

involved in the Holocaust<sup>14</sup>), it suffers to some extent from being a conference book: it is a little uneven in many respects. Some contributions (such as Saul Friedländer's thesis on Hitler's 'redemptive anti-semitism') would warrant treatment in greater detail; others, while sensible, seem to have been written during a short break between presentations (Paxton's four pages on France stand out), and yet others, especially those dealing with the plight of second-generation victims, are written in an unpleasant writing style that turns nouns such as 'question mark' into verbs. On the other hand, the volume ends with a delightful, sensitive story (clearly not general history, but of historical relevance and as such a nice illustration of how story and history can be related) by Robert Melson on the acquisition of false papers by the author's parents.

Douglas's *The Memory of Judgment*, on the other hand, is a brilliant study, and should be required reading for anyone even remotely interested in the subject. While his central thesis may not be as persuasive as he had hoped it to be (perhaps against his own better judgment), the work is extremely rich in detail, and Douglas is particularly good on outlining and analysing litigation strategies.

At the end of the day, both books leave the reader – this reader, at any rate – with the conclusion that for all their utility, trials are not the most appropriate setting for the recording of history, at least not if by that is meant the rendition of a single, paradigmatic version of the truth of what happened. That is not, in and of itself, a sufficient reason to discard trials though: while Arendt had a point in suggesting that trials ought to do justice and nothing else, Douglas also has a point in suggesting (although it is implicit in his study and never highlighted) that trials will end up writing history no matter what. The question then is, of course, whose history they will record, and in this light it might not be such a

bad thing to use trials so as to give a voice to liberal reason.<sup>15</sup>

In addition, even if trials cannot lay down the truth, they may be able, as Arendt suggested in a post-Eichmann piece, to establish moments of truth.<sup>16</sup> And it is in collecting and recollecting such fleeting moments of truth – the nine-year old writing that 'he won't learn anymore'; the teenager writing his name in blood on barrack walls and adding 'lived sixteen years' – that suffering becomes visible. Collecting and recollecting such moments of truth may well provide its own justification.

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Chandler, David. ***From Kosovo to Kabul: Human Rights and International Intervention***. London, Sterling: Pluto Press. 2002.

Pp. Xv + 268;

Österdahl, Inger (ed.). ***Is Intervention Humanitarian? Protecting Human Rights and Democracy Abroad***.

Department of Peace and Conflict Research, Uppsala University, Report No. 62. Stockholm: Elanders Gotab. 2002. Pp. 98.

Humanitarian intervention, despite its description by one of the authors reviewed here as a 'new principle' (Chandler, at 131), is an ancient phenomenon, although it has always been subject to only intermittent theo-

<sup>15</sup> Of some relevance, however, is Arendt's suggestion that political truth (typically the type of truth one would hope to uncover during war crimes trials) is itself potentially dictatorial, accepting no alternative versions of history and foreclosing any discussion. This might be difficult to reconcile with the liberal premises often underlying the pro-trials argument. See Arendt, 'Truth and Politics', reproduced in H. Arendt, *Between Past and Future* (1968) 227.

<sup>16</sup> See Arendt, 'Auschwitz on Trial', reproduced in H. Arendt, *Responsibility and Judgment* (2003, Kohn ed.) 227, esp. at 255–256 (first published in 1966).

<sup>14</sup> Various authors sketch in some detail the biographies of some of those doing the dirty work on the ground: camp administrators, engineers, etc.

retical interest. It had already formed part of the natural doctrine of *bellum iustum* as a frequently appearing just cause. The principle eventually entered the categories of positive international law, and was located in the context of the prohibition of intervention. In 19th-century literature, one would have some difficulty finding works which do not, in one way or another, address the issue of 'intervention on the grounds of humanity'. Following World War I, however, attention to the issue significantly faded and remained scant for nearly four decades, although a few distinguished scholars<sup>1</sup> did touch upon the subject. Crises flaring up in the 1960s and 1970s revived interest to a certain extent, but it was only in the 1990s that humanitarian intervention was pushed to the centre of attention again. It is fair to say that intellectual attraction for the subject of humanitarian intervention reached its climax in the wake of the Kosovo crisis in 1999. Even though subsequent events diverted attention from NATO's controversial air operation, there is still great interest in the topic.

