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978-1-107-01450-3 - The 'War on Terror' and the Framework of International Law:

Second Edition

Helen Duffy

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THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW

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.

HELEN DUFFY runs Human Rights in Practice, an international human rights law practice in The Hague. She is Professor of International Humanitarian Law and Human Rights at the University of Leiden and Honorary Professor of International Law at the University of Glasgow.

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For Maia

and in loving memory of my wee brother Paul Duffy

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CONTENTS

<i>Preface to the second edition</i>	<i>page</i> xxv
<i>Preface to the first edition</i>	xxix
<i>Select table of cases</i>	xxxi
<i>Select table of treaties</i>	lii
<i>Select table of resolutions, reports and other sources</i>	lxi
<i>Select list of abbreviations and acronyms</i>	lxxiii
1 Introduction	1
1.1 Preliminary remarks	1
1.2 Some legal basics	6
1.3 The legal framework as an interconnected whole	20
1.4 Structure of the book	21
1.5 Overview of chapters	22
PART I Terrorism and responsibility	27
2 'Terrorism' in international law	29
2.1 Developments towards a comprehensive definition of international terrorism	31
2.1.1 Pre-9/11: historical developments	31
2.1.2 Post-9/11 developments: a global convention to meet a global concern?	33
2.1.2.1 Other UN developments: providing a 'description' or 'framework' but not a 'definition' of terrorism	38
2.1.3 Specific international conventions	39
2.1.4 Terrorism in armed conflict	43
2.1.5 Regional conventions	44
2.1.5.1 Generic definition	45
2.1.5.2 Definitions by reference	47

2.2	Do we know it when we see it? Defining terrorism and customary law	48
2.2.1	Identifying elements of a definition of terrorism from international instruments and practice	49
2.2.1.1	Conduct	49
2.2.1.2	Purpose, motive and 'justification'	50
2.2.1.3	Who or what is protected	52
2.2.1.4	International element	53
2.2.1.5	The authors: state actors and national liberation movements	53
2.2.2	Other international practice: UN General Assembly and Security Council	57
2.2.3	The practice of International Criminal Tribunals	58
2.2.4	National definitions	61
2.2.5	Meeting the legality threshold: preliminary conclusions on customary international law	66
2.3	Filling the gap? Terrorism and other international legal norms	68
2.4	Conclusion	72
3	International responsibility, terrorism and counter-terrorism	75
3.1	State responsibility in international law	78
3.1.1	State responsibility for terrorism: legal standards of attribution?	78
3.1.1.1	Effective or overall control?	80
3.1.1.2	<i>Ex post facto</i> assumption of responsibility	82
3.1.1.3	A grey area? 'Harbouring', 'supporting', or 'causing' terrorism (and the case of Afghanistan) post-9/11	83
3.1.2	Responsibility for failure to prevent and protect against terrorism	89
3.1.3	Consequences of international responsibility for terrorism or breach of obligations relating to the prevention of terrorism	91
3.2	Responsibility of non-state actors in international law	95
3.2.1	The 'individualisation' of international law	96

CONTENTS

ix

3.2.2	International humanitarian law	98
3.2.3	International human rights law	99
3.3	Responsibility arising from counter-terrorism	104
3.3.1	Responsibility of the state for its own and other states' wrongful conduct	104
3.3.2	'Privatising' counter-terrorism and issues of responsibility	106
3.3.2.1	<i>De facto</i> agency: scope and limits of attribution?	108
3.3.2.2	'Exercising elements of governmental authority'	110
3.3.2.3	Private security companies and human rights law	111
3.3.2.4	Conclusions re private security companies and international responsibility	112
3.4	Conclusion	113
PART II	Responding to terrorism: legal framework and practice	117
4	Criminal justice	119
4A	The legal framework	123
4A.1	Crimes, principles of criminal law and jurisdiction	123
4A.1.1	Crimes under international and national law	123
4A.1.1.1	Crimes against humanity	125
4A.1.1.2	War crimes	134
4A.1.1.3	Aggression	137
4A.1.1.4	Terrorism	139
4A.1.1.5	Common crimes	143
4A.1.2	Relevant principles of criminal law	143
4A.1.2.1	Direct and indirect individual criminal responsibility	143
4A.1.2.2	Certainty and non-retroactivity in criminal law: <i>nullum crimen sine lege</i>	148
4A.1.2.3	Bars to prosecution: amnesty, immunity and prescription	149
4A.1.3	Jurisdiction to prosecute	152
4A.1.3.1	National courts and crimes of international concern	152
4A.1.3.2	International alternatives	156

