
Book Reviews

Kimberley N. Trapp. ***State Responsibility for International Terrorism. Problems and Prospects.*** Oxford: Oxford University Press, 2011. Pp. xvii + 295. £70. ISBN: 9780199492999.

Ten years after the terrorist attacks of 11 September 2001, the priorities of world politics now appear to shift to different topics and themes. Accordingly, it is time for international lawyers to identify whether the international fight against terrorism has an enduring legacy. The monograph by Kimberley Trapp will be of particular help for this endeavour with respect to the allocation of state responsibility for international terrorism.

In this book, terrorism is not presented as a 'new challenge' which reveals the inadequacy of existing rules. Instead, Trapp explores the potential of the existing legal rules to hold states responsible for their implication in the commission of terrorist attacks. Her main prism of analysis is the law of state responsibility; not so much in the sense that she would go through the work of the ILC and see how terrorism-related violations of international law could be addressed by the ILC Articles on State Responsibility. Rather, Trapp uses the framework of the law of state responsibility in a constructive and practice-oriented manner to establish how states can effectively be held responsible for their implication in terrorist activities. She follows a pragmatic approach which gets lost neither in discussions about the definition of terrorism nor in the ideological cleavages about the possibility of 'state terrorism'. Her definition of terrorism is drawn from existing, as she calls them, 'terrorism suppression conventions' ('TSCs') and supplemented by elements of the practice of both the UN Security Council and the UN General Assembly (at 14–23). With respect to 'state terrorism' Trapp pragmatically holds that this notion could fulfil a useful role as it highlights 'the possibility of state sponsorship and support for acts' that fall within the overall regime of international law concerning terrorism (at 24).

The road map of the study is thus to determine first what forms of state participation in terrorist activities are actually prohibited in international law, and secondly how wrongful conduct can be attributed to states (at 24–62). Thirdly, Trapp discusses obligations of prevention with respect to terrorist activities which are rooted in the various TSCs (at 63–130) before she turns to the possibilities of bringing states implicated in terrorist activities before the International Court of Justice (at 131–181). Apart from judicial avenues for the litigation of terrorism-related charges, Trapp discusses other means of holding terrorist states responsible, such as counter-measures, both under general international law and in specialized regimes such as WTO law or the law of civil aviation (at 182–229). Finally, Trapp explores the relationship between state responsibility and individual responsibility in terrorism-related contexts (at 230–263). In all of these sections, the presentation by Trapp is extremely rich in detail yet focused on the most salient legal points. The study is so dense that it would go beyond the space confines of this review to present the various arguments Trapp makes in the individual sections of her book. Nevertheless, a number of features stand out and deserve to be highlighted.

A particular benefit of the book under review is the author's talent for reframing well-known discussions about controversial aspects of international law such as the relationship between self-determination and terrorism into issues concerning the relationship between various regimes of international law (at 17). Trapp provides a very useful overview of how the due diligence obligation to prevent terrorism has begun to merge with obligations to refrain from acquiescing in or tolerating terrorism after 9/11¹ (at 80–82). In the same section she highlights

how what she calls the ‘capacity building overkill’ – an ever-increasing number of obligations imposed upon states in the field of the fight against terrorism – shifts the boundaries of acceptable state neglect in this regard. The legislative efforts of the Security Council make it ever less conceivable for states to hold the position that they were not aware of terrorist threats in the abstract. Before 9/11, states could plausibly hold the view that they would not engage in counter-terrorism activities as they would not be affected by this phenomenon. That this has changed is certainly not a new insight. What makes Trapp’s analysis so valuable, however, is that she is able to point towards certain tectonic changes in the field of international responsibility. Trapp shows that a more general shift towards obligations of prevention is taking place in international law.²

This line of analysis is carried further in Chapter 4 where Trapp discusses possible avenues for ICJ jurisdiction over terrorism-related disputes. Here she does much more than just analyse and compare the different compromissory clauses of the various TSCs. In particular, she analyses whether the approach of the ICJ in its *Genocide Convention* case,³ in which the obligation to prevent in Article 1 of the Genocide Convention was transformed into a substantive obligation of states not to engage in either genocide or the ancillary modes of participation listed in Article 3 of the Convention, may also be applied to the TSCs under analysis. Accordingly, Trapp traces the consequences of the development she has identified beforehand – the shift towards more obligations of prevention – at the level of judicial dispute settlement. She concludes, ‘A broad interpretation of the obligation to prevent in the TSCs would therefore be somewhat less convincing than that adopted in the *Genocide Convention* case, although such approaches to treaty interpretation are not beyond the Court when its jurisdiction hangs in the balance’ (at 142). Her analysis, which carefully weighs the pros and the cons of such a transformation, will be a valuable goldmine for legal advisors of states arguing either for or against state responsibility for the failure to prevent acts of international terrorism.