What is more, the scope of the discourse on humanitarian intervention has been substantially extended beyond the 'traditional' question of lawfulness. One of the current fields of discussion looks into the true motives behind the seemingly humanitarian actions of states. This might be important for international lawyers, since good faith seems to be a key factor in evaluating the humanitarian nature of an intervention. Moreover, the motivations informing an intervention can also be seen as being interwoven with the problem of *opinio juris* concerning humanitarian interventions in general. The works reviewed here make a worthwhile contribution to this issue.

The two books have very different scopes, narrative textures and methods. David Chandler's work is a monograph, whereas the volume edited by Inger Österdahl com-

prises five studies originally presented as papers at a symposium. *From Kosovo to Kabul* as well as some of the chapters of *Is Intervention Humanitarian?* (Susan Marks, Inger Österdahl) are theoretical, while the other chapters in the edited volume are more concrete and devoted to specific cases or countries (Jan Hallenberg, Kjell-Åke Nordquist, Howard L. Reiter). Additionally, the authors – six in all – represent different branches of the social sciences. Still, both of these books aspire to investigate the same kind of question, aptly phrased in the title of Österdahl's volume: *Is intervention humanitarian?* Thus, their review in a single article.

Any analysis of humanitarian intervention inevitably raises difficult definitional issues. In the absence of a generally accepted definition of the term, a given approach – within reasonable limits – is probably just as suitable as any other one. This axiom needs to be kept in mind while reading the two books, as they reflect slightly different perceptions of humanitarian intervention. While assessing past US interventions, Hallenberg, writing in Österdahl's volume, defines the US concept of humanitarian intervention as 'a type of intervention undertaken for the sole purpose or, quite plainly, principal purpose of protecting a people from its own government, or from perhaps other entities within the state' (at 53). (Interestingly, this author overlooks the fact that 'humanitarian intervention' is also routinely used in US terminology to describe the rescue of a state's own nationals.<sup>2</sup>) Österdahl's introductory chapter, however, goes beyond that vision and restricts humanitarian intervention to 'an intervention undertaken abroad and by military means to protect human rights and, typically today, also to advance or defend democracy as a system of government' (at 3, emphasis added).

<sup>1</sup> See, e.g., P. Guggenheim, *Traité de droit international public*, vol. 1 (1953), at 289–290; Lauterpacht, 'The Grotian Tradition in International Law', *BYbIL* (1946), at 46; A. Verdross, *Völkerrecht* (2nd ed., 1950), at 260.

<sup>2</sup> See, e.g., the comments by Frey-Wouters and Samuels, in R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1972), at 22–23, 42–43. See, also, Bowett, 'The Use of Force for the Protection of Nationals Abroad', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), at 49.

Although some operations – for example, the Haitian mission – are seemingly located at the very intersection of these two definitional categories, it is perhaps wiser to consider that humanitarian intervention and pro-democracy intervention do raise substantially different issues. The case of Haiti as well as of East Timor gives rise to an additional question. Österdahl rightly notes that the target of a humanitarian intervention can only be a state that does not request or consent to the intervention. Nevertheless, he does not seem to attribute much significance to this criterion. He recalls that the governments involved agreed to the deployment of troops in Haiti and in East Timor, yet classifies both operations as humanitarian intervention. Is it inconsistency, or does it conceal a positive answer to the following question: Can a forcible enforcement measure under Chapter VII of the Charter be adequately characterized as coercive, if the government of the target state explicitly consents thereto?

