

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.

and of the issue of legal title in general, defined as the cause or source of a right. Distefano's bibliography details almost all the literature on the question, going back to centuries-old scholarship and case law, in five languages (French, English, Italian, German and even Latin). On the negative side, he overuses quotations in their original language without translation, which can be problematic in the case of extensive Roman quotations.

*Title to Territory in International Law. A Temporal Analysis* is a collective book edited by J. Castellino and S. Allen, two young legal scholars who are interested in the dichotomy that exists between the notion of territory, on the one hand, and the ideas of minority and indigenous rights and governance, on the other. The specific issue of indigenous rights is developed by Jérémie Gilbert in a separate chapter (ch. 7). The aim of the book is to show how the notion of territorial title has evolved through space and time. Territorial sovereignty has been shaped by political conditions and the evolution of the legal order reflects these challenges. This book is accessible and meets the needs of both students and teachers. Its goal is to outline and review the issues and to give concrete illustrations as much as to discuss some fundamental notions, particularly the inevitable concept of *uti possidetis*. One small shortcoming is that, unfortunately, it refers only to the existing literature in English, with the one exception of a token French book on minority and indigenous rights.<sup>4</sup>

Castellino and Allen opt to show the evolution of territorial titles through the study of different key periods of history. They highlight three main evolutions in this respect, starting with the Roman origin of titles, moving on to the colonization/decolonization processes, and up to contemporary challenges to territorial integrity by irredentist or secessionist forces. Conversely, Distefano first deals with the concept of title in general and its narrower sense of territorial title (Part 1). After developing the etymology and the history of the concepts, he rejects the old distinction between border and

territorial conflicts<sup>5</sup> in favour of the difference between the strength and the territorial extent of the title. He also criticizes the classical notion, derived from the analogy with private property law, of the modes of acquisition of territory (occupation, accretion, cession, conquest and prescription). This notion, seems excessively descriptive, and has been abandoned in the case-law because transfer of territory can rarely be ascribed to any single rule or mode of acquisition. Distefano shows that territorial title is a complex phenomenon that can be better understood using the notion of gradation of title. A legal title is not necessarily absolute from its inception and it must follow the evolution of the international legal system to be consolidated and to remain valid. It is only when the *titulus acquisitionis* (the *causa*, the legal source of sovereignty) and the *modus acquisitionis* (i.e. the effectivity of the acquisition or transfer of sovereignty) meet that the title can be said to be complete, valid *erga omnes*, i.e. unchallengeable (Part 2).

This doctrine is particularly useful to understand the analysis developed by Castellino and Allen on the African colonization process in the 19th century and the evolution of territorial acquisition norms based on the "Three Cs": Commerce, Christianity and Civilization (ch. 4). During colonization, Western powers had acquired different title deeds (*inchoate* or relative titles if one uses the vocabulary of Distefano), such as discovery, treaties with local rulers not considered as fully sovereign, or treaties delimiting spheres of influence, etc. With the evolution of international law in the 19th century, these titles, while valid, were not considered as unchallengeable because they did not always reflect the reality of the exercise of sovereignty on the territory claimed and thus had to be completed. Because of the increasing competition between these different roots of titles, it became imperative to find an incontestable rule for territorial acquisition. At the end, in order for the title deed to stay valid, territorial acquisition had to be effective on the ground within a reasonable period of

<sup>4</sup> N. Rouland, N. Pierre-Caps and J. Poumarede, *Droit des minorités et des peuples autochtones* (1996).

<sup>5</sup> ICJ, *Frontier Dispute Case* (Burkina Faso v. Mali), 22 December 1986, para. 17, at 563.

time. In effect, it had to be completed by effective possession (*modus acquisitionis*). The holder of the legal title had to confirm its sovereignty by effectively exercising it.<sup>6</sup>

Most territorial evolutions today are relative to state succession, particularly in connection with the principle of *uti possidetis*. Both books extensively comment on this principle as a title, although in Distefano's it is simply one title among others. The origins of this principle are found in Roman Law in *jus civile* and *jus gentium*. Its primary goal was to prevent disturbance of the existing state of possession. It is, in other words, a principle of legal security, whose objective is to maintain order and the stability of property. Interesting differences surface, however, between the Roman notion of property and the modern international notion of territorial sovereignty. For instance, in Roman law, possession had to be peaceful, while the International Law doctrine of *uti possidetis* is indifferent to the way sovereignty was acquired by the colonial power. *Uti possidetis* in international law also stresses the *de jure* over the *de facto* situation, i.e. the legal title prevails over actual possession.

