

**All Quiet on the Western Intervention Front: A Brave Attempt to Trace
New Routes over Well-Travelled Ground- Book Review;**

**Philip ALSTON and Euan Mc DONALD, *Human Rights, Intervention, and
the Use of Force*, Oxford, Oxford University Press, 2008**

Ciarán Burke

I. Introduction

This collection of eight essays represents a detailed discussion on the legal, ethical and political framework surrounding the humanitarian intervention debate. The authors examine various different issues involved in the sphere, ranging from the impact of intervention and human rights on traditional notions of state sovereignty to the rules on ‘targeted killing’ and the development of the responsibility to protect initiative. Their collective work may be useful as a reference point for any student wishing to broaden his or her knowledge of this area.

Philip Alston and Euan McDonald begin with an introduction to the debate, couched in familiar terms. Noting the changes since the 2001 terrorist attacks, they argue that we now inhabit “a radically different world in which the sovereignty of Westphalia and the human rights of the Universal Declaration compete, often unsuccessfully, with issues of national security as sources of both international legitimacy and legality” [p. 1]. Nonetheless, they go on to explain that the issue at hand is vastly more nuanced than security versus sovereignty *simpliciter* and that there are a variety of factors at play which undermine the assertion that advances in human rights must necessarily undermine sovereignty. They point out that new labels like ‘preventive self-defence’ and ‘enemy combatants’, which are anathema to the human rights lobby, may erode classical notions of sovereignty as much as reinforce them. They note the fact that several discourses will often surround any one event, since states increasingly justify their actions in different ways depending on the audience. They further note the broad acceptance of the United States’ bombardment of Afghanistan, pointing to just how far away from the classical doctrine of self-defence this was. This first essay ends with the conclusion that the inevitable ethical and legal dilemmas arising from the new trends brought about by sovereignty, security and human rights must be met head-on by international lawyers. Alston and Mc Donald seemingly revel in the complex web of problems thrown up

by the debate, concluding that “*everything* is dangerous; that’s what keeps things interesting” [p. 31].

II. Human rights and state sovereignty

Hélène Ruiz Fabri, in her contribution, provides insight into the history of state sovereignty in international law, and how this has been, and is being, reshaped by human rights. Examining the interplay between the two at an abstract, conceptual level, she notes that rights are traditionally portrayed in terms of individual autonomy *vis-à-vis* the sovereign, and the two thus become antithetical, whereby a gain for one represents a loss for the other. Departing from this, she proceeds to chart the ways in which the state’s freedom may become limited by human rights, distinguishing between whether a state desires such limitations and whether they are imposed upon it by external pressure, noting the variety of constraints in existence and the various modalities of the control mechanisms and their potential efficacy. Ruiz Fabri presents sovereignty as a legal fiction, presented as an ideal, but inevitably containing a plethora of exceptions. This leads her to reject the over-simplistic assertion that a gain for sovereignty must necessarily entail a loss for human rights or *vice versa*. Rather states as guardians of societal structure, must necessarily also be employed as the most effective guardians of human rights. She notes that the modern state is the subject of two notable tensions, namely nationalism and globalisation, which weaken the state itself and therefore are likely to weaken human rights protections and may often be accompanied by the trivialisation of rights violations. She notes that human rights law has a long road yet to travel to reach its goal of universal protection, and calls for a closer co-operation between states and an international civil society in which sovereignty and human rights are interlocked, co-dependent and mutual guarantors. Ruiz Fabri’s logic is coherent in the main part and her reasoning easy to follow. However, her argument is undermined somewhat by a selective reading of history, ignoring the pioneering English and Dutch experiences of limiting sovereignty and conferring individual rights, and beginning her analysis with the oft-discussed American and French declarations. She also fails to explore some interesting questions, such as whether only Western democracies can fulfil the necessary criteria to become ‘friends’ of human rights. This point in particular warrants further attention.

