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JEAN-CHRISTOPHE MARTIN, *LES RÈGLES INTERNATIONALES RELATIVES À LA LUTTE CONTRE LE TERRORISME*, (BRUXELLES: BRUYLANT, 2006)

Par Kimberley N. Trapp[*]

Les règles internationales relatives à la lutte contre le terrorisme by Jean-Christophe Martin[1] is a comprehensive survey of the rules of international law applicable in the counter-terrorism context. As the fragmentation of international law continues apace—and specialization becomes ever more characteristic of international legal academia—we might be tempted to ask whether there is an emerging "international law of terrorism."[2] Dr. Martin's study definitively answers that question. A careful examination of its table of contents reveals that terrorism is a field to which general international law applies–not a field of international law onto itself.

In this regard, the scope and breadth of Dr. Martin's study are impressive, making it a good reference tool for those interested in pursuing the topic further. The number of subject matters covered, ranging from the right of peoples to self-determination, reservations to international treaties, international criminal jurisdiction, international humanitarian law, mutual judicial assistance, police cooperation, State responsibility, the prohibition of the use of force, the right to use force in self-defence, and the role of the Security Council (SC) in the maintenance of international peace and security, might have resulted in a fairly cursory examination of each. Instead, Dr. Martin's study is reasonably rich in details and highlights the salient features of debates on which much ink has been spilled, even if he is cautious in reaching firm conclusions on questions of controversy.

Dr. Martin is currently serving as the maître de conférences en droit public at the Université de Provence – Aix Marseille I, in its Centre d'Études et de Recherches Internationales et Communautaires. He received his doctorate in 2005 from the Faculté de droit et de sciences politiques, at the Université Paul Cézanne, Aix-Marseille III. His doctoral thesis, published as the book under review, received the Lauréat du Prix de Droit international public from the Faculté de droit et de sciences politiques, awarded to the best thesis on public international law.

Les règles internationales relatives à la lutte contre le terrorisme is divided into two parts, with a preliminary chapter addressing in great detail the definition of terrorism. Part One of Dr. Martin's study explores the international legal framework of terrorism suppression, in particular the institutional and *ad hoc* arrangements

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[1] Jean-Christophe Martin, *Les règles internationales relatives à la lutte contre le terrorisme* (Bruxelles: Bruylant, 2006).

[2] See Rosalyn Higgins, "The General International Law of Terrorism", in Higgins & Flory, eds., *Terrorism and International Law*, (London: Routledge, 1997) at 13-14 on this question, arguing that terrorism is not a discrete topic of international law with its own substantive legal norms, but a contemporary phenomenon to which international law applies.

dedicated to the arrest, prosecution and punishment of terrorist criminals. Title 1 of Part One (Chapters 1 & 2) focuses on international penal suppression, while Title II of Part One (Chapters 3 & 4) considers alternative modes of suppression.

Chapter 1 of Dr. Martin's study examines the set of conventional suppression obligations which need to be operationalized within States' domestic legal systems. In particular, the obligations to criminalize terrorist conduct falling within the scope of the relevant Terrorism Suppression Conventions (TSCs);[3] to impose appropriate penalties; and to establish jurisdiction over the defined terrorist crimes is assessed. In this regard, Dr. Martin emphasizes that the crimes defined in the TSCs are not crimes under international law, as is the case for genocide or apartheid. Instead, he characterizes the TSCs as an indirect application of international criminal law, in that prosecution and punishment are carried out within the framework of each State Party`s domestic law.

Dr. Martin also highlights Security Council Resolutions adopted under Chapter VII as a source of the obligation to criminalize terrorist crimes. He remarks that, with the adoption of Resolution 1373, the SC entered into the business of legislating, but only addresses the debate on the legitimacy of the SC`s novel exercise of its Chapter VII powers briefly. Dr. Martin concludes by cautiously heralding the international community's acceptance of SC legislative power as signalling an emerging constitutional practice within the UN and even a change in the foundations of the international legal order, such that SC resolutions are potentially a new source of international law, alongside treaties and custom (but without the limitations of either). His analysis on this point is as brief as his conclusion is controversial.

