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## Book Reviews and Notes

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# Law and Disorder? The War on Terror and the International Legal System

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Sfida all'ordine mondiale : l'11 settembre e la risposta della comunità internazionale / Andrea de Guttry e Fabrizio Pagani. - Roma : Donzelli, [2002]. - 141 p. - (Saggine). - ISBN 88-7989-689-X

Sfida all'ordine mondiale is a well-timed book. Released only a few months after the events of 11 September, the authors describe the conduct of states and other international actors in the immediate aftermath of that tragic occurrence through the lens of international law. Pools of scholarly ink have been spilled in the last months over the various legal implications – both in domestic and international terms – of the attacks on the World Trade Center (WTC). Their legal qualification under public international and international criminal law, the legitimacy and legality of the US response in the light of the relevant provisions of *jus ad bellum* and *jus in bello* and its impact on the UN collective security system, the atypical institutional architecture of the International

Security Assistance Force have all been the object of numerous and well-articulated contributions to a literature which, due to the unprecedented nature of the situation, was rather scant. These issues find adequate space in the authors' analyses. In addition, specific parts of the book are devoted to the United Nation's attitude towards Afghanistan in the Taliban era and the political and institutional debate leading to Italy's participation in the operation Enduring Freedom.

Andrea de Guttry and Fabrizio Pagani are well placed to deal with the somewhat bewildering legal scenario that emerged after 11 September. In addition to their command of the relevant branches of the international legal system, they both have a profound knowledge of the political, institutional and operational aspects of peacekeeping operations.

As specified in the preamble, this work does not claim to be scientific *strictu sensu*. The wide span of subject matter

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covered, the lack of any pretension of dogmatic reconstruction and the absence of in-depth legal analysis are spelled out from the outset. The book presents itself as a case study endeavouring to decipher through the grid of the applicable law – and international law, in particular – the events set in motion by the 11 September attacks. The law in force before 9/11 has been stretched, deformed and finally reshaped by the ensuing developments. However, in the authors' view, a juridical appraisal conducted by means of the relevant existing legal institutions and instruments still represents an essential tool for study of the international community's response.

Chapter 1 tackles the question of the legal qualification of the attacks. Their characterisation as acts of terrorism under the relevant treaty law is accepted as self-evident. Similarly, there seems to be little doubt that the attacks constitute a crime against humanity. This is inferred from a parallel analysis of Article 7 of the Statute of the International Criminal Court as well as from a jurisprudential reconstruction of the customary definition of crimes against humanity, based on the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and on the UN International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind. Labelling the events as an armed attack appears to be more problematic. Firstly, the notion of indirect aggression is expounded on by going over UNGA Resolution 3314 defining aggression and the World Court's jurisprudence in the Nicaragua case. On these grounds, the authors

contend that in view of the magnitude of the events and taking into consideration the practice of states and intergovernmental organisations in their aftermath, the legal notion of armed attack is probably expanding. Correspondingly, there has possibly been a widening of the right to self-defence which would now encompass the ability to react using military force to an attack carried out by a non-state actor availing itself of the support of a third state. The exact nature and extent of this support, however, requires further legal clarification and appears to be a question *de jure condendo*.

Chapter 2 depicts the various steps taken by the UN system to address the Afghan problem from the early nineties to the adoption of UNSC Resolution 1377 in November 2001. It clearly illustrates how the increasingly restrictive sanctions regime put in place against the Taliban government by successive Security Council resolutions was rendered *de facto* ineffective by the predominantly uncooperative attitude displayed by the member states. This point is emphasised by comparing the degree of implementation of the relevant UNSC resolutions adopted after 11 September to the virtual inertia characterising the situation prior to that time. Thus one cannot but share the authors' view that the establishment of highly sophisticated control mechanisms aimed at ensuring and supervising respect for Security Council resolutions may be deprived of any effectiveness if not supported by the states' political will to honour their legal commitments.

