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Manfred Nowak, Anne Charbord, eds., Using Human Rights to Counter Terrorism, Edward Elgar Publishing 2018, 371 pages¹

Keywords: book review; terrorism; counter-terrorism measures; international human rights law

There are names in academia that always attract attention. This is because their holders not only represent the highest expertise in their given field but also because they are always able to add value to the scholarly discourse. One of such names in international human rights law is definitely Manfred Nowak – the celebrated professor of law at the University of Vienna but, foremostly, a human rights practitioner holding in the past, as an independent expert, many posts in the UN human rights system and beyond. That is why the book *Using Human Rights to Counter Terrorism*, co-edited by Manfred Nowak together with Anne Charbord, draws attention from the outset despite the fact that it is yet another of hundreds of books on terrorism and human rights that have been published in the aftermath of the attacks of 11.9.2001.

Indeed, the contributors of the book under review, which was published in 2018 as the fifth volume in the *Elgar Studies in Human Rights* series, are its great advantage. All of the co-authors are international lawyers with vast practical experience in human rights, and include three

¹ The eBook version is available from eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

UN Special Rapporteurs on the promotion and protection of human rights while countering terrorism subsequent to the post's establishment in 2005 (Martin Scheinin, 2005-2011; Ben Emmersson, 2011-2017; and Fionnuala Ní Aoláin, 2017-present), as well as their legal adviser (Anne Charbord). The book presents an attractive approach that might be labelled as 'human rights in action' and offers valuable insight from within the UN human rights system.

The book's starting point does not seem especially original. As the co-editors point out, it is obvious that, despite vast counter-terrorism measures having been adopted internationally and domestically since 2001, the threat of terrorism is nowadays greater than ever. What is more, the measures taken often cause serious human rights concerns whereas, as Nowak and Charbord put it: 'from a legal perspective [...] the role of respect for human rights in any effective counter-terrorism strategy is central' (p. 2). Here, the book offers an intriguing perspective. Instead of rather trivialized and hackneyed arguments on the dichotomy between liberty and security and dogmatic arguments on the necessity to comply with international law obligations, the book is based on the approach claiming (the) 'importance of respecting human rights as an essential component of an effective counter-terrorism strategy' and that 'respect for human rights does not hinder the fight against terrorism; it actually assists it from a moral, legal, judicial and operational perspective' (p. 3). Thus, the approach taken is aimed at concerns that human rights guarantees are serious obstacles for effective security policies. Also, it is in line with the approach taken in the United Nations Global Counter-Terrorism Strategy adopted by the UN General Assembly in 2006, underscoring that 'effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing' (UN Doc. A/RES/60/288). This approach has been advocated also by other UN institutions. Because of the practical experience of the co-authors, the framework of this approach consists of a decent critical overview of the institutional developments at an international level that precedes some future-oriented suggestions.

The book consists of eight chapters out of which the first one – co-written by the co-editors and entitled 'Key trends in the fight against terrorism and key aspects of international human rights law' – forms the in-depth in form and substance introductory overview of the policies taken, followed by seven chapters aimed at more particular aspects. What is definitely absent in the book is any kind of definitive conclusion. This *prima facie* impression gathered by a quick scan of the Table of Contents

is only strongly affirmed after reading the entire book. To leave a reader alone with the arguments delivered may be a thought-provoking exercise, but it lessens the impact of its message and impairs the book.

Chapter One by Nowak and Charbord provides for an extensive general outline of counter-terrorism measures in their legal diversity. The novelty of this part of the book is limited. Yet it may be very useful for didactic purposes and serves as a good introduction to the subsequent chapters. Although the scope of the first chapter is broad and addresses very detailed and multifaceted aspects of counter-terrorism developments, one important standpoint seems to be missing. It is the *jus ad bellum* perspective and, especially, the well-known and heated debate concerning self-defence in the fight against terrorism. Contrary to appearances, this aspect is also strongly linked with human rights issues. It is especially striking in the context of the reference to the use of war paradigm as (in-) famously used by the US, which is exclusively analysed from the international humanitarian law (IHL) and international human rights law (IHRL) perspectives. The chapter ends with the strong claim that the right framework we need to counter terrorism effectively is 'counter-terrorism and human rights' instead of 'counter-terrorism against human rights,' as it is still perceived in many States.

The following three chapters are written by the three UN Special Rapporteurs on the promotion and protection of human rights while countering terrorism and, as such, they present – in extensive fashion – the actions and approaches of this institution.

The Chapter Two is entitled 'Impact of post-9/11 counter-terrorism measures on all human rights' and it is mainly aimed at the critically assessed UN Security Council (UNSC) counter-terrorism framework. The critical approach taken should not surprise a reader as the chapter is written by Martin Scheinin and based on his achievements as the first UN Special Rapporteur. Scheinin starts with a broad critique of the 'legislative powers' having been acquired by UNSC Resolution 1373 (2001) and openly claims that the UNSC has been 'acting ultra vires, exceeding the powers granted to it in the UN Charter'. Scheinin points out that the determination of international terrorism as a threat to international peace and security, empowered the UNSC to adopt most of the counter-terrorism resolutions under Chapter VII of the UN Charter that changed the very paradigm of counter-terrorism under international law. In consequence, States might have claimed that 'counter-terrorism obligations would enjoy primacy in respect of human rights obligations, pursuant to Article 103 of the UN Charter' (p. 93). Obviously, this approach is vulnerable to the polemics that

the doctrine has occasioned. However, the chapter offers an interesting sketch of actions taken by the first Special Rapporteur (including his proposal on the definition of terrorism presented as a model in 2010) in the mostly critical approach to that what was metaphorically referred to in the chapter's conclusion as 'a long shadow' of the terrorists attacks of 9/11.