In Chapter 2, Dr. Martin studies the broader set of obligations both in the TSCs and general international law which support the eventual prosecution and punishment of terrorist crimes, including extradition, police cooperation and mutual judicial assistance. He gives a brief but concise summary of the conventional rules and exceptions generally applicable to extradition, in particular the rules of speciality and double criminality; the political offence exception; and the non-extradition of nationals. Dr. Martin emphasizes that there is no priority given to extradition in the *aut dedere aut judicare* formula of the TSCs and that extradition remains subject to conditions elaborated in State Parties' domestic law. Finally, Dr. Martin gives a detailed account of the arrangements between States for police cooperation, some of which have evolved specifically in the counter-terrorism blitz following September

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[3] Dr. Martin correctly notes that the relevant set of criminal suppression conventions are characterized as *terrorism* suppression conventions, but that many of the crimes covered therein could equally be committed for private, non-terrorist, ends. Nevertheless, universal conventions require states to criminalize, punish, and prevent the following 'terrorist' crimes: aerial hijacking; crimes against the safety of civil aviation; crimes against internationally protected persons; hostage-taking; violence at international airports; crimes against the safety of maritime navigation and fixed platforms; terrorist bombings; terrorist financing and acts of nuclear terrorism. See *International Instruments Related to the Prevention and Suppression of International Terrorism*, 2nd ed. (New York: United Nations, 2004). Collectively (along with conventions defining terrorism generally adopted under the auspices of regional organizations), these conventions will be referred to as the "**Terrorism Suppression Conventions**" or the "**TSCs**".

11th, and some of more general application, including counter-terrorism efforts by INTERPOL and EUROPOL. The literature rarely addresses the particularities of police cooperation or mutual judicial assistance in the counter-terrorism context. As a result, Dr. Martin's study relies heavily on primary sources and is particularly useful given his careful research and analysis.

The Second Title of the First Part of Dr. Martin's study looks at alternative means of suppressing international terrorism, and divides the sphere of available measures into those that are 'juridically founded' and those that are 'problematic'. In Chapter 3, on juridically founded modalities of suppression, Dr. Martin explores the cases in which a State`s counter-terrorism cooperation was compelled by SC Chapter VII action. He describes *sui generis* criminal processes in the counter-terrorism context, providing a thorough account of the *Lockerbie* trial by a Scottish Court sitting in The Hague, and the internationalisation of the enquiry into former Lebanese Prime Minister Harriri's assassination.

Dr. Martin then reviews the failed efforts to establish an international criminal jurisdiction for terrorism prosecutions and explores the alternative of prosecuting terrorism as a war crime or crime against humanity before the International Criminal Court (ICC). He argues that terrorist crimes falling within the scope of the 1949 Geneva Conventions committed by non-combatants would amount to war crimes subject to the exercise of universal jurisdiction, so long as those crimes were of a sufficient gravity and had some connection to the armed conflict.[4]

Dr. Martin also adopts H.-P. Gasser's position that

> *[l]e droit international humanitaire n'impose aucune obligation directe aux individus qui ne représentent pas l'État d'une façon ou d'une autre. Mais les États sont tenus de promulguer une législation nationale pertinente pour garantir le respect des règles du droit international public.*[5]

In the context of a discussion on whether acts of terrorism by non-combatants can be prosecuted as war crimes, this Statement indicates some confusion between the criminal responsibility of individuals acting on behalf of a State for war crimes, and States' more general obligations to prevent acts of terrorism (including through the adoption of appropriate criminal legislation applicable both in times of war and peace).

Dr. Martin's analysis of terrorism as a crime against humanity is more convincing as it is supported textually by the Statutes of the *ad hoc* International Criminal Tribunals and that of the ICC. His conclusion that terrorism will sometimes satisfy the elements of a crime against humanity, but should not lightly be

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4 Martin, *supra* note 1 at 249.
5 *Ibid.* at 249.

characterised as such,[6] is more nuanced than his conclusion regarding war crimes and is more compelling as a result.

