
Book Reviews

Andrea Bianchi (ed.). **Enforcing International Law Norms Against Terrorism**. Oxford: Hart, 2004. Pp. 549. £60 ISBN 1-84113-430-9.

The legal problems raised by international terrorism have often been the subject of in-depth studies by international legal scholars over recent years. It is not within the scope of this review to examine this literature, given its vastness and widespread availability. What can be said, however, is that it includes articles and volumes, sometimes collective books, often dealing with specific aspects,¹ and sometimes of a more general character.² Among the latter is the volume edited by Andrea Bianchi, which appears worthy of specific attention, for at least two reasons of a general nature.

The *first* is its systematic organization. Indeed, the volume is more like a manual on post-11 September international terrorism than a simple collection of essays. In the book's four parts, all the main legal aspects of the possible responses of the international community to terrorist acts are examined, starting from those issues more closely connected to inter-state relations (parts I and II), going on to deal with the individual responsibility for such activities (part III), and, lastly, examining economic and financial measures against terrorism, focusing specifically on the

use of computer technology (part IV). What is missing is a specific analysis of anti-terrorism measures adopted by states at national level, even though such measures are particularly important in enforcing international norms on terrorism. This is not particularly surprising, however, as Bianchi's volume appears to complement, from this point of view, another recent collection of studies;³ furthermore, a study of domestic rules and practices is sometimes to be found within individual contributions.⁴

The *second* point of interest is the fundamental question which the greater part of the volume focuses on; i.e., whether the conceptual and normative instruments of international law can really be used against international terrorism.

The answer to this question tends to be positive in the first part of the volume as regards state responsibility,⁵ the organization of 'covert operations' against terrorism,⁶ the application of *Jus in bello* in the 'war against terrorism',⁷ and the treatment of terrorist suspects captured abroad⁸.

But is it really the case that international law as it stands in these areas answers most of the questions that have arisen since 9/11?

There is no doubt that all the above contributions are richly argued; nor can it be denied

¹ E.g., E. Bribosia and A. Weyembergh (eds.), *Lutte contre le terrorisme et droits fondamentaux* (2002) and, more recently, on completely different subjects, A. O'Day (ed.), *Cyberterrorism* (2004) and G. G. S. Suder, *Terrorism and the International Business Environment: the Security-Business Nexus* (2004).

² Among these see K. Mollard Bannelier, T. Christakis, and O. Corten (eds.) *Le droit international face au terrorisme: après le 11 septembre 2001* (2002).

³ C. Walter, S. Vöneky, V. Röben, and F. Schorkopf (eds.), *Terrorism as a Challenge for National and International Law. Security v. Liberty?* (2004).

⁴ E.g., Benvenisti, 'National Courts and the "War on Terrorism"', 316–328.

⁵ Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility', 6–12 and 13–16.

⁶ Ronzitti, 'The Legality of Covert Operations Against Terrorism in Foreign States', at 24.

⁷ Condorelli and Naqvy, 'The War Against Terrorism and Jus in bello', 30–33.

⁸ Borelli, 'The Treatment of Terrorist Suspects Captured Abroad', at 41.

that both international humanitarian law and the international norms on human rights must keep a place in the fight against terrorism, as has been recognized in important decisions adopted by domestic courts. Yet, it is also undeniable that the characteristics of international terrorism, as revealed by the attacks of 11 September, pose completely new problems, among which, for example, is the possible international personality of the terrorist 'network' Al Qaeda, despite their not controlling a definite territory. This problem is dealt with in P. M. Dupuy's essay from the point of view of international responsibility,⁹ but might have perhaps deserved fuller research, considering the general interest it raises. Suffice it to think that resolutions against terrorism adopted by the Security Council are often addressed to individuals or groups suspected of terrorist activities, rather than to states.

The need to rethink some traditional legal phenomena, taking into account the new aspects of terrorism, is highlighted in G. Abi Saab's brilliant introductory essay, where the author refutes the definition of the fight against international terrorism as a 'war', but does not fail to underline the originality, or, better, the atypical nature of the well known resolution 1373, which should be qualified—according to him—as a 'declaration of an international state of emergency . . . establishing a temporary regime under Charter VII to take measures against terrorism in this particular emergency'.¹⁰ The above-mentioned Security Council sanctions against individuals or groups suspected of terrorists activities—which differ from the typical model of interstate sanctions envisaged by chapter VII of the Charter—could be considered, for example, as an outcome of such a 'regime'.