4A.2 Implementing justice: international cooperation and enforcement in criminal matters 160

- 4A.2.1 Extradition 161
 - 4A.2.1.1 Key features of extradition law 162
 - 4A.2.1.2 Extradition and human rights 165
- 4A.2.2 Mutual assistance 168
- 4A.2.3 Cooperation and the Security Council 170

4B Criminal justice and international terrorism post-9/11 171

- 4B.1 Prosecutions in practice post-9/11 174
 - 4B.1.1 Paucity of prosecutions post-9/11 174
 - 4B.1.2 Terrorism trials 178
 - 4B.1.3 International versus national models of justice post-9/11 188
 - 4B.1.3.1 Focus on justice for terrorism at the national level 188
 - 4B.1.3.2 The ICC and state responses: Afghanistan, Iraq and beyond 192
- 4B.2 The changing face of criminal law and terrorism 195
 - 4B.2.1 Creation of new 'terrorism' and ancillary offences: widening the net 197
 - 4B.2.1.1 'Terrorism' 197
 - 4B.2.1.2 Before the crime? Conspiracy, preparatory acts, planning and possession . . . 199
 - 4B.2.1.3 Membership of terrorist organisations 202
 - 4B.2.1.4 Failing to provide information 204
 - 4B.2.1.5 Material support for terrorist organisations, financing and facilitating 205
 - 4B.2.1.6 Incitement, provocation, glorification, or apology for terrorism 207
 - 4B.2.2 Penalties and sentencing in terrorism cases 210
 - 4B.2.3 Modified procedures and principles of criminal law 213
 - 4B.2.3.1 'Special' jurisdictions 214
 - 4B.2.3.2 Modified approaches to procedure and evidence 217
 - 4B.2.3.3 Principles of criminal justice and terrorism trials 219

CONTENTS xi

4B.3	Progress and challenges in inter-state cooperation in practice post-9/11	220
4B.3.1	International standards and coordination	221
4B.3.2	Streamlining cooperation and relevant safeguards	226
4B.3.2.1	Lowering evidentiary requirements in extradition proceedings	228
4B.3.2.2	Removal of double criminality and political offence exceptions	229
4B.4	The impact of 'war on terror' violations on international cooperation and criminal justice	231
4B.4.1	Inability to secure suspects: extradition and human rights	231
4B.4.2	Inability to secure mutual legal assistance	234
4B.4.3	Abuse of process and jeopardising trial	235
4B.4.4	Inadmissibility of evidence	237
4B.5	Criminal justice for counter-terrorism crimes: the other side of the coin	238
4B.6	Conclusion	243
5	The use of force	246
5A	The legal framework	247
5A.1	The use of force as a last resort	247
5A.2	The use of force in international law: general rule and exceptions	248
5A.2.1	Self-defence	251
5A.2.1.1	Conditions for the exercise of self-defence	253
5A.2.1.2	Individual or collective self-defence	270
5A.2.2	Security Council: maintenance of international peace and security	271
5A.2.2.1	The Security Council and international peace and security: powers and limitations	273
5A.2.2.2	Express and implied authorisation to use force: interpreting resolutions	278
5A.2.2.3	Veto power and the 'failure' of the Council to act	280