Chapter 4 addresses 'problematic' means of suppressing international terrorism, including those involving a use of force in foreign territory. Dr. Martin has a particularly clear way of categorizing different uses of force in the counter-terrorism context. He first examines State practice in regard to the extra-territorial apprehension or assassination of terrorists. Dr. Martin's assessment of jurisprudence touching on a court's competence to judge an accused whose presence has been secured in violation of international law is clear and insightful. His analysis, drawing on an analogy to the principle of speciality in extradition law, and taking account of the dangers inherent in such a practice for international legal order, concludes that courts should refuse to exercise their jurisdiction over persons whose presence is secured in violation of international law.[7]

Finally, Dr. Martin engages the very difficult legal and political issues raised by recourse to force in foreign territory against non-State terrorist actors. He tackles with frankness some of the more peripheral arguments which have emerged to justify such uses of force, and addresses the more compelling justifications related to the right of self-defence with a pragmatism that is refreshing. His synthesis of the doctrinal debate on the scope of the prohibition of the use of force, the self-defence exception, and their application in the terrorism context, is succinct and frames his own analysis well. He hesitates, however, in drawing any hard and fast conclusions from recent State practice, and offers instead some tentative, yet insightful, thoughts on the interaction between State sovereignty, the prohibition of the use of force, and the security interests of State victims of terrorist attacks within the framework of existing international law.

The Second Part of Dr. Martin`s study focuses on the international legal framework supporting the prevention of international terrorism. Dr. Martin views the objects of prevention through a public/private prism. In Title I (Chapters 5 & 6), he examines the framework of prevention aimed at private terrorist conduct. In Title II (Chapters 7 & 8), Dr. Martin considers the legal tools available to the international community in preventing, or at least addressing, State involvement in terrorism.

In Chapter 5, Dr. Martin offers a careful textual analysis of the general obligation of prevention set forth in the Terrorism Suppression Conventions and SC Resolution 1373. He notes an evolution in the language and culture of prevention over the last 35 years, and highlights the increased specificity with which the obligation of prevention is approached. While the enforcement of prevention obligations is problematic in the international legal system, the SC's Counter Terrorism Committee and international and regional organizations offer technical and counter-terrorism capacity building support. Dr. Martin reviews the parameters of their practice with a view to evaluating the effectiveness of the institutional framework of terrorism prevention. In Chapter 6, Dr. Martin provides a detailed overview of the international

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6 *Ibid*, at 260.
7 *Ibid*. at 286.

legal measures which have developed to prevent terrorists from having access to financing and weapons of mass destruction.

In Title II of the Second Part, Dr. Martin examines the international community's reaction to State sponsorship or support for terrorism. Chapter 7 is divided into two sections: the source and nature of the prohibition of sponsorship or support for terrorism in international law; and the regime of State responsibility brought to bear on violations thereof. Dr. Martin looks to customary international law in analysing a State's obligation to refrain from sponsoring or supporting terrorism, in particular as instantiations of the general prohibition of the use of force and the principle of non-intervention.

Given the dearth of judicial decisions in which States have been held responsible for supporting terrorism, Dr. Martin offers an interesting analysis of alternative mechanisms for holding States to account which avoids the 'mis en jeu' of formal State responsibility, while sharing the reparative aims of that responsibility. He explores Libya's use of a non-governmental foundation to indemnify victims of terrorist attacks *ex gratia*,[8] and the US lawsuits under the Foreign Sovereign Immunities Act against States listed as sponsors of terrorism by the State Department.[9] His appreciation of these alternatives, which exist outside the four corners of the International Law Commission's Articles on State Responsibility, is original but manifests some scepticism as to the effective role of State responsibility in the 'war on terror.'

Dr. Martin finishes the chapter by exploring the practice of retorsion and counter-measures against States supporting or sponsoring terrorism. He evaluates both with a view to determining the space they occupy in general international law (and particularly the law of State responsibility) and their effectiveness in addressing State sponsorship or support for terrorism.

In his final chapter (8), Dr. Martin analyses the role of the United Nations in maintaining international peace and security as it has been applied in the counter-terrorism context. He first examines multilateral sanctions, in particular the SC's use of Article 41 sanctions against Libya, Sudan and the Taliban. Dr. Martin highlights that the Council's powers of appreciation in this regard are extensive. He raises well founded concerns regarding the legitimacy of the sanctions regime as applied by the SC, given the indeterminate (and often fluid) nature of the obligations imposed on the targeted States, and the unprincipled way in which the lifting of sanctions has been approached.

