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Introduction

1.1 Preliminary remarks

Acts of international terrorism, such as the atrocities committed on 11 September 2001 (hereinafter, '9/11') and the many others committed before and since then, highlight the critical importance of the international rule of law and the terrible consequences of its disregard.[1] Ultimately, however, the impact of such attacks depends on the responses to them and, in turn on the reaction to those responses. To the extent that the lawlessness of terrorism is met with unlawfulness, unlawfulness with impunity, the long-term implications for the rule of law, and the peace, stability and justice it serves, will be grave. Undermining the authority of law can only lay the foundation for future violations, whether by terrorists or by states committing abuses in the name of counter-terrorism. Conversely, so far as states operate within the law, and bring it to bear on those responsible for terrorism and crimes committed in the name of counter-terrorism, the authority of law can ultimately be reasserted and the system of law strengthened.

An underlying premise of this book is that the legitimacy of measures taken in the name of the fight against international terrorism depends on their consistency with international law. It is essentially this reference to objectively verifiable standards and processes – rather than subjective assertions as to good and evil or those who believe in freedom and those that seek its destruction[2] – that enable credible distinctions to be drawn

[1] The number of people killed by the terrorist attacks on 9/11 was officially estimated by US authorities at 2,819. *See* 'Names of 9/11 Victims Published', *Associated Press*, August 20, 2002. Shortly after the attacks, al Qaeda, an Islamic fundamentalist network or organisation, was identified as being responsible for the attacks; *see* 'Al Qaeda Claims Responsibility for 9/11', *CNN News*, April 15, 2002. Since 9/11, as prior to it, attacks of international terrorism had occurred around the globe with notable attacks including those in Madrid, London, Bali, Mumbai, Libya, Iraq and beyond.

[2] Such references peppered political discouse post-9/11; *see*, e.g., former US President Bush's renowned speech concerning the 'axis of evil' threatening the world, State of the Union Address, January 29, 2002, available at: http://archive.org/details/SOTU_2002.

between those who abide by the rules of the international community and those who conspire against them. In an intensely politicised area, the law can provide us with meaningful parameters within which to assess what is loosely and invariably pejoratively labelled 'terrorism' and states' responses to such acts.

International terrorism and measures of counter-terrorism, and many of the challenges they pose, are not new phenomena, but existed long before 2001. In counter-terrorism practice since 9/11, famously framed as a 'war on terror',[3] persistent emphasis has been placed on the exceptional nature of threats, on the unprecedented challenges posed by 'modern' international terrorism and on a 'novel' kind of conflict against a different kind of enemy.[4] While the nature and *modus operandi* of terrorism changes over time and place, posing different but very real challenges, the extent to which the nature of terrorist threats, or indeed states' responses to them, are in fact so unprecedented, novel or exceptional has been questioned over time.[5] Emphasising the novelty of threats, responses and challenges,[6] and adopting an 'exceptionalist'

[3] The US President George W. Bush coined the 'war on terror' epithet on September 20, 2001, when he declared that '[o]ur "war on terror" begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.' *See* Address of the US President George W. Bush to a Joint Session of Congress and the American People, September 20, 2001, available at: http://archive.org/details/gwb2001-09-20.flac16. As discussed in Chapter 6, the phrase 'war on terror' was dropped by the Obama Administration, but it retains the position that there is a conflict with al Qaeda and associated groups. The fact that this is not a conflict in any legal sense is addressed in Chapter 6.

[4] *See*, e.g., 'State of the Union Address', January 29, 2002, *supra* note 2; Statement by Ambassador at Large, Pierre Prosper, Address at Chatham House, 20 February 2002, cited in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford, 2012), p. 2; Press Gaggle by Ari Fleischer, Aboard Air Force One, November 5, 2002, available at: www.whitehouse.archives.gov/news/releases/2002/11/20021105-2.html. *See* Chapter 6 for the discussion of the 'new war' theory.

[5] *See*, e.g., G. Abi-Saab, 'Introduction', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Oxford, 2004). *See* 'Assessing Damage, Urging Action', Report of the Eminent Jurists Panel, 2009 (hereinafter, 'Eminent Jurists Report'), 2009. On the nature and scale of the threat posed by al Qaeda, *see* Chapter 5, 6 and 12. See also L. van den Herik and N. Schrijver, 'Introduction', in L. van den Herik and N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge, 2013).