Chapter 3 deals with operation Enduring Freedom's consistency with

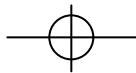
the requirements of the law on the use of force and of international humanitarian law (IHL). The US-led intervention's conformity with existing rules regarding the right to self-defence is thoroughly examined. The customary principles of immediacy, necessity and proportionality are aptly recalled, as are the relevant conventional limitations.

As for the applicability of IHL, the authors stick to the traditional division between international and non-international armed conflict. They imply that the hostilities between the US-led coalition and the Taliban and between the latter and the Northern Alliance ought to have been regulated by two different sets of rules. In the first case, the four Geneva Conventions and their First Additional Protocol (to the extent to which it reflects customary law) should have been respected, while the internal conflict between the Taliban and the armed groups opposing them should have been fought in accordance with Common Article 3 to the Conventions and their Second Additional Protocol. While part of the literature still supports this stance, reference should probably have been made to the relevant ICTY case law on the possibility that an internal conflict may be "internationalised" under certain conditions. The 1999 Tadic Judgement (Appeals Chamber), the 2000 Blaskic Judgement and the 2001 Kordic & Cerkez Judgement (both Trial Chamber) all envisage this possibility. In the latter two, direct armed intervention by a foreign state is deemed sufficient to internationalise an otherwise non-international armed conflict. The Afghan scenario after 7 October

arguably satisfies this criterion. The legal implication is that the full range of IHL regulating international armed conflicts was applicable to the hostilities between the Taliban and the Northern Alliance.

Adequate space is devoted to a review of the lawfulness of means and methods of warfare employed during the bombing campaign. Contrary to what happened in the 1991 Gulf war and in Kosovo, this time the selection of targets attracted less criticism, with the notable exception of the Al-Jazeera TV Station in Kabul. However, a finger is once again pointed at the policy adopted by the US and its allies to minimise risks for their pilots. They were allowed to drop bombs from considerable altitudes at which they were out of the range of most hand-held surface-to-air missiles and anti-aircraft artillery. As a consequence, the degree of accuracy of the bombings was lowered to a level possibly inconsistent with the relevant rules on precautions to be taken in the conduct of military operations. This "zero-casualty warfare" approach has no basis in current IHL, while it detrimentally affects correct application of the principle of distinction between civilian and military objectives. The question is raised whether additional legal restraints on those powers enjoying overwhelming technological superiority are needed and whether this would be compatible with the fundamental principle of equality of legal obligations between belligerents.

The anomalous situation of the apprehended Al-Qaeda and Taliban fighters detained in the Guantanamo Bay camps is also analysed. After a short



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survey of the pertinent provisions of the III Geneva Convention, the authors submit that, by denying a priori POW status to the detainees, the US is flouting its obligation to have their status determined by a competent tribunal. On this point, reference to the relevant provisions of international human rights law could have been useful for a full understanding of the legal protection to which the detainees are entitled, especially considering that the Inter-American Commission has already been seized with the case.

Chapter 4 describes the diplomatic steps that led to the conclusion of the Bonn Agreement and to the establishment of the International Security Assistance Force (ISAF). It is contended that the central role assigned the UN in the negotiation process and in the transitional phase towards reinstatement of a full-fledged democracy was instrumental in overcoming the mutual distrust of the various Afghan actors anxious to play a role in the confused post-war scenario.

The unusual legal measures devised to regulate the coexistence of ISAF with the coalition forces still acting under the

Enduring Freedom hat are also the object of thorough scrutiny based on a comparison with previous UN practice in similar circumstances.

Chapter 5 provides interesting insight into the political and institutional debate that preceded Italy's participation in Enduring Freedom and gives an account of the domestic legal framework pertaining to Italian involvement in peace-support and peace-enforcement operations.

Chapter 6 is a sort of a "lessons learned" section setting out the future prospects for Afghanistan along with possible relevant developments in international law.

The authors endeavour to be fair and comprehensive in their description of the events and to provide an even-handed portrayal of the legal implications without indulging in the temptation to write too "technical" a treatise. While being direct and pleasantly readable, *Sfida all'ordine mondiale* also represents a very useful tool for all those – pundits or laymen – who wish to acquire an overall legal perspective of the events stemming from the attacks on the WTC.