5A.3 Other justifications for the use of force? Humanitarian intervention, protection, or 'force to enforce'	282
5A.3.1 Humanitarian intervention and 'R2P'	283
5A.3.2 Breakdown in international enforcement	289
5A.3.3 Hot pursuit	290
5A.4 Failed and failing states and the use of force	290
5B The use of force post-9/11	292
5B.1 Afghanistan	293
5B.1.1 Key questions arising	295
5B.1.1.1 Armed attack by a terrorist group: dispensing with the state responsibility requirement?	296
5B.1.1.2 Regime change as necessary and proportionate?	301
5B.1.1.3 Last resort?	303
5B.1.1.4 Self-defence and the Security Council post-9/11	305
5B.2 The use of force in the 'war' with al Qaeda and associated terrorists worldwide	306
5B.2.1 Overriding sovereignty? Questioning the relevance of Article 2(4)	310
5B.2.2 Justifications based on self-defence	312
5B.2.2.1 Identifying the 'armed attack'	313
5B.2.2.2 From anticipatory self-defence to preventive force	314
5B.2.3 Necessary and proportionate force and terrorism	320
5B.3 Iraq	322
5B.3.1 Security Council authorisation	325
5B.3.2 Force to enforce UN resolutions	329
5B.3.3 Unilateral action where the Council fails to act	329
5B.3.4 Anticipatory self-defence	331
5B.3.5 Humanitarian intervention	334
5B.4 The US National Security Strategies: internationalism, unilateralism or exceptionalism?	335

5B.5	The implications for the use of force against terrorism by other states	336
5B.6	Conclusion	338
6	International humanitarian law	344
6A	The legal framework	346
6A.1	When and where international humanitarian law applies	349
6A.1.1	Armed conflict: international or non-international?	349
6A.1.1.1	International armed conflict	350
6A.1.1.2	Non-international armed conflict	353
6A.1.2	Temporal scope of IHL: defining a start and an end point	357
6A.1.3	Identifiable territorial scope and the reach of IHL	358
6A.2	Applicable law	359
6A.2.1	Targeting: the principle of distinction and proportionality	363
6A.2.1.1	Lethal use of force against combatants and armed groups	364
6A.2.1.2	Civilian protection and 'direct and active participation in hostilities'	366
6A.2.1.3	Targetable objects	371
6A.2.2	Indiscriminate attacks and disproportionate civilian loss	373
6A.2.3	Necessary precautions in attack	374
6A.2.4	Methods and means of warfare: unnecessary suffering	375
6A.2.5	Humanitarian protections	378
6A.2.5.1	Civilians	379
6A.2.5.2	POWs and the wounded or sick	380
6A.2.6	Occupiers' obligations	382
6A.2.7	Responsibility and ensuring compliance with IHL	384

6B IHL and the 'war on terror'	387
6B.1 Armed conflicts since 9/11	388
6B.1.1 Armed Conflict with 'al Qaeda and associated groups'	388
6B.1.1.1 An 'international' armed conflict with al Qaeda or associated groups?	393
6B.1.1.2 A 'non-international' armed conflict with al Qaeda and associated groups	394
6B.1.1.3 The 'global' war: territorial limits and armed conflict	399
6B.1.1.4 The 'war without end'?	403
6B.1.2 Real armed conflicts post-9/11: Afghanistan, Iraq and beyond	405
6B.1.2.1 Nature of the conflict in Afghanistan	405
6B.1.2.2 The conflict in Iraq and obligations of occupying forces	408
6B.2 Particular issues of IHL in the post-9/11 'wars'	410
6B.2.1 'Enemy combatants'	410
6B.2.2 Targeted killings and the lethal use of force	412
6B.2.2.1 Targeted killings and drone attacks on terrorist suspects worldwide	412
6B.2.2.2 Legal justifications for drone killings?	417
6B.2.2.3 Drone killings as part of armed conflicts in Pakistan, Yemen and beyond	418
6B.2.2.4 Drones and questions of lawful targeting: identification, capture and 'signature strikes'	420
6B.2.2.5 Drones and civilian casualties	423
6B.2.2.6 Transparency, accountability and drones	425
6B.2.2.7 International context	427
6B.2.3 'Wanted dead or alive': rewards and the bounty hunter in IHL	429
6B.2.4 'War on terror' detentions and IHL	431
6B.2.4.1 Lawful basis for detention	432
6B.2.4.2 Procedural safeguards	435
6B.2.4.3 End of the conflict and detention	436

