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The 'war on terror' and International Law

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The 'War on Terror' and International Law

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Foreword

This doctoral thesis is the culmination of extensive research and writing on the “war on terror” and the framework of international law applicable to it. The research has taken various forms and stretched back a number of years. In addition to academic study and publication, I have been involved in the application of the legal framework as a practising lawyer engaged in counter-terrorism related cases, and have sought to reflect this experience and perspective in the thesis.

My research in this field had its inception in a short paper prepared in the immediate aftermath of the 9/11 attacks, in October 2001. The paper set out in skeletal form the framework of international law that appeared to govern potential responses to those attacks. It was motivated by the relative dearth of such analysis at that time, as well as confusion regarding international law and its relevance. Over time this paper was developed into the first edition of a book, published by Cambridge University Press in 2005, entitled *The ‘war on terror’ and the framework of international law*. The book was widely used and favourably reviewed, and it was suggested that I consider the presentation of a modified version of the book as a doctoral thesis. I began to reflect on the possibility of deepening and expanding the study, wherein the idea for this thesis was born.

Much had changed since the 2004 date when the first edition was completed. Responses (by states, international or regional organisations and others) had proliferated, impelling normative and policy changes on the national, regional and international levels. Some practices that had sprung up around the globe in the name of counter-terrorism constituted clear violations of international law; in other situations, the practice raised complex and novel legal questions or exposed apparent gaps or tensions in the framework itself. Likewise, just as counter-terrorism responses had burgeoned, so in turn had reactions *to* them, of potentially critical significance to the long-term implications of the war on terror. Many years into post 9/11 counter-terrorism practice, it was necessary to take into account the extent to which, in a particularly dynamic field of practice, the legal framework may have been shaped or influenced by post 9/11 practice. In short, it became clear that to do it justice, what was required was more than substantial updating.

This thesis therefore builds upon, but varies from, the first edition in significant respects. In keeping with the nature of the enterprise, the thesis seeks to provide a more academic framework for the work, with a section on

methodology and a more detailed discussion of sources than the original book, through an expanded introduction and conclusion. It maintains as its key objective the identification and exploration of the current legal framework governing terrorism and counter-terrorism measures. The thesis examines developments in that framework that have taken myriad forms in recent years: standard setting initiatives by regional and international organisations, international agreements, judicial decisions (at domestic and international levels) and of course potential developments in customary international law.

Where the thesis provides much more research and analysis than the original book is in relation to the state practice that has developed in response to international terrorism. While the emphasis in the first edition was heavily on the framework that would govern future responses, the thesis necessarily focuses more attention on illustrating how those responses have in fact unfolded during the twelve years of practice since 9/11 (and the nine years since the book was completed), and how the legal framework speaks to that practice. The lethal use of force by 'drones', the systematic and coordinated 'extraordinary rendition' programme, the regimes of listing of individuals and groups, and in particular contorted attempts to address procedures for 'de-listing,' are among the most notorious of these measures. Other practices have swept the globe further beneath the radar but raising just as important international legal issues. These include for example developments in the use of criminal law and practice to punish an expanding group of persons 'associated' with or deemed to 'support' broadly defined terrorism, or the use of private actors (such as private security companies) in counter-terrorism. In all of the chapters, much of the consideration of new or amended legislation, policies and practices is new to the thesis.

Building on this core, the thesis also contains several new chapters. Two new case studies' address the practices of extraordinary rendition and the killing of Osama bin Laden, complementing an updated case study on Guantanamo Bay. Each of these explore factual scenarios in more depth than would be possible within the main chapters, and consider the multiple overlapping norms 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 second tier responses to anti-terrorism practices that may have strained or been inconsistent with the legal framework. A major component of this 'reaction' to the war on terror over time has been judicial, as challenges to the counter-terrorism practice have been adjudicated. An additional new chapter therefore 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 counter-terrorism practice.

The importance of a holistic approach to international law as highlighted in the first edition of the book, by understanding rules not in isolation but as part of the framework as a whole, has been borne out by practice. This thesis

explores in more detail the overlapping layers of legal obligations, and intersections between them, to determine applicable law in particular situations. It also highlights the manipulation and selectivity in the approach to that framework in practice and tensions arising. Much of the uncertainty around international law in the counter-terrorism context may relate more to a refusal to be bound by law (or by particular areas of law or specific norms), or to accept the implications of law's constraint. Areas of genuine complexity in relation to the interplay of norms (such as under IHL and international human rights law or human rights and UN Security Council obligations) have, however, been acknowledged and explored in more detail than in the original book.

While the focus remains on identifying the applicable legal framework, the thesis is necessarily more reflective throughout, and in particular in the concluding chapter, as to the nature and impact of post 9/11 counter-terrorism practices that have now unfolded for over a decade, the challenges they pose and their potential longer term implications for international legality.

The research for the thesis was completed on 31 August 2013. A slightly modified version of this thesis will in due course be published as a second edition of the CUP book.

Helen Duffy
25 September 2013

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