Finally, Dr. Martin measures the effectiveness of the sanctions adopted by the SC in the counter-terrorism context. He takes a somewhat extra-legal approach by highlighting the breaches in international solidarity occasioned by the SC's sanctions against Libya; the unintended consequence of fostering support for terrorism targeting the States perceived to be behind unjust sanctions regimes; and the arbitrary 'mise en

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8 *Ibid*. at 470-474.
9 *Ibid.* at 475-481.

oeuvre' of the SC's discretion to determine threats to international peace and security motivated by political interests.[10]

Section 2 of Chapter 8 revisits the issue of recourse to armed force, but this time *against a State* in response to its sponsorship or support for terrorism (to be distinguished from a recourse to armed force against non-State terrorist actors, examined in Chapter 4). The SC has yet to authorise a use of force under Chapter VII in response to a terrorist attack or a State's sponsorship or support for terrorism. Therefore, Dr. Martin can do little more than note that such an authorisation would indeed be a legitimate exercise of Chapter VII powers, and lament the SC's failure to act in the wake of September 11th, leaving the U.S. to act unilaterally.[11]

Dr. Martin is therefore left to consider State practice in using defensive force against State sponsors or supporters of terrorism. Given that force is occasionally targeted at the State itself (in the place of or in addition to the non-State terrorist actors operating from the State's territory), Dr. Martin looks at the bases for attributing terrorist conduct to a State, and quickly reviews the *Nicaragua* "effective control" vs. *Tadic* "overall control" debate. His approach is uncritical, and he does not address arguments that an attribution based analysis, and the *Nicaragua* attribution test, are ill suited to the terrorism context (in particular as it regards the right to use force in self-defence).[12]

Finally, Dr. Martin examines the arguments invoked to justify pre-emptive self-defence against terrorism, and gives a careful summary of the doctrinal debate. His own conclusions in this regard, supporting a restrictive reading of Article 51 of the UN Charter and refusing to see in the international community's support for the operation in Afghanistan following the September 11th attacks any changes in the *lex lata*, are briefly but well argued.[13]

Dr. Martin's study on the rules of international law applicable in the counter-terrorism context focuses on the international legal framework as it exists today. The purpose of the study is not to advance some new theory of suppression or prevention, nor is it Dr. Martin's objective to re-write general principles of international law in order to better respond to the increasing threat posed by terrorism. Instead, Dr. Martin's book is a guide to all that is terrorism related in international law.[14] Many (if not most) of the fields of international law broached by Dr. Martin have been the subject of discreet studies on terrorism, either in journal articles or monographs. Few studies on terrorism, however, cover the field of applicable principles of international law – and certainly none to date in French.[15]

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10 *Ibid.* at 519-530.

11 *Ibid.* at 532.

12 See for instance; Tal Becker, *Terrorism and the State; Rethinking the Rules of State Responsibility* (Portland: Hart Publishing, 2006).

13 Martin, *supra* note 1 at 549-553.

14 Dr. Martin expressly excludes the topics of State terrorism and the human rights implications of counter-terror operations and Security Council action from his study. Martin, *supra* note 1, at 22-27; 30.

15 In English, see Helen Duffy, *The "War on Terror" and the Framework of International Law* (Cambridge: CUP, 2005), which similarly catalogues the subject matters of international law as they

Dr. Martin's comprehensive approach serves to highlight the flexibility of the international legal system as it responds to new challenges, even while acknowledging the limitations of de-centralisation and the potential for abuse inherent in adapting existing legal rules to unanticipated threats. In this regard, Dr. Martin concludes that cardinal principles of international law, particularly those relevant to the use of force, have been stretched and distorted to respond to terrorist threats. Dr. Martin's general approach to the application of international law in the counter-terrorism context, however, is not especially critical. Instead, his study is about taking stock—and even if too often erring on the side of caution in its conclusions—his book serves as a useful survey of the international community's legal efforts to combat terrorism.

apply to the 'war on terror'. Her approach is both less comprehensive (in that it does not cover all the subject areas covered by Dr. Martin) and more comprehensive (in that it addresses the human rights implications of the 'war on terror') than Dr. Martin's study.