CONTENTS

XV

6B.3	The Afghan conflict and particular issues of IHL compliance	437
6B.3.1	Targeting	438
6B.3.1.1	Drug lords, financiers and other 'nexus targets': identifying the targets for legitimate lethal force in Afghanistan	438
6B.3.1.2	Civilian casualties and targeting in Afghanistan	441
6B.3.2	Methods and means: cluster bombs in Afghanistan	444
6B.3.3	Humanitarian protection of prisoners	446
6B.3.4	Transparency, inquiry and accountability	449
6B.4	Conclusion	451
7	International human rights law	456
7A	The legal framework	458
7A.1	Legal basics: sources and mechanisms of IHRL	458
7A.2	Scope of application of human rights obligations	467
7A.2.1	Territorial scope of human rights obligations: 'the jurisdiction question'	467
7A.2.2	Personal scope of human rights obligations: irrelevance of nationality or wrongdoing to applicable law	473
7A.3	The flexible framework of human rights law in crisis or emergency: accommodating security imperatives	475
7A.3.1	Flexibility: I – lawful limitations and 'claw back' clauses	476
7A.3.2	Flexibility: II – temporary suspension through derogation	477
7A.3.2.1	Public emergency threatening the life of the nation	477
7A.3.2.2	Procedural requirements for derogation and supervision	479
7A.3.2.3	Inalienable 'non-derogable' rights applicable in all situations	479
7A.3.2.4	Consistency with other obligations	480
7A.3.2.5	Measures strictly necessary and proportionate	481

7A.3.2.6	Non-discrimination in application of derogation	482
7A.3.3	Flexibility: III – adjusting to armed conflict, the relationship between IHL and IHRL	483
7A.4	Terrorism, positive obligations and responsibility	487
7A.4.1	'Terrorism' as a human rights violation	487
7A.4.2	Protecting human security: positive human rights obligations	489
7A.4.2.1	'Due diligence' to prevent and protect	490
7A.4.2.2	Investigation and accountability	490
7A.4.2.3	Remedy and reparation	492
7A.4.2.4	Inquiry and onus of proof	494
7A.4.2.5	Positive obligations and the implications for victims of terrorism and counter-terrorism	495
7A.4.3	State responsibility and human rights violations	496
7A.4.3.1	Agents and private actors	496
7A.4.3.2	Collective responsibility and violations by others?	498
7A.5	Specific rights protected and counter-terrorism	499
7A.5.1	Life: arbitrary deprivation, lethal use of force and the death penalty	500
7A.5.2	Torture, cruel, inhuman and degrading treatment	506
7A.5.3	Liberty and detention	511
7A.5.4	Fair trial guarantees	514
7A.5.5	Certainty and non-retroactivity in criminal law	519
7A.5.6	Freedom of expression, association and assembly	521
7A.5.7	Right to privacy	524
7A.5.8	Property rights	525
7A.5.9	Economic, social and cultural rights	526
7A.5.10	Transfer: extradition, deportation and <i>non-refoulement</i>	527
7A.5.10.1	Scope of rights protected: <i>non-refoulement</i> to serious human rights violations	531
7A.5.10.2	Assessing (and proving) the 'real and personal' risk	535

