VÖLKERRECHT. By Wilhelm Wengler. Berlin-Göttingen-Heidelberg : Springer-Verlag. 1964. Vol. I : pp. xxvi, 929. Vol. II : pp. x, 600. Index. Bibliography. DM 198 (approximately $53.46).

To advise the reader to buy this treatise is an easy task. Indeed, I need not write this review to persuade him to invest his fifty dollars for this treatise. The American Society of International Law considers this work "representative of the resurgence of German scholarship in the field of international law";[1] Wengler received the Society's Certificate of Merit for 1966.[2] But to tell the reader what he can expect for his money is not as easy. The treatise is not only massive in size but also in scope; it is a remarkably detailed and refreshing analysis of the whole field of international law. I can attempt only a sketchy summary within the short compass of this review.

At the outset, I hasten to warn the reader on the matters he cannot expect from these volumes. This treatise is not an "encyclopedia" of international law, not a compendium of "International Law Chiefly as Interpreted and Applied in . . ." type of work. The tedious recital — often slightly modified in language — of important treaties, characteristic of many treatises on international law today, has been deliberately avoided by the author. Likely to disappoint the case-law oriented reader, however, is the author's limited use of judicial decisions. His reason — hardly convincing even to one who does not equate the judges' utterances with gospel truths — is that treatment of cases implies the danger of conceiving international law as an uncritically oriented collection of precedents. Further, the treatise is not the place to look for the latest scholarly debates; only in few places, generally in footnotes, has Wengler attempted to engage another writer in a debate. Wengler's style is rather that of a great preacher, expounding his ideas on international law by a vigorous monologue, stopping occasionally to turn the head of the unbeliever away from false doctrines. This style — and the arrangement of the treatise — can be explained by Wengler's aim in writing these volumes : "The main concern of the author is to elucidate rules of contemporary international law in their character as legal norms and their interrelationship in the legal order, that is, to show the operation of international law in the individual phases of the creation, observance, and violation of norms, the realization of sanctions and the determination of fact situations relevant to the norms" (p. vii). This method of treatment, Wengler believes, permits one to master the tremendous material in international law and to understand correctly the possibilities, limitations and techniques of influencing human behaviour through international law.

The treatise consists of three parts : the theoretical foundation of international law (Part I), contemporary international law, general part (Part II), and contemporary international law, special part (Part III).

[1] Letter from the American Society of International Law to Members, May, 1966.
[2] PROCEEDINGS SIXTEENTH MEETING AM. SOC'Y INT'L L. 172 (1966).

Part I should delight the theorist. Wengler calls upon the social sciences to elucidate a theory of law in general and international law in particular that serves as the general frame of reference for his discussion of various phases of international law. But he remains a jurist faithful to his trade, never aiming to be an amateur psychologist, sociologist and so on, nor forgetting that his task is to expound the rules, their creation and operation. Decidedly a normativist, he nevertheless respects the sociologists, thus skillfully avoiding the shadow-boxing between them. One can subscribe to the view that law is a cultural phenomenon without being a privy to the exaggeration that the nature of law could be exclusively circumscribed within sociological categories. He can affirm the thought that the contents, enforcement and observance of legal norms are influenced by interest situations, by natural and psychological realities, but he need not deny that the totality of the norms constitutes a construct of ideas, a normative order, an operative system. One can distinguish in international law the historical or factual process that developed a rule from the rule itself that determines the behaviour of subjects.

The exposition of the relationship between international law and municipal law proceeds from the view that the legal order is a collection of interrelated legal norms. Hence, plurality of distinctive legal orders, existing side by side, *e.g.* municipal legal order, church legal order, international legal order, is possible. Pursuing this insight further, the author ends up becoming one of the few exponents of the dualistic theory. The monistic theory does not, not even Verdross's moderate monism, please him. Thus to Wengler, the much debated "primacy" in the relationship of international and municipal law is illusory.

Much original thought can be found in Wengler's treatment of international law subjects. Throughout his discussion, I feel that Wengler succeeded in holding apart the sociological and normative aspects of international law. The circle of sociological addressees of a norm can be, and often is, larger than the circle of those addressees who would be responsible subjects (p. 39). Subjectivity in international law cannot be derived immediately from the content of a legal norm (p. 153); if subjectivity means the capacity to be observer or violator of international law, then only human beings are subjects; they and they alone are the persons affected by the sanction. The concept of subjectivity should not be confused with responsibility (p. 157). Responsibility is merely a technique of expression of the norm. The international law norm may call the head of the state, the people as a whole, the state, or an organ of the state, responsible, but regardless of who is formally named accountable for the wrong, the sanction brought to bear as a consequence of a wrong actually affects the interest of the nationals of the state. Even in cases of "collective liability," the individual is the violator and observer of international law norms.

Part I closes with a perceptive and strong critique against the theories that assert that the state is the "primary," "exclusive," or "original" subject of international law. Calling the state a subject is a confusing shorthand expression that does not reflect the true position of the state. Indeed, the states have not even attained a monopoly of the subject-quality being attributed to them by these expressions. The truth is, Wengler contends, there is an unlimited changeability of addressee and responsible subject in international law. This is because international law is a collection of interrelated legal norms, whose content and factual effects are themselves unlimitedly changeable (pp. 75, 164).