III. Human rights and collective security

In the third essay, Olivier Corten questions whether there is an emerging right of humanitarian intervention. Framing his piece in terms of traditional international law, he identifies two notable trends of scholarly opinion, namely those who claim that gross human rights violations can constitute a threat to the peace, thereby allowing Chapter VII action by the UN Security Council, and those who hold that the importance of human rights is so great that traditional sovereignty rules may be cast aside whenever a state is guilty of gross abuses of the rights of its nationals. Despite the absence of any real consensus on the issue, Corten focuses on the possibility that such a right has developed, either as a customary norm, or as a reinterpretation of the UN Charter. By means of an examination of past purportedly humanitarian interventions, such as those in Iraqi Kurdistan and Rwanda, Corten compares the practice and *opinio juris* of the states involved. Despite arguing that such evidence offers little to affirm the existence of a right of humanitarian intervention, and thus may not be used in order to support future interventions, he nonetheless notes that such trends may serve as proof that human rights ensure that international law is no longer oblivious to states' treatment of their own nationals. He cites the 1999 NATO operation in Kosovo as a prime example of this, exploring in detail the reasons given by the intervening states for their action. He notes the myriad of ethical and political rhetoric advanced in various *fora*, but is careful to point out that the legal basis was often rather unclear. While Security Council Resolutions were offered in support, Corten opines that this indicates a reluctance to stray too far from traditional conceptions of the international law on the use of force, and certainly no real enthusiasm for a new right of humanitarian intervention. Since Kosovo, little has changed in this regard. Corten finds meagre evidence of support for such a new right, with most states holding firmly to the idea of Security Council primacy in matters concerning the use of force. He fails to discuss self-defence in any detail here, and dismisses the responsibility to protect initiative as adopted in the 2005 World Summit Outcome Document, since it merely "reiterates the rules on the use of force as they appear in the Charter" and "leaves no doubt as to the rejection of any unilateral initiative taken in response to extreme situations" of human rights abuses [p. 128]. Overall, Corten casts a gloomy picture of the prospects for change in this sphere, noting that institutional change is quasi-impossible, and that states lack the requisite appetite for unilateral humanitarian intervention to receive support.

IV. The implications of Kosovo for international human rights law

Richard B. Bilder, in his contribution, assesses the implications of NATO's Kosovo intervention for international human rights law. Supporting Corten's thesis, Bilder concludes that there is little to support the claim that a right to humanitarian intervention exists. Again returning to a familiar theme, Bilder highlights the many challenges which arise due to the interaction and conflict between human rights and state sovereignty. He strikes a conservative note, counselling against throwing caution to the wind with regards intervention, noting the value of the existing UN institutions, and the damage which may be visited upon them if states follow the knee-jerk reaction to 'do something', even against the law, when this is demanded by conscience and morality. Interestingly, however, Bilder notes that the language of the Charter prohibition upon the use of force by states may in fact permit humanitarian intervention if it is specifically in furtherance of the human rights purposes of the Charter. However, this is mentioned only as a passing thought, and Bilder avoids opening this particular Pandora's Box. Instead, Bilder goes on to challenge the traditional separation of *ius ad bellum* and *ius in bello*, arguing that a requirement of proportionality must necessarily be a component of any potential right of humanitarian intervention, and that this may only be assessed with reference to the actual conduct of the operation itself, and its conformity with international humanitarian law. This being the case, the less-than overtly humanitarian conduct of NATO's forces in Kosovo must necessarily inflict serious damage upon the legitimacy of the operation, and may thereby have lost any tentative claim to legal justification which might have been advanced. He also notes that the intervention deepened already bitter divisions in Serbian society, further fuelling regional instability, and thus reducing the action's effectiveness on the 'more harm than good' scale. Further, this mismanagement by NATO can, *per* Bilder, only create insecurity for small states and a further incentive to develop weapons of mass destruction for their own protection. Bilder curiously posits that the great disparity of forces between the two sides during NATO's Kosovo intervention is 'troubling'. However, this would seem to be an illogical conclusion, unless one is yearning for a re-hashing of the Clausewitzian '*iustus et aequalis hostes*' model. If anything, in theory at least, an intervening force ought ideally to be manifestly superior in order to quickly bring an expedient end to the conflict with a minimum of damage. As noted by Bilder himself, and by Alston and Mc Donald, this chapter concludes with more questions raised than answered. This is, indeed, a common trend throughout the volume.