[6] The shifting nature of threats over time is recognised in, e.g., President Obama's speech at the National Defense University, May, 23, 2013. For an example of a broad-reaching approach to threats in US policy; however, *see* the discussion of the law of self-defence in Chapter 5.

approach to international terrorism[7] may blind us to the relevance of lessons of the past,[8] and the extent to which international law and practice provide tested – albeit fluid and evolving – parameters to address many of the challenges posed by international terrorism.

It is indisputable, however, that counter-terrorism practice has proliferated on many dimensions and in many forms post-9/11 and that the heralding of a 'global 'war on terror' (GWOT) has had global manifestations and repercussions. It is the practice of terrorism and counter-terrorism in this post-9/11 environment, and the legal framework applicable to it, that is the focus of this study. The book locates this phenomenon not in a normative void but against a backdrop of established and evolving international law and developing international practice.

The principal purpose is to identify the current state of international law concerning terrorism and counter-terrorism, which provides the framework for the assessment of acts of terrorism and the legitimacy of measures taken in the name of counter-terrorism. The former UN Secretary General has noted that the 'war on terror' affects all areas of the UN agenda.[9] The legal framework in turn is derived from diverse branches of international law none of which can or should be seen in isolation. This study will seek to set out in an accessible fashion multiple areas of law, and myriad sources of law, that together form the international legal framework, and explore the connections and interplay between them. While the framework is multi-dimensional and may at times raise complex issues, it is also underpinned by basic legal principles that provide, for example, for basic levels of protection, process and accountability in all situations.

Assertions regarding the nature and role of the international legal framework have abounded in the post-9/11 era. Allegations have been levelled of perceived 'gaps' in the legal framework or of a framework that

[7] For discussion of why there can be no 'global emergency', legally speaking, *see* Chapter 7. The exceptionalist approach is evident in all areas of law, such as broad-reaching approaches to the use of force (Chapter 5), criminal law (Chapter 4), the invocation of a 'war' paradigm (Chapter 6) and in justifications for violations of human rights (Chapter 7). *See* Chapter 12 on the creeping reach of exceptionalism.

[8] *See* Eminent Jurists Report, *supra* note 5.

[9] Statement by UN Secretary-General Kofi Annan to the Security Council, 4 October 2002, Press Release SG/SM/8417, SC/7523, and subsequent GA Res. A/RES/67/97. *See also* the background report by UN Secretary General Ban Ki-moon, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels*, UN Doc. A/66/749, 16 March 2012.

is inadequate, 'outmoded', 'quaint', or too 'inflexible' to address the realities of modern terrorism and state reactions to it. Some have foreseen transformative shifts in the legal framework to embrace the nature of counter-terrorist practice – heralding 'turning points' or 'Grotian moments' in the legal order.[10] Others have questioned the very relevance and authority of international law in the face of the security challenges embodied in the 9/11 attacks and the threat of their recurrence.[11]

By setting out the key parts of the legal framework, this book will question whether there are genuine normative gaps in the legal framework or, as one commentator noted, more perceived 'interpretative' or 'policy-created' gaps.[12] It will also question whether there has been a seismic shift in the legal order, while acknowledging and exploring areas of potential legal development post-9/11 and their effect. It will highlight the nature of the legal framework, including the extent (and the limits) of its flexibility to adjust to terrorism and counter-terrorism in the twenty-first century, tensions and challenges that arise, and areas where the law may indeed be unsettled or weak, in flux, or likely to develop in the future.[13] In short, it seeks to grapple through the fog created by a 'war on terror', in which international law has at times been notably absent, at others distorted, and often presented as hopelessly confused or ill equipped to address the 'new challenges'.

The focus is on identifying the obligations of states under international law, reflecting the fact that international law does not, generally, impose obligations on private actors or groups as such (unless their acts are attributable to the state which is then responsible). This traditional 'state-centricity' of international law, which has been described as a limiting factor for the relevance of international law in this area, is, however, increasingly subject to question. This is seen most clearly in developments in relation to individual criminal responsibility for terrorism and counter-terrorism related crimes, explored in Chapter 4, the 'individualisation' of international law through sanctions regimes that effectively bring international law to bear directly on individuals, discussed in Chapter 7, and the

[10] Examples of such claims appear throughout relevant chapters, and conclusions in this respect are drawn in Chapter 12.