As is well-known, the concept of *uti possidetis* in contemporary International Law has its origin in the process of decolonization in Latin America (Castellino and Allen, ch. 3). Although the principle did incorporate some of the arbitrariness of imperial borders, it also paradoxically constituted a protection against that same imperialism. Indeed, although that second dimension is a little forgotten nowadays, *uti possidetis* had two meanings: not only a prohibition to contest the boundaries inherited from the former mother country, but also the absence of *terra nullius*, which made it impossible for the colonial powers to recolonize the Latin America continent (see the Monroe doctrine). It confirmed the Westphalian conception of international relations based on the

equal sovereignty of states, originally defined by territory rather than by social and religious identity. The principle was then extended to Africa and Europe, but neither of these two books really discusses its application to Asia.

The doctrine of *uti possidetis* also emerged as being directly linked to the role of the judge. Although attempts at regional union in Latin America had failed partly because of territorial conflicts, the idea developed that arbitration should become a regional principle and that a mediation body to resolve territorial disputes should be created. Judicial conflict resolution, which has always been fundamental to the evolution of the rules relative to territorial international law, is dealt with very differently in the two books. Castellino and Allen tend to take the cases on a one-by-one basis, while Distefano takes a more transversal and theoretical standpoint. Castellino and Allen's book starts with the study of some ICJ cases (ch. 5), but the choice of these particular cases is not clear, except for the fact that they concern delimitation, and their comments not specifically original. Most of them treat territoriality in the post-colonial phase, mostly in Africa. Two cases concern maritime delimitation of continental shelves because of the convergence of the maritime functional regime and territorial sovereignty.

Distefano's book deals with the theoretical aspects of case-law and makes numerous references to pre-World War II cases. He could have given more consideration to recent cases, especially those before the World Court. Even if the contemporary international judge adjudicates territorial conflict in a way that is not substantially different from its predecessors, the recent cases are interesting because they mainly deal with post-decolonization conflicts. Moreover, by giving more recent examples, Distefano would have better demonstrated the relevance of his theory today. Instead, he focuses his argumentation on the function of title in territorial conflicts and on the role and impact of the international judge when adjudicating territorial conflict.<sup>7</sup> This

<sup>6</sup> See for instance, 'since the nineteenth century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered', *The Palmas Island Arbitral Decision*, CPA, 4 April 1928, RIAA, at 884.

<sup>7</sup> 'In adjudging conflicting claims by rival sovereigns, all available evidence relating to the exercise

process is mainly dependent on the relative burden of titles, relied on and proved by the parties, but also depends on their conformity to the international legal system at a given date (called critical date). Furthermore, in adjudicating territorial conflict, equity is for the judge not only a subsidiary principle but also the finality of his reasoning since his decision is more an intellectual construction than a mere dispositive decision (part 3).

The authors are naturally led to discuss the goal of stability and order in the international legal system, based on territorial sovereignty. From Distefano's point of view, problems arise from the tension between legality and effectivity, where the territory subject to a dispute is effectively administered by a state other than the one possessing the legal title. Moreover, the crystallization of the doctrine of *uti possidetis* in modern International Law shows how territory determines the future of peoples and stresses the West's influence on today's world order. Despite the judicial development of positive law in this field, many territories are still adversely possessed. Examples of actual adverse possession are nevertheless not explored in these two studies, nor are alternative theories legitimizing territorial claims, such as the unequal treaty theory or the claim against *uti possidetis* as a general international law principle.

International Law concepts focus on territory as the basis of state sovereignty, but is it not time to reconsider the human dimension of sovereignty and to go beyond the Westphalian foundation of the world order, as suggested by Castellino and Allen? Since the prohibition of conquest, the challenges of territorial integrity have been internal rather than international. The treatment of territory in modern Yugoslavia is a good illustration. The Badinter Commission tried to find an acceptable balance

between territorial stability and respect of minority rights across borders. It declared that the existence of a state is a matter of fact. While secession is generally viewed as unlawful, it generalized the application of *uti possidetis* beyond the decolonization context and declared minority rights as positive international law, which is questionable. The Commission 'reinterpreted' its initial mandate in order to integrate the internationalization of the conflict. From the point of view of many international publicists, an international tribunal could never have taken such decisions. It may be that this was a consequence of the ad hoc nature of the Commission, which was composed of constitutional lawyers and whose decisions were not compulsory. The legal results of the Commission's decisions and of the Dayton Agreement can nonetheless be criticized for giving too much importance to ethnicity. Castellino and Allen show the danger and the legal limits of these Yugoslav precedents in accepting the validity of ethnicity in the state formation process and in automatically transforming administrative limits in international boundary, as shown in the Kosovo case (ch. 6).