CONTENTS xvii

7A.5.10.3	Transfer, <i>refoulement</i> and due process	538
7A.5.10.4	Obligation of non-cooperation beyond the transfer of persons	540
7A.6	Conclusion	541
7B	Human rights in practice post-9/11	543
7B.1	Security versus human rights post-9/11	544
7B.1.1	From conflict to complementarity	544
7B.1.2	Igniting the debate: Security Council responsibility for human rights violations	548
7B.1.3	Obligations of states implementing Security Council Resolutions and human rights	553
7B.2	The global ‘war on terror’: leaving human rights obligations at home	557
7B.2.1	Detention or interrogation of prisoners abroad?	558
7B.2.2	Extra-territoriality and lethal force	561
7B.3	The ‘war’ and human rights	563
7B.3.1	Armed conflict with al Qaeda and associates and the approach to interplay in the ‘war on terror’	566
7B.3.2	<i>Interplay 1</i> : detention in NIAC	569
7B.3.3	<i>Interplay 2</i> : drones and targeted killings: armed conflict or assassination?	574
7B.3.4	<i>Interplay 3</i> : investigating and remedying violations	579
7B.3.5	Conclusion	581
7B.4	Derogation and emergency post-9/11	582
7B.4.1	The practice of derogation post-9/11	583
7B.4.2	An emergency threatening the life of the nation	584
7B.4.3	Linkage between measures taken and the emergency	588
7B.5	The ‘terrorism’ label and the legality principle	589
7B.5.1	The scope and impact of the ‘terrorism’ label post-9/11	589
7B.5.2	Retroactivity of criminal prosecutions	594
7B.5.3	Punishing terrorism	595

7B.6	Torture and inhuman treatment: Abu Ghraib and (far) beyond	596
7B.6.1	Torture as an instrument of the 'war on terror'	596
7B.6.2	Justifying torture? Redefinitions, 'executive privilege' and the undefusable 'ticking bomb'	603
7B.6.3	Undermining the absolute nature of safeguards against torture and the exclusionary rule	607
7B.7	Restricting liberty in liberty's name: preventative detention and control orders	611
7B.7.1	Detention	611
7B.7.2	Control orders	613
7B.7.3	Deprivations of liberty: burden of proof and procedural safeguards	615
7B.8	Listing and delisting: rights sanctioned	616
7B.9	Immigration, asylum and refugee exclusion	622
7B.10	Dispatching the problem: <i>refoulement</i> post-9/11	624
7B.10.1	<i>Refoulement</i> : absolute ban or balancing in the public interest?	626
7B.10.2	'Diplomatic assurances'	627
7B.10.3	The scope of affected rights and <i>refoulement</i> : wavering standards in instruments and jurisprudence	630
7B.10.4	Undermining procedural safeguards	631
7B.11	Proscribing dissent and controlling opinion	633
7B.12	Profiling, equality and anti-discrimination	637
7B.13	Restricting privacy	641
7B.14	Justice, accountability and reparations for terrorism and counter-terrorism	643
7B.14.1	Investigation and criminal accountability for terrorism and security-related offences	644
7B.14.2	Investigation and criminal accountability for counter-terrorism	645
7B.14.3	Reparations for victims of terrorism	652
7B.14.4	Reparation and remedy for victims of counter-terrorism	654
7B.15	Conclusion	657

PART III	Case studies	663
8	Case study I: Guantánamo Bay detentions under international human rights and humanitarian law	665
	8A Guantánamo Bay and its detainees: the basic facts	669
	8A.1 The detainees and their treatment in Guantánamo Bay	670
	8A.2 Overview of military procedures governing detention	677
	8A.3 The long quest for judicial review	680
	8A.4 The Guantánamo Task Force Review and continuing indefinite detention	683
	8A.4.1 Limbo within limbo: detainees 'cleared' but not released	684
	8A.5 Trial by Military Commission	686
	8B Application of humanitarian and human rights law to detainees in Guantánamo Bay	690
	8B.1 The framework and reach of IHL	692
	8B.2 The framework and reach of IHRL	693
	8B.3 The status of detainees	696
	8B.3.1 Entitlement to POW status	698
	8B.3.2 'Civilian' detainees	700
	8B.3.3 Persons not covered by GC III or GC IV	702
	8B.3.4 Determining detainees' 'status' and implications	703
	8B.4 Specific rights of detainees under IHL and IHRL	708
	8B.4.1 Existence of a lawful basis for detention	708
	8B.4.2 Information on reasons for arrest and detention	712
	8B.4.3 Judicial oversight of detention	714
	8B.4.4 Prosecution: fair trial rights	719
	8B.4.4.1 Military Commissions and the right to trial before an independent and impartial tribunal	720
	8B.4.4.2 Scope of crimes prosecuted	722