Chandler, conversely, does not devote much attention to the issue of a definition of humanitarian intervention. Instead, the reader is left to deduce a definition from his analysis of why the ethical agenda of human rights gained such importance in the external relations of Western states after the Cold War, and what the broader political consequences of the human rights discourse are, both at the international and at the domestic level. Chandler suggests that the roots of contemporary ethical foreign policy are to be sought in the evolution of the NGO movement. The grievous experience of the Biafran crisis prompted the establishment of a new generation of NGOs. Having abandoned the traditional neutral standards of humanitarian action, these representatives of civil society base their activities on two 'solidarity principles', namely 'freedom of criticism' or 'denunciation' and 'subsidiarity of sovereignty' or 'right of intervention' (at 31). In other words, they feel free to criticize oppressive governments as well as to intervene in cases of humanitarian emergency. In time, some of these agencies started to claim that aid merely treats the symptoms rather than the roots of

the problem, and could even prolong crises. In order to avoid that risk and to enhance the effectiveness of operations, assistance has been increasingly subjected to political as well as human rights conditions, the non-fulfilment of which could even provide an ethical justification for the denial of help. The most radical advocates of the 'new humanitarianism', however, consider the conventional forms of relief insufficient and urge military action. The original humanitarianism has, therefore, frequently turned into its opposite: it has become coercive, partial and politicized.

Chandler renders perceptible the philosophy of new humanitarianism in unambiguous terms. As he reiterates, for the new interventionists 'The old principle of sovereign equality is a barrier to acting on the new "principle" of the right of intervention. . . . This new human rights principle, derived from the needs of the universal human rights victim, imposes a duty on outside bodies to act if the nation-state, of which they are a citizen, fails to or is unable to.' (at 131) Since they reject the international legal order established during the Cold War as well as any negotiated settlement, human rights interventionists urge the use of force against oppressive regimes, and maintain that, being 'the lesser of two evils' (at 170), it is permissible even in the absence of an authorization by the UN Security Council. They argue that the development of a people-centred international law necessitates the replacement of the cumbersome UN crisis management mechanisms by humanitarian actions of 'democratic coalitions of the willing'. In addition, interventionists seem to have re-evaluated war itself by arguing that positive peace (the realization of human rights protection) has overcome the notion of negative peace (the absence of armed conflicts). War is now being held either as a degenerate and barbaric attack against a defenceless people by a non-Western government, or a gallant effort by the West to save the victims, 'killing people only as an unintended consequence of restoring human rights' (at 171).

Chandler claims that Western states and their international organizations appear to have decided to espouse these radical

demands, and explains why this has occurred. He argues that Western governments ostensibly resort to force to protect human rights abroad, but their purpose is to overcome certain problems of their own. The strength of an ethical foreign policy, in his view, is that it demonstrates adherence to values and goals – the protection and promotion of human rights – that are able to unify a society and consolidate the domestic authority of Western governments by providing a new form of legitimacy. Ethical foreign policy can legitimize political power in a non-political manner and establish an area where ‘the government can operate outside the traditional sphere of policy-making’ (at 70). Chandler points out that the pursuit of such policy has other advantages as well: the object of criticism is a foreign government and ‘credit can be claimed for any positive outcome of international policy, while any negative outcome can be blamed on the government which was the object of criticism’ (at 65).

However, seeking the genuine motives of humanitarian intervention in domestic politics is not trouble-free at all. Reiter and Hallenberg, writing in Österdahl’s volume, focus on domestic factors. In contrast with Chandler’s general approach, the two contributors are much more specific, in that they merely focus on the practice of the United States. Reiter argues that Democrats are as reluctant to go to war on the grounds of humanity as Republicans are, even though their Wilsonian approach to foreign relations suggests the opposite. He also assesses the gravity of a variety of circumstances influencing the proclivity to intervene on humanitarian grounds, and observes that the American people are ‘more sympathetic to humanitarian goals than their political leaders’ (at 87).<sup>3</sup> This leads him to consider that the United States will probably not participate in such actions in the near future. Whether this conclusion, reached presumably in late 2001, is based on concrete facts is an interesting question. The hesitant

and limited US involvement in Liberia in 2003 seems to verify it. The invasion of Iraq, conversely, leaves room for different interpretations: humanitarian claims played a subsidiary role at the outset but were subsequently emphasized – although only after the original rationale of the attack was substantially undermined by the failure to locate the alleged weapons of mass destruction.