The rights of indigenous people also raise another challenge to territorial integrity. The main aspect of this issue is the regime protecting indigenous land rights based on an international but mostly non-binding (although perhaps destined to become customary) legal regime and domestic case-law. It is interesting to note that state practice is particularly developed in countries where the rights of the first inhabitants were completely ignored during the colonization process (considered as *terra nullius* while inhabited), such as in Canada and Australia. The current international regime, which has primarily been based on human rights, nonetheless suffers from the contested definition of 'people' entitled to self-determination, and the issue of whether that right implies statehood and even secession. Land is central to the definition of indigeneness and its protection is a vital component of this law. Land rights comprising a hybrid legal regime have arisen to respond to this challenge, mixing public and private property,

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of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has exclusively or predominantly vested', *The Indo-Pakistani Western Boundary Case*, Award 19 February 1968, Opinion of the Chairman, *RUNAA*, vol. XVII, 554.

ownership and internal self-determination, and also private and public law and domestic and international regimes (ch. 7).

*Title to Territory in International Law* could end on a more positive note, for example by analysing the removal of the sacred aura of territoriality through regionalization and globalization. Distefano offers a more static vision. It is nevertheless a very useful one, which can theoretically explain almost all territorial situations. Its shortcoming is that, being more classical, it fails to take into account new challenges. Finally, these two books complement each other, one being theoretical the other more anchored in today's concrete reality.

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Sadat-Akhavi, Seyed-Ali. ***Methods of Resolving Conflicts between Treaties.***

Graduate Institute of International Studies (Series), Vol. 3. Leiden: Brill Academic Publishers, 2003. Pp. 228.

EUR 107. ISBN: 9041120319

Wolfrum, Rüdiger and Nele Matz.

***Conflicts in International Environmental Law.*** Berlin/London:

Springer, 2003. Pp. xi + 213.

ISBN 3-540-40520-8.

These two recently published books provide a thoughtful vision of the body of law that deals with resolving conflicts between international agreements and thus give an important impulse to new thinking in this field of international law.<sup>1</sup> In this regard, both books are very timely and constructive contributions.

Conflicting regulations in any legal system are problematic because they are a threat to the coherence and effectiveness of the law. In the field of international law, however, normative conflicts are more likely to occur than in national legal orders because of the absence of a well-established hierarchical normative structure. Particularly because treaty law has developed in an *ad hoc* and fragmented manner, parallel and in some cases overlapping and contradictory obligations can be created. The situation is made even more complicated by the formally equal validity of all international norms (save *jus cogens*). This situation poses a danger of uncertainty as to the interpretation and application of overlapping treaty provisions. Meanwhile, the issue of resolving conflicts between conflicting treaty norms in international law has not been dealt with satisfactorily. The two studies therefore are valuable in that they provide insights into the drawbacks of the current structure of international law, while suggesting possible ways to adapt to the abovementioned challenges.

Each publication deals with the subject of conflicting rules, although from slightly different angles. In terms of the precise subject, Sadat-Akhavi's framework is broader since he envisages the body of public international law in general. By contrast, Wolfrum and Matz's focus is confined to the body of international *environmental* law, as a special area of public international law. This is a useful choice of a special case because the field of international environmental law is particularly prone to conflicting regulation. Several factors account for this. First, much existing environmental regulation was adopted in a reactive manner in the aftermath of environmental disasters, therefore dealing only with a

<sup>8</sup> I am grateful to Professor Francis Snyder for his kind help.

<sup>1</sup> Earlier contributions include Jenks, 'Conflict of Law-Making Treaties', 30 *BYbIL* (1953) 401. Zuleeg, 'Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten, 1977', 20 *GYIL* 246. Akehurst, 'The Hierarchy

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of the Sources of International Law, 47 *BYbIL* (1974–1975) 273. Bos, 'The Hierarchy among the Recognized Manifestations ("Sources") of International Law', 25 *NILR* (1978) 334 and J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), a recent publication which also addresses norms produced by sources other than treaties.