[11] *See* Chapter 7B.1.

[12] K. Samuel, 'The Rule of Law Framework and its Lacunae: Normative, Interpretative, and/or Policy Created?', in A. M. Salinas de Frías, K. Samuel and N. White, *Counter-Terrorism International Law and Practice* (Oxford, 2012).

[13] A thorough analysis of how the law may have changed since 9/11 is not, however, the objective of this study.

growing momentum towards recognition of non-state actor responsibility more generally, noted in Chapter 3.[14] While focusing on states' international legal obligations and practice, the study therefore reflects the plurality of actors, including state and non-state actors, involved in terrorism and counter-terrorism, and the international legal issues arising in respect of each.

While the primary purpose of this book is to identify the legal framework, a secondary and inter-related focus is on highlighting and assessing how states have responded in practice to the challenges of counter-terrorism post-9/11. While terrorism, counter-terrorism, and the international legal framework governing them existed long before 9/11, a particular flurry – and perhaps at times frenzy – of normative, political and institutional development and activity has ensued since the introduction of the so-called global 'war on terror'. This activity has often fallen foul of the rule of law framework, as well as in some situations contributed to and shaped that framework for the future.[15] This study considers examples of practice in the fight against terrorism alongside the legal framework, to identify issues that have arisen regarding its interpretation and application, the extent of compliance with it and areas of possible legal development.

The post-9/11 practice explored in subsequent chapters has unfolded on multiple levels (international, regional, national and local). It has involved a plurality of actors (legislative, judicial, executive, intelligence agencies, private actors and others) and taken a multiplicity of forms (including laws, policies and practices, through the conduct, direction or control of states or the complicity and support of many more, and through their acts and omissions). Although in some areas the extent, nature and influence of US practice have justified greater emphasis on that state than on others, terrorism, counter-terrorism and the challenges they pose in the post-9/11 era are global phenomena. The focus of the study is accordingly global. It draws on universal norms and practice but also regional and sub-regional standards, and examples of national counter-terrorism practice from diverse states around the globe, from Afghanistan to Algeria, Bahrain to Bali, Colombia to Chechnya, and beyond, where diverse practices in the

[14] The 'individualisation' of international law notably occurs through, e.g., Security Council sanctions that directly address and impose sanctions on individuals and not, as was traditionally the case, on states; *see* Chapters 7B.8 and 11 and van den Herik and Schrijver, *Counter-Terrorism Strategies*, *supra* note 5. *See also* Chapter 6 on the responsibility of non-state parties to a conflict.

[15] GA Res. 67/97 'The rule of law at the national and international levels', UN Doc. A/RES/67/97, 14 January 2013.

name of terrorism raise persistent questions regarding respect for the legal framework.

It is a feature of the broad-reaching approach to the 'war on terror' and counter-terrorism that some of the practice illustrated may be viewed as not in fact relating to international terrorism at all. One example might be the Iraq invasion and related developments, which may have had little real link with the counter-terrorism agenda but which occurred in the broad context of, and were justified in large part by reference to, the fear of international terrorism.[16] Many counter-terrorist measures taken in states around the world, where terrorism (and counter-terrorism) have been matters of concern long before 2001, are not a post-9/11 'war on terror' phenomenon. Many have, however, found justification by reference to a new global imperative around the fight against terrorism since then. The practice explored in subsequent chapters illustrates how the long shadow of 9/11 and the 'war on terror' that ensued have been used as pretexts for action against individuals and entities not linked to 9/11, or in many cases to international terrorism at all.[17] Elasticity in the exceptional approaches to 'terrorism', and their creeping reach, is one of the features of the 'war on terror' to which we will return in the concluding Chapter 12.

This book does not and could not present a comprehensive factual report on the plethora of state practice in response to terrorism since 9/11. It seeks, however, to highlight through examples specific issues of law and practice that the 'war on terror' has thrown up, of relevance to an assessment of the role and relevance of international law in light of the global security threat that has beset the start of the twenty-first century.

1.2 Some legal basics

1.2.1 Sources of international law and terrorism

It is perhaps a unique – certainly an unusual – feature of the present area of study that one phenomenon, international terrorism, is addressed through such a plurality of areas of international law and fed by such a multiplicity of sources of law. The identification of the legal framework

[16] President Bush is reported as having stated that 'one of the hardest parts of my job is to connect Iraq to the "war on terror"' and the controversy around the existence of any plausible link supports that proposition. *See further* Chapter 5B.3 on the use of force in Iraq.