Hallenberg questions Reiter’s calculations by predicting that the more interventionist approach of Democratic presidents will remain in sharp contrast to the reluctant Republican standpoint in the future. He also contradicts Chandler’s findings, when he notes that not all US interventions have been prompted by domestic considerations: the operations in Somalia and Haiti were, in his view, clear instances of humanitarian intervention, whereas the actions in Bosnia or Kosovo came about ‘through concern for the future of another international organization, namely NATO’ (at 71). Note, however, that a finer case-by-case approach may lead to more complex conclusions. In a book published in 2002, Robert C. DiPrizio analysed six scenarios with a view to unveiling the United States’ reactions to specific humanitarian crises, and concluded that domestic political concerns had been of primary importance only in Rwanda, Haiti and Bosnia and Herzegovina, but had merely played a secondary role in Northern Iraq, Somalia and Kosovo.<sup>4</sup>

Both books present several arguments regarding the undesirable implications of the interventionist approach. Chandler vividly highlights the challenges to the international order: what human rights advocates consider the strengthening of international law runs the risk of being, in fact, its abolition. The implicit denial of the sovereign equality of states, the bypassing of the Security Council and the marginalization of the UN are likely to deprive international law of its consensual

<sup>3</sup> For the relevant results of a 1995 poll, cf., D. P. Forsythe, *Human Rights in International Relations* (2000), at 143.

<sup>4</sup> See R. C. DiPrizio, *Armed Humanitarians: U.S. Interventions from Northern Iraq to Kosovo* (2002), Table 2, at 153. Surprisingly, two pages later he refines this ratio as four to two. Cf., *ibid.*, at 155–156.

basis, introduce institutionalized inequality among its subjects, raise the frequency of armed conflicts, and revive the old Westphalian order. The rise of international criminal justice, as well as the inclination of Western powers towards the invocation of a 'higher duty' of fighting evil for the justification of unauthorised armed interventions are, in his view, all eloquent symptoms of this tendency. His gloomy vision of a 'post-UN international order' adequately identifies certain anomalies and echoes the concerns of many experts.<sup>5</sup> Yet it begs the question whether it is the pursuit of an ethical foreign policy itself that endangers the present international order or the unilateralism it occasionally seems to involve. Indeed, an ethical foreign policy does not necessarily imply resort to unilateral measures, and unilateral measures are regularly taken for reasons that have little to do with ethics and values. Conversely, the goals of ethical foreign policy can be achieved by multilateral means, as well (e.g., the authorized humanitarian interventions of the 1990s). Therefore, it is not illogical to believe that the principal source of problems is unilateralism, rather than anything like a people-centred approach to foreign relations.

A second reason why one might think that humanitarian intervention is not altogether advantageous is because of the way the human rights discourse challenges political equality and popular democracy at the domestic level, both within the intervening Western and in the non-Western target states. As far as Western states are concerned, Chandler warns that ethical foreign policy inevitably narrows the domain of political discourse; particularly because of the way 'ethical' decisions are made by an elite at a distance from the public debate. When it comes to non-Western states, the risk, according to Chandler, is that human rights advocates will describe both the local political

elite and the local people as politically incompetent. This legitimizes calls for an alternative regulation dictated by external actors on the basis of human rights – for instance in the form of long-term transnational authorities, such as those in Bosnia and Herzegovina, Kosovo, East Timor or Afghanistan. This solution, however, substantially undermines the legitimacy of non-Western states, which is increasingly evaluated by other states or international organizations on the basis of human rights rather than through domestic democratic channels. For that reason, Chandler is sceptical about the long-run feasibility of an ethical foreign policy and the practice of humanitarian intervention. He suggests that instead of the 'new humanitarianism', we need 'a new humanism, a positive approach to problem solving that makes the most of people's capacity for autonomy and collective rational decision-making' (at 236).

