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1 Introduction

1.1 Preliminary remarks

Acts of international terrorism, such as the atrocities committed on 11 September 2001 (‘9/11’) and others since then highlight the critical importance of the international rule of law and the terrible consequences of its disregard. 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 study 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 believe in freedom and those that seek its destruction – that enable credible distinctions to be drawn between those who abide by the rules of the international community and those who conspire against them. In an intensely politicized 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.

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

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,’ 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. Whether the nature of any terrorist threat, or indeed states’ responses to it, are in fact so unprecedented, novel or exceptional has been questioned over time. Emphasising the novelty of threats, responses and challenges and adopting an ‘exceptionalist’ approach to international terrorism may blind us to the relevance of lessons of the past, 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 the heralding of a ‘global war on terror’ has had global manifestations and repercussions. It is the practice of terrorism and counter-terrorism in this post 9/11 environment,

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3 The US President George W. Bush coined the ‘war on terror’ epithet on 20 September 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, 20 September 2001, available at: http://archive.org/details/gwb2001-09-20.flac16. As discussed below 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.


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

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 Conclusions on ‘exceptionalism and its creeping reach’.

and the legal framework applicable to it, that is the focus of this thesis. The thesis locates this phenomenon of post 9/11 international terrorism and counter-terrorism, not in a normative void, however, but against a backdrop of 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 lawfulness of measures taken in the name of counter-terrorism. The 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 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 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 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

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9 Statement by UN Secretary-General Kofi Annan to the Security Council, 4 October 2002, Press Release SG/SM/8417, SC/7523, and subsequent General Assembly resolution 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.

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

11 Chapter 7.B.1.

Chapter 1

the limits) its flexibility to adjust to terrorism and counterterrorism in the 21st 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. 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 ‘new challenges’.

While the primary focus of this book is on identifying 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 time frenzy – of normative, political and institutional development and activity have 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. 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 and national). It has involved a plurality of actors (legislature, judiciary, executive, intelligence agencies, private actors and others). It has taken a multiplicity of forms including the passage of laws and implementation of policies and practices, through the conduct, direction or control of states, or their complicity and support, and through 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 counter-terrorism practice not only from the state leading the war on terror but from a range of states around the globe, from Afghanistan to Algeria, Bahrain to Bali, Colombia to Chechnya, and beyond, where diverse practices in the 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

13 A thorough analysis of how the law may have changed since 9/11 is not, however, the objective of this study.
invasion and related developments, which may have had little real link with 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. 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 of them, however, have 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 has been a pretext for action against individuals and entities not linked to those events and some cases not linked to terrorism at all. Elasticity in the exceptional approaches to terrorism and the creeping reach of terrorism related justifications is one of the features of the war on terror to which we will return in the concluding observations.

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 state-centricity of the international legal order has been described as a limiting factor for the relevance of international law in this area. It is also increasingly subject to question as the thesis shows for example, in light of developments of individual criminal responsibility, explored in Chapter 4, the effective ‘individualization’ of international law through sanctions regimes that effectively impose international legal obligations directly on individuals, discussed in Chapter 7, and the growing momentum towards recognition of non-state actor responsibility more generally, noted in Chapter 3. While focusing on the international legal obligations and practice of states, the study therefore also reflects the plurality of actors, involved in terrorism and counter-terrorism, and international legal issues arising.

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 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 21st century.

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15 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.
16 Chapters 7 and 11 contain examples of the creeping reach of terrorism justifications, and Chapter 12 ‘Conclusions’.
17 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, *Terrorism Law and Practice*, supra note 5.
1.2  THESIS AND SCOPE OF ENQUIRY

As foreshadowed above, this thesis addresses several overarching groups of questions. The first group relates to the nature of the legal framework. To what extent can and does the existing legal framework speak to and govern ‘international terrorism’ and states responses thereto? How should we understand that framework, considering its key provisions and its structure as a whole? Does the framework equip the international community of states to meet the challenges associated with international terrorism, or is it, as some have suggested, inadequate or inappropriate to govern in the post-9/11 era?

