For a classic statement of this argument see, e.g., Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', 38 *Political Science Q* (1923) 470.

¹⁵ On a related idea, viewed through the lens of constitutional theory, see Oklopcic, 'Constitutional (Re) Vision: Sovereign Peoples, New Constitutional Powers, and the Formation of Constitutional Orders in the Balkans', 19 *Constellations* (2012) 81.

¹⁶ After all, as Koskeniemi has pointed out, the view that states should be the appropriate subjects of international law and that by virtue of that fact they naturally possess a number of fundamental rights is grounded squarely in 'the liberal-naturalist assumption about the primacy of the individual': Koskeniemi, *supra* note 1, at 131.

¹⁷ On the need to 'rethink' international law in the context of the 'Arab Spring', e.g., see Fakhri, 'Arab Uprisings: Approach to Law', *Al-Akhbar English*, 29 June 2012, available at: <http://english.al-akhbar.com/content/arab-uprisings-approach-law> (accessed 3 July 2012).