V. Legality versus legitimacy

In the fifth contribution, Anthea Roberts tackles the central question of the humanitarian intervention debate: what to do when the law forbids what our morality commands. Of course, this is a familiar theme, and one, again, which has divided opinion throughout the ages. She notes that the antimony is reflected here in the ambivalent reaction of many in the legal community to the Kosovo intervention: that it was illegal but legitimate. She labels the approach as “intuitively attractive” but “ultimately not a sustainable position given the role of state practice in shaping international law” [p. 180]. She notes that describing such violations as merely ‘technically’ illegal is inappropriate given the norms with which we are dealing, namely important norms of international law dealing with the use of force. She undertakes an extensive review of the leading scholarly literature in the field, examining the various tacks which have been employed by authors to make their support for illegal action seem justified. She notes that most of these employ the language of legitimacy as a counterpoint to that of legality, and cites three reasons underpinning this discourse: firstly using legitimacy as a complete escape from the strictures of law allowing flexibility to powerful states, secondly as a tool to supplement strict notions of legality in an attempt to maintain the law’s integrity while doing justice in individual cases and thirdly as a means to critique and progressively develop the law. Roberts highlights the inherent subjectivity of moral standards, however, and warns that any attempt to set down criteria of ‘legitimacy’ that stray from international law may give rise to uses of force which are far from humanitarian and abuse of the doctrine. She herself argues for a more flexible interpretation of legality as a spectrum, ranging from fully legal to fully illegal, with many less clear cases in between. In such cases, to a varying degree, legitimacy might be useful as a (non-exclusive) means of determining where on the spectrum certain actions should be placed. Roberts’ article, while admittedly open to criticism over its conclusions, is extremely well-researched and provides excellent insight into the legality *versus* legitimacy debate. Nonetheless, her ‘legal spectrum’ model cannot be left unchallenged. The idea of ‘semi-legality’ smacks of the same logic that brought about phrases like ‘acting off the Charter’.¹ In attempting to criticise the mistakes of previous scholars, Roberts has, to some extent, fallen into the same trap.

¹ B. SIMMA, “NATO, the UN and the Use of Force: Legal Aspects”, *European Journal of International Law*, 1999, p. 22.

VI. Intervention in a divided world

Nathaniel Berman examines the rhetorical construction of international law's legitimacy in cases of armed intervention and their aftermath. He argues "for an understanding of international legitimacy which is less foundational and more vulnerable, less static and more tentative, less certain and more messy" [p. 218]. 'Messy' is indeed apt to describe Berman's reasoning, which, although interesting, is written in a haphazard way, and which is by no means easy to follow. He draws parallels between international law's colonial past and the mandates and protectorates of the *interbellum* and the human rights protection agenda which represents international law's future. Berman claims that the paternalistic initiative to protect and civilise savage peoples is being repeated, in effect by external interference in war-torn, peripheral, states by the western core. Berman's paper "seeks to understand international law's attempts to achieve legitimacy in response to three kinds of challenge - attacks on the status of its identity, critiques of the coherence of its words as well as its deeds, and attempts to associate it with spectres from its unsavoury past" [pp. 220-221]. He cites the historical precedents of the Sudetenland and Abyssinia -based on (then) international norms such as minority rights and international tutelage- as a counterpoint for the modern Kosovo debate. Here, Berman makes an interesting comparison, and it is perhaps a shame that his piece chooses to be so 'messy', launching into divisions of legitimacy as a concept and thereby losing clarity, as otherwise this could be a valuable contribution. However, the essay as it is fails to meet such a billing. The clarity which is pervasive throughout most of the essays in this volume is alien to Berman, who fails to adequately communicate with his reader. One is left wondering whether it is his choice of rhetoric or his choice of reasoning which so clouds the argument, but in either case, Berman's piece is probably the least convincing and well-delivered contribution.

VII. States of exception

Nehal Bhuta, in the penultimate chapter, detaches himself from the main debate, and focuses on the regulation of targeted killings. Borrowing heavily from Carl Schmitt's *Theorie des Partisanen*,² Bhuta argues that while the *lex specialis* model is superficially attractive as a means of conceiving of international humanitarian law, it is unsuitable in its present form for

² C. SCHMITT, *Theorie des Partisanen*, Berlin, Duncker & Humblot; Funfte Auflage, 2008.

dealing with suspected terrorists. As with the partisan, to satisfy the laws of war, a terrorist “would have to give up his strongest weapons, secrecy and opacity” [p. 244]. Plainly, since he will not do so, the modern terrorist cannot be made to neatly fit into any of the Geneva Conventions’ various distinctions, which seek to protect ‘regular’ combatants. The application of either human rights law or humanitarian law to the exclusion of the other in order to carry out targeted killings is one which entails risks, whichever course is taken. He argues that perhaps a more flexible approach to the *lex specialis* principle might reveal a better model on which to proceed, speculating that human rights provisions might, for example, be used to ‘fill out’ the “indispensable judicial guarantees” mentioned in common Article 3 § 1 of the Geneva Conventions. As Bhuta notes, the problem of targeted killings in general is that it is something of a ‘vanishing point’ for the two regimes, and thus the logic of ‘the exception’ tends to expand and intrude upon the normal. He concludes by suggesting a pragmatic, fundamental human rights-based proportionality approach, balancing risks with rights to whatever extent possible. This may well be a sensible proposal, given the legal problems surrounding targeted killings, and the fact that neither legal framework can adequately deal with this issue, but it obviously raises the possibility of abuse and subjectivity of judgment and raises questions about supervision. Yet again, legality and legitimacy come face-to-face. Unfortunately, yet again, the author seems unable to offer an adequate reconciliation of the two.