[17] Chapters 7 and 11 contain examples of the creeping reach of terrorism justifications, and *see* Chapter 12.

set out in this book has therefore been drawn from a diverse range of overlapping and mutually reinforcing sources of law relevant to an understanding of terrorism and counter-terrorism. The norms addressed include 'primary norms' that impose obligations on states in respect of the prevention and response to terrorism, or constrain the manner in which that counter-terrorism unfolds. In addition, 'secondary norms' that address the consequences of breach and rules governing the responsibility of multiple states are also central to this study.

The traditional starting point of every discussion of sources is Article 38 of the Statute of the International Court of Justice (ICJ),[18] which lists 'sources' of international law.[19] In setting out the legal framework applicable to international terrorism, this study focuses on treaty law and customary international law as the most important sources of international law. However, the study also relies on many other subsidiary sources which have differed greatly in the nature and their weight, but each has their place in a proper understanding of the legal infrastructure of counter-terrorism related law.

1.2.1.1 International treaties

Most of the rules of the international legal system derive from agreements between states,[20] which in turn give rise to obligations that become binding on states parties to them. While there is no one comprehensive global terrorism treaty, as discussed in Chapter 2, a complex network of international treaties exists, enshrining a broad range of international obligations, of relevance to terrorism and counter-terrorism. Some are general in nature, others addressing specific conduct

[18] Although Article 38 is formally only binding on the ICJ (and previously, on the Permanent Court of International Justice, PCIJ) as to the law applicable to cases before it, it is generally considered as the 'authoritative' list of the sources of international law. *See* R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law, vol. 1* (Oxford, 2008), 9th edn, p. 24.

[19] The sources according to Article 38 include (a) international conventions; (b) customary international law; (c) general principles of law 'as recognized by civilized nations'.

[20] The rules relating to the formation, modification, suspension and termination of international agreements are contained in two multilateral conventions, the Vienna Convention on the Law of Treaties of 1969, 1155 UNTS 331, entered into force 27 January 1980 (hereinafter, VCLT 1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986. Most of the provisions of the Vienna Conventions are considered to reflect customary international law.

or issues, some are universal or international and others regional or bilateral.

It is a basic rule that only states which are parties to a treaty are bound by it, and an international agreement cannot in itself produce obligations on third-party states.[21] For major international treaties such as those addressed in this study, states generally become bound through ratification or accession.[22] Among the fundamental rules governing international agreements is that once a state is bound by a treaty, it must fulfil the obligations deriving from it in good faith,[23] and may not for example 'invoke the provisions of its internal law as justification for its failure to perform a treaty'.[24] A state that has *signed* but not ratified a treaty 'is obliged to refrain from acts which would defeat the object and purpose of the treaty'.[25]

While the vast majority of treaties, including the terrorism conventions or extradition treaties referred to in this book, aim at exchanging rights and obligations between the parties, some multilateral treaties covered by this study lay down general rules that appear to be directed at, and which affect, all states of the international community. The category of so-called 'law-making treaties',[26] which includes for example certain multilateral conventions on the protection of human rights discussed in Chapter 7, or the Geneva Conventions and other multilateral treaties on international humanitarian law discussed in Chapter 6, may either set standards for the international community as a whole, or codify customary law (see below). Moreover, the UN Charter is a key source in this area, which stands apart from other treaties given its

[21] This fundamental rule is referred to as the rule *pacta tertiis nec nocent nec prosunt*. See s. IV (Articles 34–38) VCLT 1969.

[22] *See* Article 11 VCLT 1969: '[T]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.' Note however that signature does not generally bind the state, *see* Article 12 VCLT 1969.

[23] This is commonly expressed with the Latin maxim *pacta sunt servanda*. *See* Article 26 VCLT 1969: 'Every treaty in force is binding on the parties and must be performed by them in good faith.'

[24] Article 27 VCLT 1969. [25] Article 18 VCLT 1969.