Parts II and III deal with the familiar problems in contemporary international law conceived along a new approach of classification of these problems, and skillfully written with that characteristically German touch of systematic exposition. Part II extensively (758 pages) treats the more general topics in contemporary international law, exploring in separate chapters the creation of international law norms (pp. 171-425); the observance of international law (pp. 425-489); the international law wrongs and their consequences (pp. 489-669); the determination of international law relevant fact situations (pp. 669-832); and the influences that affect the creation of international law norms, the determination of international law relevant fact situations and the enforcement of sanctions (pp. 833-929). A thesis that prominently emerges from among the many that Wengler develops in Part II refers to the criterion of determining whether a rule belongs to international law or not. Influenced by Ross, Wengler contends that a rule belongs to the international legal order, not because of its mode of creation, but because of its content; not upon how the specific rule is created, but rather "whether the sanction prescribed for the violation of this rule is directed to legal situations that have been produced through other legal norms belonging to international law" (p. 173). This has decisive significance in the "constitutional law" of the international legal order which Wengler defines as "those rules that regulate the creation of new international law norms."

A short discussion (10 pages) of customary international law, primarily on the requirements of custom is offered. More significant is the thorough and interesting discussion of the law of treaties (184-361), and of the general limitations on claims for compliance of international law norms : the *clausula rebus sic stantibus*; as a consequence of war, impossibility of performance, necessity, confusion of obligor and obligee; and so on (pp. 371-404). In the chapter on wrongs and their consequences, we are introduced to sanctions of general character, *e.g.* reprisals, down to special sanctions, such as those provided in treaties, to nullity of certain legal acts. These are not only examined within the sphere of international law but also within the sphere of municipal law. When we come to the determination of relevant fact situations, Wengler tells us that our method of operation is analogous to

the operation of the municipal legal machinery. As in any legal order, determination of relevant fact situations is for the purpose of applying a rule of law. But before one can determine the relevant facts, we always make an intuitive approximation of the applicable rule. The author shows the different kinds of determination of relevant fact situations, how it is done in international law, by treaty and other acts, through national and international organs. The recognition of state and government is dealt with as a kind of determination of a fact situation.

The special part of contemporary international law is discussed in four comprehensive chapters : the general international law of peace concerning states (pp. 931-1101); the modifications of state sovereignty by particular international law (pp. 1101-1190); international organs, international organizations, and organizations of states (pp. 1191-1359); and the international law of war (pp. 1360-1479). In the first chapter, the author develops state territory and nationality as assumptions of the territorial and personal sovereignty of states, indicating also the limitations imposed by general customary law upon sovereignty. Brief but provocative and interesting is his examination of possible limitations on the power of the states over stateless persons or their own nationals, bringing in human rights as a possible norm. He rightly remarks that the old view that the state may act freely as it wishes towards its nationals, or towards stateless persons is losing validity. The United Nation's Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms show the great interest of nations to protect persons against the arbitrary acts of their own state. But Wengler is being realistic when he expresses pessimism on the role of human rights in international law. In several places in the United Nations Charter, [3] we can articulate a duty of the states to protect and respect human rights. Although it is hard to accede to the view [4] that these are empty declarations of faith in the Charter rather than a binding "pledge", [5] it is realistic to recognize that the lack of definition and implementation of these rights has denied human rights the character of perfectly coercible legal rights. It is perhaps prudent that their definition and implementation should not be forced at this time for the wide differences in ideological premises of the states and in their conception of the role of man in the state may bring about the total rejection of human rights at this time.

The chapter on international organs and organization sketches a distinctive approach to this subject. We are first given a general theory of types,

[3] See *e.g.*, U.N. CHARTER at Preamble; art. 1, para. 3; art. 13, para. (1)(b); art. 55, para. c; art. 62, para. 2; art. 68; art. 76, para. c.

[4] See KELSEN, THE LAW OF THE UNITED NATIONS 29-30 (1951); Kunz, Comment, 43 AM. J. INT'L L. 316, at 317-18 (1949); Hudson, Comment, 42 AM. J. INT'L L. 106, at 107 (1948).

[5] U.N. CHARTER art. 56. For a discussion of the obligatory character of the human rights provisions in the Charter, consult EZEJIOFOR, PROTECTION OF HUMAN RIGHTS UNDER THE LAW 59 (1964); JESSUP, A MODERN LAW OF NATIONS 91 (1948).

structure, function, rights and obligations of these organizations before we encounter the excellent and perceptive summary of some organizations, such as the League of Nations, the United Nations, OAS, West European Union, Arab League, NATO, Warsaw Pact, Common Market, GATT and so on. In the international law of war, we find a study of the concept of war and its present day relevance, an exposition of the international rules governing the conduct of war and of the international law of neutrality. Wengler urges a more creative re-thinking of the antiquated rules. Events of the recent past seem to justify his concern. I see no valid reason why the international law of war should be neglected (especially in the classroom); one does not need to be a warmonger to know that war will be with us for some time. A work directed towards the modernization of the laws of war may prove more useful today than a work constructing involved arguments to show that war is illegal in international law, or senseless in international politics.

Can one take issue with Wengler? With the broad scope of these volumes, one should not have difficulty finding points of disagreement. But perhaps the most serious criticism is directed to Wengler's theoretical conception of law in general and international law in particular. Thus he is said to have returned "to the outworn retrogressive dualistic doctrine, abandoned everywhere except in Italy." [6] I happen to be one of those who do not think that the dualistic theory should be abandoned everywhere except in Italy. It was the great achievement of Kelsen to have seen the unity of a legal order, but he has exaggerated his point when he saw in the world only one legal order.

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[6] Kunz, Book Review, 59 AM. J. INT'L L. 403, at 406-08 (1965).

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