VIII. The schizophrenias of R2P

In the concluding article, José E. Alvarez discusses what he dubs “the schizophrenias of R2P”, that is, of the responsibility to protect doctrine, warning against the transforming of R2P into a legal norm [p. 274]. He notes the wide, and above all diverse, array of supporters of the initiative, and says that instinct “should warn us there must be something wrong as well as right with an idea that can be endorsed by such strange bedfellows” [p. 277]. Noting, further, that the discourse has strayed far from where the original report’s drafters intended, he recounts the ‘horror’ of many of the R2P’s initial proponents, including ICISS co-chair Gareth Evans, at the bastardisation of their project. He notes further that the concept reduces sovereignty to ‘abuse it and lose it’; an instrumental value, rather than an intrinsic one, which can lead down the slippery slope to the Bush administration’s controversial notions of the pre-emptive use of force. Alvarez’s argument has much to commend it, calling as it does for a return to the language of humanitarian intervention and a move away from a new concept which has already in the few short years since its inception, developed a variety of problems.

Indeed, as the R2P has grown in renown, it has shrunk in stature, becoming progressively less and less useful to the causes which it was supposed to protect and progressively more and more a tool which can be perverted by the unscrupulous. His logic in this regard is convincing, and his citing of the ‘founding fathers’ as rejecting their own creation due to its abusive employment by governments opposed to the ideals for which it initially stood is a welcome wake-up call to many of those who have blindly jumped on the R2P bandwagon.

IX. Conclusion

All in all, this collection is a useful tool for the student who wishes to garner a broader understanding of humanitarian intervention and related issues, although it must be said that while it purports to represent a state-of-the-art, it falls short in a number of key spheres. While deducing trends from the volume is difficult due to the diversity of the offerings, one may nonetheless tentatively proffer a few comments.

Firstly, as works in this particular field are frequently wont to do, this book leaves many key questions unanswered. The same old issues are re-hashed and re-discussed by another series of authors, who, as is often the case, fail to say anything new, criticising their predecessors but often making the same elementary mistakes which have been made before. This, is, however, hardly surprising, given the material which is being discussed, and the difficulties with which even the foremost international lawyers have experienced in dealing with the interaction of general international law concerning the use of force and human rights norms. The humanitarian intervention debate, in particular, is far from settled, and this book, while being far from a significant milestone on the journey to the resolution of the issues at hand, is a useful yardstick by which we may measure how far we have come.

Secondly, the legality / legitimacy dichotomy remains the central point of contention throughout the volume, and little consensus is reached here either. Again, the fact that this is not a new trend may be evinced as a defence of the book, but it is nonetheless discouraging to see so little progress or evidence of fresh ideas in this area.

Finally, the various authors come down surprisingly firmly for a reaffirmation and in some cases even a positive strengthening of state sovereignty to protect human rights, and for a somewhat conservative, traditionalist reading of international law. This theme may be seen

to run throughout the broad mass of the contributions in this volume. Given the conflict raised in the early chapters between human rights and sovereignty, this would seem remarkable, since many would argue that protecting human rights implies increased state accountability and *ergo* decreasing the effect of sovereignty as a doctrine. Nonetheless, the authors manage to present a fairly coherent defence of this position throughout, arguing that sovereignty may imply duties as well as rights, and that state power must be the primary tool in effecting actual human rights protection.

This book will find favour with the student of international law who wishes to broaden his or her knowledge of the conflicts arising between human rights and the regime governing the use of force. In this respect, it is a useful book, encompassing a variety of viewpoints, but nonetheless settling upon a clear message. The work is coherent in this regard, and the authors clearly had knowledge of one another's views before writing, so that a structured document emerges. This is something which is found lacking in many other volumes of this kind, and warrants praise. However, despite the structure and clarity of voice, the authors deliver a message which is not new or original and which occasionally borders on the stale, and this is certainly to be regretted.