The approach Trapp takes in her chapter on measures which are adopted in response to international terrorism is refreshing, as she looks beyond the general law of state responsibility and considers how specific sub-systems of international law address this issue. In this respect, her approach is consistent with her focus on aspects of regime-interaction. With respect to WTO law she discusses the exception for ‘essential security interests’ in Article XXI GATT 1994 which would also be applicable to reactions by states not directly affected by the terrorist activity in question (at 214). Having recourse to the security exception would offer another benefit over countermeasures in general international law: states could adopt measures in response to terrorism irrespective of the question whether the ‘relevant terrorist incident results from the breach of an international obligation’ (at 217). According to Trapp, recourse to the security exception would also remedy the ‘at your own risk’ element which is inherent in the taking of countermeasures. This element refers to the requirement that the state which wishes to take the countermeasure needs to form an opinion on the wrongfulness of the conduct which triggers the recourse to the countermeasure. As Trapp rightly notes, it is an open question whether a WTO panel or the Appellate Body would be in a position to review the ‘necessity’ of measures taken for the protection of essential security interests under Article XXI(b)(iii) of GATT 1994. In this regard she cautions against a narrow approach with respect to necessity, as this would unduly restrict the scope of the security exception under GATT (at 217–218). At the same time she emphasizes that a particular benefit is the presence of the WTO dispute settlement mechanism which could cure many of the dangers of escalation usually associated with the taking of countermeasures. At the same time, as Trapp notes herself, the question whether measures

¹ See on these issues also the excellent monograph by T. Becker, *Terrorism and the State – Rethinking the Rules of State Responsibility* (2006).

² This trend should be seen in connection with the growing role of obligations of cooperation in the law of state responsibility: see further H.P. Aust, *Complicity and the Law of State Responsibility* (2011), at 352–365.

³ *Case Concerning the Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007 [2007] ICJ Rep 43.

adopted under the 'essential security interests' exception in the GATT are subject to scrutiny under WTO dispute settlement is a hotly contested issue which raises all kinds of issues pertaining to the question whether states are self-judging their conduct in this respect or not.⁴ Even if the organs of WTO dispute settlement exercised judicial review over this question, the reach of their review would be limited by the fact that it need not be violations of international law against which these measures are taken.

A recurring impression while reading the book is that it is a 'how to use international law to fight terrorism' manual for government advisors. Trapp writes that 'this book has mapped the mechanisms available under international law for implementing a state's responsibility with a view to laying the groundwork for successful invocations of state responsibility for international terrorism' (at 267). In most parts of the work, Trapp succeeds in implementing this programme in a nuanced and convincing manner. In some parts, however, the present reviewer feels that she has been captured by this mission statement. This becomes particularly apparent in the section on self-defence against terrorist actors. Here Trapp develops quite wide-ranging arguments which do away with the requirement of state involvement in order to use self-defence against non-state actors on the territory of a third state (at 58–60). Her analysis of state practice is not entirely convincing. In order to argue her case she relies primarily on an analysis of the Israel–Lebanon conflict in 2006 and various excursions of Turkey into Iraq in order to fight PKK forces. With respect to the former conflict, she points to a majority of states in the Security Council which allegedly supported Israel's stance that it was justified in using self-defence against Lebanon (at 55).⁵ With respect to the latter case, she invokes very limited support among states as a decisive change of the position of the international community on the matter (at 56–57). The present reviewer is not convinced that the international practice is sufficiently clear to support Trapp's argument. Just as Trapp very effectively argues away the limiting factors from the ICJ jurisprudence in the *Wall opinion*⁶ and the *Congo v. Uganda* case⁷ (at 51), it would be possible to contextualize the reaction of the international community to the conflicts she analyses so as to minimize their 'generalising effects'. With respect to the Israel–Lebanon conflict, for example, other commentators place more emphasis on the ambiguity of state reactions to the Israeli claim of self-defence. As Tom Ruys put it, 'states that recognized Israel's right of self-defence did not explain why the right was applicable in the present circumstances and refrained from elaborating on the legality of self-defence against attacks by non-state actors'.⁸ The same commentator stressed with respect to the Turkish operation against the PKK in 2007–2008 that the reactions of both the US and the EU were far from being unequivocal.⁹ It is of course a conundrum how states should defend themselves against terrorist attacks emanating from non-state actors. Whether the state of the law has generally changed remains open to doubt. While a good case can be made that the criterion of state involvement has been called into question by international practice, it appears premature to hold that it has given way to a clearly defined new rule which would allow for self-defence against non-state actors even in the absence of any form of state involvement.¹⁰

⁴ See on this issue also D. Eisenhut, 'Sovereignty, National Security and International Treaty Law – The Standard of Review of International Courts and Tribunals with Regard to "Security Exceptions"', 48 *Archiv des Völkerrechts* (2010) 431.

⁵ For a more nuanced discussion of this case see O. Corten, *The Law Against War – The Prohibition on the Use of Force in Contemporary International Law* (2010), at 463–464.

⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 8 July 2004 [2004] ICJ Rep 136.

⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005 [2005] ICJ Rep 168.

⁸ T. Ruys, 'Armed Attack' and Article 51 of the UN Charter (2010), at 455.

⁹ *Ibid.*, at 460.

¹⁰ *Ibid.*, at 486; see also Corten, *supra* note 5, at 470.

This minor point of criticism should not deflect from the fact that Kimberley Trapp has written a very important book which should set the standard for years to come for research on the international legal issues pertaining to the implication of states in terrorism-related contexts. The book is well structured, easily readable despite its richness in detail, and will also be very accessible to the practitioner. For the academic, it weaves together the various strands of the debate on state involvement in acts of international terrorism and delivers a coherent picture of the state of the law 10 years after the terrorist attacks of 9/11.

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