

EDITORIAL COMMENT

BOOK REVIEWS AND LIBEL PROCEEDINGS

*By Lori Fisler Damrosch, Bernard H. Oxman, Richard B. Bilder, and David D. Caron**

The *American Journal of International Law* has been informed of the initiation in France of penal proceedings against the editor in chief of the *European Journal of International Law* (*EJIL*), by virtue of a complaint filed by an author of a book reviewed on a Web site affiliated with the *EJIL*.¹ We share the concerns of other professional societies regarding the potential of such litigation for chilling academic discourse.² We also take this opportunity to explain the practice of the *AJIL* concerning communications from authors who object to book reviews published in our pages, and to state our position on the important questions of academic freedom involved.

The *AJIL* regards the impartial review and assessment of new scholarship as one of the most important functions of a scholarly journal and as essential to the advancement and integrity of a scholarly discipline. For reviewers or editors to be subjected to criminal proceedings for writing and publishing, in good faith, a review that the author of the reviewed book finds objectionable threatens the important and long-established institution of scholarly book reviewing.

We believe that authors of scholarly works are fully aware that their books may be subject to critical scholarly review; know and accept the risk that such reviews may sometimes be disappointing and that reviewers in different journals or venues may reach different assessments of the same work; and understand that publication of a review in a scholarly journal does not imply that the editors either agree or disagree with the statements, opinions, or assessment expressed in the review.

Over more than a century in which the *AJIL* has been contributing to scholarly discourse in the field of international law, thousands of books have been reviewed in our pages and many of the reviews have been critical (arguably more so than the review giving rise to the pending criminal libel action in France). While the editors occasionally receive complaints from authors disappointed in the review of their books, the *AJIL* has never, to our knowledge, withdrawn such a review.

* The authors are (respectively) editors in chief and book review editor of the *Journal*, and president of the American Society of International Law.

¹ The *AJIL* was not involved in the events and has no direct knowledge of facts that may be disputed in the pending proceedings. Our understanding of the matter is based on the account in Editorial, *Book Reviewing and Academic Freedom*, 20 EUR. J. INT'L L. 967 (2009). It appears that under French law, a private party may initiate a criminal libel proceeding without having to persuade any public authority of the merit of the complaint. *Id.* at 974. Such a procedure is unknown in the United States and many other countries.

² See, e.g., European Society of International Law Executive Board, Joint Statement on the Calvo-Goller Case (Mar. 6, 2010), available at <http://www.esil-sedi.eu/english/index.html>; Société française pour le droit international, Procès-verbal, réunion du Conseil du 27 mars 2010 (on file with *AJIL*).

Our *Journal* does not routinely offer authors of reviewed books the opportunity to reply to reviews, no matter how strongly the author may disagree with the content of the review or the choice of reviewer.³ Thus, we have declined to publish letters from authors pointing out that other readers or reviewers had evaluated the book more favorably or that the *AJIL*'s reviewer had failed to acknowledge or describe its valuable attributes.

While our general practice is not to publish replies to reviews, we have occasionally made an exception when we were persuaded that a brief statement from the author or the reviewer should be allowed in the interests of rectifying an error in a published review. When we become aware that a review may have contained a factual mistake or other misstatement, our first step is to determine whether the nature of the misstatement is such as to warrant publishing a correction, which may take the form of a letter from the reviewer acknowledging the error.⁴ On rare occasions, the editors have agreed to carry a brief letter to the editors from an author, commenting on or responding to a review the author considered to contain factual errors or misrepresentations concerning the work in question.⁵ We believe that providing a reasonable opportunity for the correction of mistakes is the appropriate and generally accepted way of dealing with such matters in scholarly discourse.

As a publication of the American Society of International Law, whose membership is currently drawn from approximately one hundred countries, the *AJIL* reviews books by authors from around the world and likewise commissions reviews by scholars from many different countries. We are accordingly concerned not only with the implications of the pending action for academic freedom and scholarly debate in general, but also with the possible impact of such concerns in the transnational context in particular. We underscore the significance attached in the contemporary law of international human rights to freedom of expression regardless of frontiers⁶ and note the potential chilling effect of burdensome litigation on the exercise of such freedoms. Our concerns that defamation litigation could have a chilling effect on academic discourse are heightened in the context of the initiation of a criminal libel action. Disagreements of the sort involved in this matter should be addressed through normal scholarly channels, free from apprehension that critical comments about scholarship could subject a reviewer or an editor to legal liability.

³ In this regard we think that the *EJIL*'s editor in chief was correct in observing that it is "not the custom of most Book Reviews . . . to offer the possibility of writing a comment on reviews" and that "[v]ery few authors, whose books are negatively reviewed, have such a facility." Editorial, *supra* note 1, at 973. We have not had occasion to confront the hypothetical instance suggested by the *EJIL*'s editor in chief of "extreme categories of egregious unreasonableness," such as bad faith or conflict of interest, *id.* at 970, and thus we express no view on the appropriate editorial response should such circumstances come to the attention of the editors after publication of a review.

⁴ For examples, see letter at 104 *AJIL* 228 (2010), correcting an inadvertent misstatement in the review at 104 *AJIL* 150 (2010); and letter at 101 *AJIL* 141 (2007), correcting an inadvertent misattribution in the review at 100 *AJIL* 978 (2006). A similar practice is followed when we learn of errors in other sections of the *Journal*. See, e.g., letter at 101 *AJIL* 141 (2007), correcting an inadvertent misstatement in an essay published at 100 *AJIL* 551 (2006).

⁵ For examples, see letter at 102 *AJIL* 309 (2008) regarding the review of the author's book at 101 *AJIL* 913 (2007); letter at 98 *AJIL* 743 (2004) regarding the review of the author's book at 98 *AJIL* 374 (2004), and reviewer's reply.

⁶ See, e.g., Universal Declaration of Human Rights, Art. 19, GA Res. 217A (III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948); International Covenant on Civil and Political Rights, Art. 19(2), Dec. 16, 1966, 999 UNTS 171; European Convention on the Protection of Human Rights and Fundamental Freedoms, Art. 10(1), Nov. 4, 1950, 213 UNTS 221.