A third reason why the interventionist approach should raise scepticism is that some elements of its theoretical foundations are sketchy at best. In a chapter of *Is Intervention Humanitarian?*, Susan Marks challenges the thesis of democratic peace, which holds that international peace can be achieved via the establishment of a world of liberal states. She argues that the line of demarcation between liberal and non-liberal states is not at all clear. In fact, there are unacknowledged links between democracy and authoritarianism: 'non-liberal democratic states invariably have some democratic and liberal features and further potentials', while 'liberal-democratic states certainly have non-democratic and non-liberal features and potentials' (at 16). Furthermore, she points out that there are links between peace and war, as well. Arenas of war corrupt the alleged 'zone of peace' between liberal states, so democratic peace coexists with the reality of international war, civil war and the recent category of 'new wars'. She concludes that international law is rightly concerned with democracy, but it should serve as a 'de-territorialised principle of critique' rather than 'a means of securing the legitimation of national sovereignty' (at 23).

<sup>5</sup> Cf., e.g., H. Kissinger, *Korszakváltás az amerikai külpolitikában? A 21. századi Amerika diplomáciai kérdései* [Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century] (A. Kovács transl., 2002), at 205.

An analysis of the motives underlying humanitarian intervention should not ignore its long-term effects, since the aftermath of such actions reveals much about the true considerations of the intervener. It is among the strengths of the books reviewed that both take into account the activities of transnational authorities established following various humanitarian crises. Österdahl's volume includes an entire chapter on this issue. Although it expresses concern for the post-independence era,<sup>6</sup> Nordquist's thorough report on East Timorese nation-building contains predominantly positive findings and may challenge Chandler's view, according to which 'international protectorates' necessarily turn out to be detrimental to non-Western states.

Given its nature, Inger Österdahl's book cannot and does not offer a definite answer to the question posed in its title – the reply varies for each contributor. Conversely, David Chandler's response is unequivocally a negative one. Only one thing is certain: both works will positively enrich the ongoing debate.

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Castellino, J. and S. Allen, ***Title to Territory in International Law. A Temporal Analysis***. Aldershot, Hampshire: Ashgate, 2003. Pp. 265.  
Distefano, G. ***L'ordre international entre légalité et effectivité. Le titre juridique dans le contentieux territorial***. Paris/Genève: Pedone, 2002. Pp. 585.

Each time a new book is published on the question of territorial sovereignty, one is led to wonder whether, particularly in view of the abundant case law of the International Court of Justice, the topic has not already been exhausted. Nevertheless, these two works

offer a useful contribution to charting the state of the art on the issue of title as the source of the right to territorial sovereignty.

*L'ordre international entre légalité et effectivité. Le titre juridique dans le contentieux territorial* [International Order between Legality and Effectivity. Legal Title in Territorial Disputes] by Giovanni Distefano, grew out of his doctoral thesis written under the supervision of Georges Abi-Saab and defended two years earlier.<sup>1</sup> The tension between legality (what is prescribed by law) and effectivity (what exists in fact) is studied in the light of titles to territorial sovereignty. The book also develops themes already dealt with by the author in an article published in 1995 on the notion of legal title and territorial disputes in the international legal order.<sup>2</sup> The book claims to be theoretical, with the ultimate goal of demonstrating a unitary conception of title, whatever its forms and function in the international order (at iv). Whereas this conception is not completely new,<sup>3</sup> theoretical distinctions made here are deepened in order to render the notion of title more intelligible. Distefano declines the dichotomies between the root and the proof of titles, titles with one or several roots, the *negocium juris* (the will) and the *instrumentum* (the material expression of the will), absolute and relative or *inchoate* title, legal title and effectivity, and finally between law and fact. These binary distinctions are very useful for understanding territorial conflict resolution as a question of balancing the relative weight of titles, that is, adjudicating the better right.

This is a dense book – it will no doubt be difficult to read for those who are not familiar with territorial conflicts, but particularly valuable for those who wish to deepen their knowledge of the notion of territorial title,

<sup>1</sup> G. Distefano, *Le concept de titre juridique dans le contentieux territorial. Le juge entre légalité et effectivité dans l'ordre juridique international* (2000).

<sup>2</sup> Distefano, 'La notion de titre juridique et les différends territoriaux dans l'ordre international', *RGDIP* (1995) 335.

<sup>3</sup> J. Combacau and S. Sur, *Droit international public* (1997), at 396–398.

<sup>6</sup> The manuscript appears to have been concluded well before independence was granted on 20 May 2002.