In the second part of the volume, B. Fassbender also seems to follow the same line of thought. While underlining the inadequacy of the unilateral action of states

(including preventive self-defence) as an instrument in the fight against international terrorism, Fassbender does not hide the inadequacies for this purpose of the collective security system—especially of the Security Council—highlighting the ongoing and urgent need to launch reforms.¹¹ Similar conclusions can be drawn—albeit indirectly—from the detailed essay by A. Reinisch on the action of the European Union. In emphasizing the need to respect human rights in taking such action, Reinisch observes that 'any attempt to legitimise the disregard for human rights on the basis of superior UN Charter obligations, is not only politically unwise but also legally untenable'.¹² Leaving aside any consideration regarding the quite opposite and recent stance of the EC Court of First Instance on the implementation of Security Council resolutions concerning the freezing of suspected terrorists' assets in the EU legal order,¹³ it should be borne in mind that even such resolutions raise some human rights concerns.¹⁴ Indeed, it should be noted that these concerns arise precisely from the fact that the Council is still a *political* organ, even if, in adopting the above resolutions, it is carrying out quasi-*judicial* functions.

Regarding the applicability of the current instruments of international law in the area of individual responsibility for terrorist acts, two different answers emerge in this volume.

¹¹ Fassbender, 'The UN Security Council and International Terrorism', at 101.

¹² Reinisch, 'The Action of the European Union to Combat International Terrorism', at 160; for the same conclusion see Clapham, 'Terrorism, National Measures and International Supervision', at 295.

¹³ Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat Foundation* and Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 21 Sept. 2005; see *infra* the text and note 19.

¹⁴ E.g., with regard to the right of access to a court (for challenging a state freezing of property), which is not provided for by such resolutions see Cameron, 'UN Targeted Sanctions, Legal Safeguards and the ECHR' [2003] *Nordic J Int'l L* 159, especially at 186–195.

⁹ *Supra* note 5, at 8.

¹⁰ Abi Saab, 'The Proper Role of International Law in Combating Terrorism', at p. xix.

While for A. Cassese there is already a universally accepted definition of the crime of terrorism – both in treaty law and customary law and despite the problem of enforcing these norms¹⁵ – R. Kolb arrives at an opposite conclusion.¹⁶ It is obviously a question of the consequences of two different methodologies in the reconstruction of international norms, which I cannot explore here, but which offer more than one occasion for reflection.

One aspect I can underline here, however, concerns the role of the Courts in the balance between the need for (prevention and) punishment of individual acts of terrorism and respecting human rights. The opinion of both A. Clapham and E. Benvenisti is that the international Courts (e.g., the European Court of Human Rights, the European Court of Justice, etc.) are more suited to bringing about this balance as they are less influenced by the national security issues that national governments have to face, which domestic Courts, in contrast, are more sensitive to.¹⁷ To support this opinion one could even add that international Courts are ‘better placed’, *in principle*, than the domestic Courts, also in the light of the global dimension taken on by the phenomenon of terrorism and its direct incidence on international security. It must, however, be observed that it is precisely the domestic courts which have shown, *in actual fact*, that they can play a courageous role in the field of human rights in the fight against international terrorism. Decisions such as the ones taken in 2004 by the House of Lords on the incompatibility of section 23 of the 2001 Antiterrorism and Security Act with the European Convention on Human Rights, and by the Supreme Court of the United States on the jurisdiction of US courts over the Guantanamo base are cases in point. Compared

with these, the *Bosphorus* judgment of the European Court of Human Rights seems rather disappointing, as are the aforementioned recent decisions of the CFI of the European Community, according to which Security Council resolutions must prevail over those human rights principles provided for by EC law which *cannot* be characterized as *ius cogens* principles¹⁸. In this light, it is domestic courts which seem to be the more effective – if not the only – forum where the protection of human rights is expected to be realized in the framework of the ‘war’ against terrorism.

This situation, which may seem surprising, clearly shows the multiplicity of points of view from which the legal phenomenon of the fight against terrorism needs to be observed. The complexity of this phenomenon is confirmed, furthermore, not only by the articles dealing with the funding of terrorist acts¹⁹ and cyberterrorism,²⁰ but also by A. Bianchi’s final and in-depth considerations. While refuting the idea that ‘the unity of international law’ is actually at risk, because of the need for *ad hoc* discipline on international terrorism,²¹ the author underlines how the phenomenon does no more than highlight, from various angles, some traditional inadequacies of international law (insufficient domestic implementation of international norms, lack of *consensus* on the interpretation of Security Council acts, different approaches to international law, resistance of

¹⁵ Cassese, ‘Terrorism as an International Crime’, at 225.

