Helen Duffy's comprehensive analysis of international law and practice in relation to terrorism and counter-terrorism provides an essential framework for analyzing the legislative, policy and judicial measures that have proliferated around the globe since 9/11. Among the many issues addressed in this fully revised second edition are: the lethal use of force against alleged terrorists and the death of bin Laden; the role of the Security Council, including sanctions; extraordinary rendition and its consequences; the quest for reparations and accountability; the expansive ‘preventive’ role of criminal law; exceptionalist ‘terrorism’ regimes and the creeping reach of the notions of ‘terrorism’, support or association. It considers global anti-terrorism practice, and political and judicial responses, alongside a dynamic and ever more detailed international legal framework. The book reflects on the overarching characteristics of the ‘war on terror’ and its longer-term implications for the legal framework and the rule of law.

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For Maia
and in loving memory of my wee brother Paul Duffy
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Much has changed since 2004, when the first edition of this book was completed. Global anti-terrorism practice has ballooned. Legal, policy and structural developments on the national, regional and international levels have created an elaborate architecture around security and counter-terrorism, while at times challenging fundamental rules of the international legal order. In turn, political, judicial and other responses to counter-terrorism measures have emerged, of potentially critical significance to the long-term implications of the war on terror. While the legal framework may not have undergone the transformative shift some heralded post-9/11, one result is undoubtedly a more elaborate body of law governing terrorism and counter-terrorism. This legal framework sits alongside a vastly expanded body of practice, which continues to grow and to spread its reach, assuming new forms and embracing broader ranges of behaviour under the banner of security and counter-terrorism. Given the nature and extent of developments in this area, this edition inevitably varies from the first edition in significant respects.

The book maintains as its key objective the identification and exploration of the current international legal framework governing terrorism and counter-terrorism. Many years into post 9/11 counter-terrorism practice, it takes into account how, in a particularly dynamic field of practice, the legal framework has itself been shaped and influenced by post-9/11 practice. Alongside consideration of the legal framework, it highlights and illustrates counter-terrorism practices that have unfolded, and issues of international legality that have arisen, during the thirteen years of practice since 9/11. Some of this practice represents clear violation – or perhaps the marginalisation – of the legal framework explained in the book; some raises novel legal questions to be grappled with regarding the application of the law or whether there are gaps or tensions in the framework itself.

Many of the most emblematic of these ‘war on terror’ policies and practices have only emerged or come fully into the public domain since
the first edition. The lethal use of force by ‘drones’, the systematic and coordinated ‘extraordinary rendition’ programme, the use of private actors (such as private security companies) in counter-terrorism, pervasive surveillance programmes and the regimes of listing and delisting of individuals and groups, are among the most notorious of these issues. Other practices have swept the globe further beneath the radar but raise just as important international legal issues, such as the ever expanding use of criminal law ‘preventively’ to punish persons ‘associated’ with or deemed to ‘support’ broadly defined ‘terrorism’ and related offences.

Along the way, the ‘war on terror’ epithet has been dropped. Yet, as the practice discussed in the book shows, the ‘war’ – or perhaps the ‘law of the enemy’ mindset associated with it – is very much alive and growing. This is demonstrated not only in the policies and practice of the US administration that applied and lifted the label, but also in the evolving practices of the states around the globe highlighted in the study.

The updated practice highlighted in each of the core chapters is supplemented by several new chapters. Two new case studies address the practices of extraordinary rendition and the killing of Osama bin Laden, complementing an updated chapter on the ongoing situation in Guantánamo Bay. Each of these chapters explores factual scenarios in more depth than would be possible within the main chapters, and considers the multiple overlapping laws applicable to them as well as the intersections between the relevant areas of international law. As noted above, a critical dimension of unfolding practice at this stage consists of responses and reactions to anti-terrorism practices that have violated or disregarded the international legal framework. As one major component of this reaction to the war on terror over time has been judicial, an additional new chapter considers the role of the judiciary in responding to human rights violations in the war on terror. This forms part of, and feeds into, consideration of the ultimate impact of post 9/11 counter-terrorism practice on the international legal framework.

Important developments continue to unfold daily. The detailed US Senate Intelligence report into CIA ‘brutality’, partially released at the end of 2014 as this book was in production, could not be reflected. The report confirms and elaborates on the material on extraordinary rendition in Chapter 10. It has contributed to the momentum around calls for greater truth and accountability for ‘war on terror’ violations discussed throughout the book. The horrific Paris terrorist attacks of January 2015 and unfolding reactions, as the book went to print, are the latest reminder of the enormity of the challenges we will continue to face.
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This book grew from a paper I wrote for INTERIGHTS shortly after the September 11 attacks. The paper was motivated by the apparent marginalisation of the issue of legality in public discourse on responses to those attacks, and the surprising dearth of legal material published in their immediate aftermath. In the void where there should have been debate on which responses would serve the interests of international justice, peace, security and the rule of law, the confusion and need for clarification of legal issues grew. I was encouraged by those who used that paper in their work, including partner organisations in the many countries in which INTERIGHTS works, to publish an expanded piece that addresses additional aspects of the legal framework and considers it alongside the practice of the ‘war on terror’ since 11 September 2001.

Since then, international lawyers have become more vocal and there is certainly more published material. International law is no longer absent from political discourse on the ‘war on terror’, and indeed there may be a newfound alertness to issues of international legality in public debate that is in many respects promising. However at times it seems that there is greater confusion than ever, and with it an increased vulnerability in the international legal order. This book hopes to contribute to addressing the confusion, and the perception of legal vacuum. It is written from the perspective of a practitioner in the field of human rights and international criminal law, where international law, its legitimacy and standing, are essential tools not only to combat terrorism but to guard against future human rights abuse in other contexts.

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