8B.4.4.3	Right to access evidence and present a meaningful defence	723
8B.4.4.4	Access to counsel	725
8B.4.4.5	Transparency and public trial	728
8B.4.4.6	When fair trial is a matter of life or death	729
8C	Responding to Guantánamo	730
8C.1	The obligations of other states	730
8C.2	The international response to the Guantánamo detentions	733
8C.3	Seeking justice for Guantánamo	738
8D	Conclusion	742
9	Case study II: Osama bin Laden – ‘justice done’?	747
9.1	Introductory overview of available facts	747
9.2	The killing of Osama bin Laden and the legal framework	752
9.2.1	Use of force against the territorial integrity of Pakistan: the sovereignty question	752
9.2.2	IHL: lawful killing of a legitimate target?	757
9.2.3	The killing of Osama bin Laden under the neglected framework of IHRL	760
9.2.3.1	The critical question of goals	763
9.2.3.2	The requisite planning and preparation	763
9.2.3.3	Necessity: legitimate grounds and split-second decisions	764
9.2.3.4	Positive state obligations versus the onus of conspicuous surrender	766
9.2.3.5	Clarifying the facts and the duty to investigate	768
9.2.4	The role of criminal law	769
9.3	Disposal of bin Laden’s corpse and legal issues arising	770
9.4	Conclusion	774

10	Case study III: extraordinary rendition	778
10.1	Introduction	778
10.2	Factual overview	781
10.3	The practice illustrated: victims of ERP	790
10.4	Extraordinary rendition: the legal framework	796
10.4.1	Wronging other states: territorial integrity of states, civil aviation, extradition treaties and consular relations	796
10.4.2	IHL	798
10.4.3	IHRL	802
10.4.3.1	'Extra-territorial' renditions and human rights obligations	802
10.4.3.2	Positive obligations to prevent, protect and respond to human rights violations	804
10.4.3.3	Particular rights implicated by extraordinary rendition	805
10.4.4	State responsibility	816
10.4.4.1	Responsibility for organs and agents	816
10.4.4.2	Responsibility of third states for aiding and assisting, directing, controlling, or coercing	817
10.4.4.3	Broader obligations in face of serious breach of peremptory norm	818
10.4.5	Individual criminal responsibility	819
10.5	Applying the law: state and individual responsibility in various 'rendition' scenarios	821
10.5.1	Abduction and 'black site' detention on the state's territory	821
10.5.2	Keeping them airborne: staging, stopover and logistical support	822
10.5.3	Transnational intelligence cooperation	823
10.5.3.1	Presence at interrogations and questioning detainees	824
10.5.3.2	Provision of intelligence	825
10.5.3.3	Receipt of intelligence	826
10.6	The pursuit of truth and justice for extraordinary rendition	828
10.6.1	Investigation and prosecution in practice	829