¹⁶ According to Kolb, this would be ‘the greatest obstacle in the way of recognising universal jurisdiction over terrorist acts in general’: ‘The Exercise of Criminal Jurisdiction over International Terrorists’, at 276 and 281.

¹⁷ See *supra* note 12, at 304 and note 4, at 329.

¹⁸ *Supra* note 13; see paras 277–283 of the *Ahmed Ali Yusuf and Al Barakaat International Foundation* judgment, *supra* note 13.

¹⁹ Radicati di Brozolo and Megliani, ‘Freezing the Assets of International Terrorist Organisations’, 379–413; Gardella, ‘The Fight Against the Financing of Terrorism between Judicial and Regulatory Cooperation’, 416–452.

²⁰ See both the essays by Draetta, ‘The Internet and Terrorist Activities’, at 453–465, and by Garnett and Clarke, ‘Cyberterrorism: a New Challenge for International Law’, at 465–488, in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (2004).

²¹ Bianchi, ‘Enforcing International Law Norms Against Terrorism: Achievements and Prospects’, at 530.

some states to enforcing human rights treaties, etc.).²² This position, even without denying current developments (i.e., on the use of force), is certainly in agreement with one of the recurrent themes in this volume, which is that the main challenge in the fight against terrorism is to take advantage and even improve on the *existing* international legal instruments on the subject. It may nevertheless be observed that the doubts raised by Bianchi concerning the real efficacy of these instruments confirm, after all, the cautious scepticism expressed by Abi Saab. As that author put it, even if they can go a long way to ‘cure’ terrorism as a typical ‘symptom’ of the ills of globalization, they are naturally unable to eradicate the basic causes of such ‘symptom’.²³

‘Federico II’ University Pasquale De Sena
of Naples

Email: padesena@tin.it

doi: 10.1093/ejil/chl030

David Kennedy. ***The Dark Sides of Virtue: Reassessing International Humanitarianism***. Princeton, NJ: Princeton University Press, 2004. Pp. 400. \$18.95/\$45.00. ISBN 0-691-12394-2; 0-691-11686-5.

The latest book by one of the fathers of New Approaches to International Law¹ explores a series of principle-guided traditions for renewing humanitarian thinking. In doing so, the author succeeds in ‘loading with future’ a partially retrospective look into his own work in the field at a particularly timely historical juncture for humanitarian strategic thinking after the American-led invasion of Iraq.

The book is divided into three parts. The first part focuses on the work of those who ‘seek to speak truth to power’. Writing from his own experience, the author’s analysis of humanitarian activism and advocacy is built around a revised version of his widely read

2001 article ‘The International Human Rights Movement: Part of the Problem?’.² In presenting an analytical catalogue of ‘possible risks, costs and unanticipated consequences’ of humanitarian thinking, Kennedy expressly leaves out abstract academic debates, like ‘whether rights pre-exist the efforts to articulate them’, because of their alleged disconnection from effects. The sort of criticisms which could generally ‘be dealt with by intensifying our commitment to the human rights movement’ are also excluded from a discourse where the use of a self-inclusive first person plural is remarkably present.

Instead, an ordered summarized view of the author’s decalogue of ‘pragmatic worries’ includes: first, concern related to human rights’ discursive hegemonic position as a muting-like factor for other possible emancipatory vocabularies. Second, criticisms addressed to the excessively narrow focus of the discipline on the State, the legal formalization of rights and the universality and neutrality of human rights to the detriment of non-State actors,³ actual economic arrangements and background law’s effective impact on both the global and local stages. Third, a worry with how an abstract understanding of the human experience channelled by human rights’ *newspeak* coerces alternative ways of expression, reifies roles and identities, and, ultimately, results in activist

¹ See Kennedy’s own contribution up to 1994 at Kennedy and Chris, ‘New Approaches to International Law: A Bibliography’, 35 *HLLJ*, (1994) 2. See, also, Martti Koskenniemi’s acknowledgements to David Kennedy in *From Apology to Utopia: the Structure of International Legal Argument: Reissue with a New Epilogue*, (2006) For a general view, see Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ [1996] *Netherlands J Int’l L* 65. For an external viewpoint, see Paulus, ‘International Law after Postmodernism: Towards Renewal or Decline of International Law?’, 14 *Leiden J Int’l L* (2001).

² See Kennedy, ‘The International Human Rights Movement: Part of the Problem’ [2001] 15 *Harv. Hum. Rights J.* 101 (2002).

³ Note, however, the recent publication of Andrew Clapham’s comprehensive book *Human Rights Obligations of Non-State Actors* (2006).

²² *Supra* note 21, at 499, 503, 512, 525.

²³ *Supra* note 10, at xxi.