In his chapter, Ben Emmerson identifies new challenges for compliance with IHRL that contemporary counter-terrorism measures lay down. They include the use of drones in counter-terrorism operations; mass digital surveillance; foreign terrorist fighters; countering the financing of terrorism with its impact on civil society; measures affecting the human rights of migrants; and measures countering and preventing violent extremism. The chapter presents useful overviews of the mentioned problems that may be taken as starting points for further analysis. As far as foreign anti-terrorist fighters linked with countering violent extremism and intelligence-gathering problems are concerned, they are specifically approached in the book in Chapters Five and Six respectively. Yet, the general message of Emmerson's chapter is rather pessimistic, as he concludes that 'in a continuing alarming development, a growing number of States, under the pretext of national security concerns, are abusing counter-terrorism measures to restrict civil society and stifle legitimate opposition' (p. 165).

A somewhat different approach than in the previous chapters is taken by Fionnuala Ní Aoláin. Instead of concentrating on her actions as UN Special Rapporteur, the author – presenting herself as a feminist national security scholar – delivers an essay addressing the conditions conducive to terrorism. Indeed, effectively defeating international terrorism remains impossible without identification and elimination of its causes. Yet, this task seems, in its complexity, as much desirable as hardly workable. Nevertheless, Ní Aoláin's text definitely contributes to a better understanding of this challenging phenomenon and offers an original perspective thereof.

Chapter Five by Lisa Ginsborg is devoted to the problem of foreign terrorist fighters and human rights. As the author herself admits, the problem is not new. However, what is new is the significantly enlarged scale of this phenomenon, as especially emerged in the second decade of the twenty-first century in the context of the armed conflict in Syria. As such, the problem was specifically addressed by the UNSC in Resolution 2178 (2014) – another example of the 'legislative type' of UNSC activity aimed at terrorism. Ginsborg names this Chapter VII resolution 'as momentous as the Security Council's reaction to 9/11 through resolution 1373' (p. 197) because it more strongly regards human rights and international law

obligations and offers new approach in countering violent extremism in order to prevent terrorism. Yet, the Chapter presents a comprehensive, and rather critical, analysis of the resolution and identifies human rights concerns that emerge from it, starting with the consequences of the constant failure to define terrorism in the Chapter VII legislative type resolution.

The subsequent Chapter focuses on the human rights context of intelligence gathering and was co-written by Richard Barrett and Tom Parker who both had vast practical experience in this regard, including their work for the British Security Service (MI5). It is obvious that surveillance and intelligence gathering play a pivotal role in countering terrorism. The authors claim that the main challenge in this respect is to keep the right balance between the necessary discretion of the authorities' activities and the equally necessary control under rule of law and human rights framework. As the final sentence of the chapter vibrantly states: 'An intelligence service that loses touch with that reality may ultimately pose a bigger threat to the society it is seeking to protect, than any terrorist group or foreign power' (p. 264). One of the aspects referred to by the authors was the well-known example of the so-called 'enhanced interrogation techniques' as introduced by the CIA in the aftermath of 9/11 attacks. They rightly claim that the US authorities 'have gained little intelligence and lost much credibility by doing so' (p. 247). What is more, the possibility of the allied States to be internationally responsible for illegal activities of the US authorities – as shown the European Court of Human Rights case law on the CIA black sites in some European States including Poland – might have had a chilling effect for international intelligence co-operation.

The chapter by Ulrich Garms is premised upon the claim that 'civilian courts can effectively and fairly try persons accused of having planned and carried out heinous acts of terrorism' and that 'respect for human rights from the early stages of the investigation is often a precondition for fair and successful trials' (p. 266). The author, who is an official of the UN Office on Drugs and Crime providing States with technical assistance to bring terrorists to justice, strongly advocates that what is needed is not only rule-of-law based criminal justice but also 'preventive criminal strategy against terrorism' (p. 267). The chapter presents the approaches taken in this respect in selected States and as promoted by international organisations including the UN, the Council of Europe and the European Union. The author openly admits that from the human rights perspective some side effects of the preventive criminal strategy against terrorism are impossible to avoid and may require some fair trial safeguards limitations,

especially as special investigation techniques (e.g. phone-tapping; obtaining call record data and metadata of e-mail communication) and intelligence sources are concerned. Notwithstanding, he claims that strict identification of side effects is necessary for minimalization of any negative human rights consequences and for keeping them under control.

In the final chapter, Lisa N. Oldring discusses the problems of counter-terrorism accountability including the accountability of government agents for human rights violations committed in the context of counter-terrorism. The author persuasively underscores the duty of States to ensure individual criminal accountability for serious violations of human rights in the context of counter-terrorism as 'a matter of moral effectiveness as well as legal duty' (p. 303). Indeed, the lack of accountability in this respect may be conducive to terrorism.

The authors of the book claim that human rights protection should not be perceived as an impediment in countering terrorism. On the contrary, upholding human rights is a condition *sine qua non* of effective counter-terrorism. Indeed, it is difficult not to sympathise with such a message. Nonetheless it is rather precarious, as some chapters themselves prove in their portrayals of inevitable tensions between human rights guarantees and counter-terrorism measures. International and domestic human rights guarantees definitely limit the scope of measures States use to address the threat of terrorism and, as such, impact the effectiveness of such actions. Yet, this is a price we have to pay, and it is definitely worth paying. Otherwise, we are about to deny the very values of the international legal culture that have been the fundament of IHRL for more than 70 years now. Yet, the limits should not be allowed to render us helpless in our fight against the terrorism that itself constitutes the most basic contravention of human rights. This unstable balancing act continues, and *Using Human Rights to Counter Terrorism* offers valuable and multifaceted doctrinal, as well as practical, perspectives on the process.