[26] *See* I. Brownlie, *Principles of Public International Law* (Oxford, 2008), 9th edn, p. 13: 'Law-making treaties create *general* norms for the future conduct of the parties in terms of legal propositions, and the obligations are generally the same for all parties . . . Such treaties are in principle binding only on parties, but the number of parties, the explicit acceptance of rules of law, and in some cases, the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered necessary to support a customary rule.' (Emphasis added.)

quasi-constitutional status, and its universal coverage.[27] This is also reflected in Article 103 of the Charter itself, noting the prevalence of Charter obligations over other international agreements.[28]

The result of the widespread ratification of universal treaties,[29] and the multiplicity of overlapping regional and specific treaties in this field, is that many of the core obligations referred to in this study derive from binding treaty obligations incumbent on all states. Treaties may in turn influence the development of customary international law in particular areas; in particular, the fact that many of the conventions referred to in this volume are so widely ratified may constitute a strong indication that the rules embodied in them correspond to rules of customary international law.[30] The study conducted by the International Committee of the Red Cross (ICRC) on customary international humanitarian law, for example, supports the view that many of the provisions of the Geneva Conventions and Protocols now reflect customary law.[31]

1.2.1.2 Customary international law

In the absence of a legislative body with the power to create rules binding on all the subjects of the international legal system,[32] the only source of 'general' rules of international law is customary international law (CIL).

[27] *See* in particular Chapter 4 on the use of force and Chapter 7 on human rights.

[28] Article 103 provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[29] Extremely high levels of ratification of certain treaties make their claim to represent global standards compelling. *See*, e.g., the Convention on the Rights of the Child (CRC, 1989) with 193 state parties; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) with 187 state parties; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT, 1984) with 153 parties; the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) with 160 state parties; or, from IHL, the Geneva Conventions, which have 194 parties.

[30] *See*, in general, M. Akehurst, 'Custom as a Source of International Law', 47 (1974–5) BYIL 1. The treaty would provide strong evidence of the *opinio juris*, one of the key elements of customary international law.

[31] *See* J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Geneva and Cambridge, 2005 (hereinafter, 'ICRC Study on Customary IHL').

[32] The UN Charter confers on the Security Council the power to adopt decisions which are binding on all UN Member States (and therefore on virtually every state of the international community) by virtue of Article 25 of the Charter (*see* Chapter 5A). This does not, however, imply that the Security Council should be considered as an 'international legislative body'.

CIL derives from the practice of states[33] where this practice is more or less uniform, generally consistent and widespread, and considered to be legally necessary or obligatory.[34] Generality of practice does not mean uniformity or universality.[35] The fact that a number of states follow a certain course of conduct, and other states do not protest, may be sufficient to affirm the generality of the practice; conversely the fact that some states violate norms or disagree with their content does not necessarily undermine the legal standards themselves. The second prong of the test – the attitude to the practice as obligatory or 'necessary', referred to as *opinio juris* – is crucial in distinguishing state practice relevant for the purpose of identifying a customary rule from practice, which denotes mere international usage.[36]

While the 'practice' of states referred to in this study is intended to illustrate how the 'war on terror' has unfolded, and does not purport to be representative, it is worthy of note that this practice may also be relevant to the evolution of the customary legal framework, as discussed further below.[37]

As reflected in the sources relied upon in this study, state practice, and *opinio juris*, may take many forms. State practice may comprise both 'physical and verbal acts of states',[38] embracing executive, legislative and judicial practice on the domestic level, as well as statements manifest through the functioning of international entities, such as the General Assembly, Security Council, or regional bodies. The plethora of activity

[33] 'State practice means any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organisations and (at least in theory) by the practice of individuals.' Akehurst, 'Custom as a Source of International Law', *supra* note 30, p. 53.

[34] *C.d. opinio iuris sive necessitates*. As noted by the ICJ: 'Not only must the acts concerned amount to a settled practice, but they must also be such or be carried out in a certain way as to be evidence of the belief that this practice is rendered obligatory by the existence of a certain rule requiring it.' *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *The Netherlands)*, ICJ Rep. 1969, p. 3 at para. 77. *See* Akehurst, 'Custom as a Source of International Law', *supra* note 30, pp. 16–18.

[35] ICJ judgment of 27 June 1986 in *Military and Paramilitary Activities of the United States in and against Nicaragua (Nicaragua* v. *United States)*, ICJ Rep. 1986 at para. 186.

[36] On the distinction between custom and usage – 'a general practice which does not reflect a legal obligation' – *see* Brownlie, *Principles*, *supra* note 26, p. 6.

[37] *See* Chapter 1.2.

[38] *See generally* J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Geneva and Cambridge, 2005).