10.6.2	Civil accountability and human rights litigation	837
10.6.3	International and regional human rights litigation	838
10.7	Conclusion	841
11	The role of the courts: human rights litigation in the 'war on terror'	846
11.1	Issue 1: arbitrary detention	850
11.1.1	Guantánamo	850
11.1.2	Baghram	856
11.1.3	Belmarsh (and from there to control orders and other measures . . .)	858
11.2	Issue 2: limiting the applicability of treaty obligations: extra-territorial application and action pursuant to Security Council authorisation	865
11.2.1	Extra-territoriality	865
11.2.2	Application of human rights treaties and their relationship with Security Council resolutions?	869
11.3	Issue 3: litigating torture protection: <i>refoulement</i> and the use of torture evidence	871
11.3.1	Deportation to torture or ill treatment	871
11.3.2	<i>A and Others</i> : admissibility of torture evidence	875
11.4	Issue 4: damages litigation for rendition victims	877
11.5	Issue 5: litigating 'terrorist' listing and labelling	883
11.6	Concluding observations: the role of the courts and the impact of human rights litigation	890
12	Conclusion	900
12.1	9/11: tragedy, opportunity and the 'war on terror' response	901
12.1.1	Reaction to the 'war on terror'	906
12.2	The legal framework	910
12.2.1	No gaping holes in the international legal framework	911
12.2.2	Legal change post-9/11? A 'Grotian' moment, or pockets of legal development?	914
12.2.3	Areas of tensions and possible future development	918

Cambridge University Press
978-1-107-01450-3 - The 'War on Terror' and the Framework of International Law:
Second Edition
Helen Duffy
Frontmatter
[More information](#)

CONTENTS xxiii

12.3	The 'war on terror' and international legality: some essential characteristics	921
12.3.1	Selectivity and fragmentation	921
12.3.2	Exceptionalism and its creeping reach	925
12.3.3	'Purposive' legal interpretation and undermining the authority of law	927
12.3.4	Arbitrariness	929
12.3.5	Secrecy, the refusal to look back and the lack of accountability	931
12.4	Challenges and implications: the 'war on terror' and international legality	933
	<i>Select bibliography</i>	938
	<i>Index</i>	966

Cambridge University Press

978-1-107-01450-3 - The 'War on Terror' and the Framework of International Law:

Second Edition

Helen Duffy

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-01450-3 - The 'War on Terror' and the Framework of International Law:

Second Edition

Helen Duffy

Frontmatter

[More information](#)

PREFACE TO THE SECOND EDITION

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

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Second Edition

Helen Duffy

Frontmatter

[More information](#)

xxvi

PREFACE TO THE SECOND EDITION

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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Second Edition

Helen Duffy

Frontmatter

[More information](#)

PREFACE TO THE SECOND EDITION

xxvii

A version of this book was presented as a doctoral thesis at the Grotius Centre for International Legal Studies of Leiden University and I received my PhD in December 2013. I am grateful for the warm support and helpful guidance of my thesis supervisor Prof. Nico Schrijver, and to the doctoral committee of Professors Philippe Sands, Rick Lawson, Erwin Muller, Niels Blokker, Andre Nollkaemper, Carsten Stahn and John Dugard for their interrogation of the text (and its author). Thanks also to my friend and colleague from Leiden Prof. Larissa v.d. Herik for her encouragement and assistance, which stretched to translating a thesis summary into Dutch. I was fortunate to have the early research for this project supported by a Ford Foundation educational grant while in Buenos Aires. At the other end of the process, the text has benefitted from the diligent work of Barbara Docherty, Christina Sarigiannidou and Richard Woodham at Cambridge University Press.

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Frontmatter

[More information](#)

PREFACE TO THE FIRST EDITION

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.

Many people have contributed to this book, by providing ideas, research and editing assistance and experience of the 'war on terror' as a lived reality. I am grateful to all INTERIGHTS staff, past and present and to its board. Among the volunteers and associates who provided helpful research and assistance along the way are Sanchita Hosali, Debbie Sayers, Mark Pallis, Benedetta Lacey and Larissa Leiser. Particular thanks are due to Silvia Borelli for excellent research

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Second Edition

Helen Duffy

Frontmatter

[More information](#)

xxx

PREFACE TO THE FIRST EDITION

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