The study will therefore seek to set out the parameters of the international legal framework applicable to international terrorism and responses thereto. It will explore areas of uncertainty, areas where the law may be in flux, while demonstrating that there are no gaping holes in the international legal order.

A secondary question that flows from the first is to what extent have the norms and mechanisms of the international legal system been respected, upheld, distorted or undermined in the practice of counter-terrorism in this post 9/11 environment. It will approach this question by exploring examples of practice on the various levels and types referred to above, international and national, executive, legislative and judicial. It will address, principally, state practice that is carried out (or purports to be carried out) in response to international terrorism, but also practice in responding to wrongs arising in the course of counter-terrorism.

A third group of underlying questions that emerge from the consideration of the law and the practice relate to the longer implications of the ‘war on terror’. The thesis does not purport to provide an in-depth study of the potential movement in customary law through state practice and opinio juris. It does, however, highlight the possibility, by reference to examples, of how the framework may itself have been influenced by the practice explored. It therefore highlights the implications of the war on terror for the legal framework. In the final chapter, drawing conclusions from the research, it reflects on the broader implications for the rule of law and outstanding challenges. Terror attacks in recent years render beyond a doubt the challenge facing the international community, to address effectively the scourge of international terrorism. The war on terror highlights the countless challenges for the international community to ensure that this is done within a rule of law framework.\(^\text{18}\)

\(^{18}\) See Chapter 12 which reflects on these challenges.
1.3 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 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. Secondary norms that address the consequences of breach and rules of state responsibility are also central to this study.

The traditional starting point of every discussion of sources of law is Article 38 of the Statute of the International Court of Justice,19 which lists ‘sources’ of international law.20 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.

1.3.1 International treaties

Most of the rules of the international legal system derive from agreements between States,21 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

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19 Although Article 38 is formally only binding on to the International Court of Justice (and previously, to the Permanent Court of International Justice) 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. Jennings and A. Watts (eds.), Oppenheim’s International Law (Oxford: Oxford University Press, 2008), ninth edition, p. 24.

20 The sources according to Art. 38 include a) international conventions; b) customary international law; c) general principles of law ‘as recognized by civilized nations.’

21 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.
terrorism and counter-terrorism. Some are general in nature, others address specific conduct 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. For major international treaties such as those addressed in this study, states generally become bound through ratification or accession. 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, and may not for example ‘invoke the provisions of its internal law as justification for its failure to perform a treaty’. 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’.

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’, which includes for example certain multilateral conventions on the protection of human rights discussed at Chapter 7, or the Geneva Conventions and other multilateral treaties on international humanitarian law discussed at 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 quasi-constitutional status, and its universal coverage. This is also reflected

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22 This fundamental rule is referred to as the rule *pacta tertiis nec nocent nec prosunt*. See Section IV (Articles 34-8), VCLT 1969.
23 See Article 11 VCLT 1969: ‘The 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.
24 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.’
25 See Article 18, VCLT 1969.
26 See I. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford, 2008), p13 ‘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.’
27 See in particular Chapter 4 on the use of force and Chapter 7 on human rights.
in Article 103 of the Charter itself, noting the prevalence of Charter obligations over other international agreements.29

The result of the widespread ratification of universal treaties,30 and the multiplicity of overlapping regional and specific treaties, 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 a large number of States have ratified a number of the conventions referred to in this study may constitute a strong indication that the rules embodied in them correspond to rules of customary international law.31 The study conducted by the 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.32

1.2.2 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,33 the only source of ‘general’ rules of international law is customary international law (CIL). CIL derives from the practice of States34 where this practice is more or less uniform, generally consistent and widespread, and considered to be legally necessary or

29 Art. 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.’
30 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 with 193 state parties; the Convention on the Elimination of Discrimination against Women with 187 state parties; the Convention against Torture with 153 parties; the ICESCR with 160 state parties; or from IHL, the Geneva Conventions which have 194 parties.
31 See, in general, M. Akehurst, ‘Custom as a Source of International Law’, 47 (1974-75) BYIL 1. The treaty would provide strong evidence of the opinio juris, one of the key elements of customary international law.
33 The UN Charter confers to 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 5, section A). This does not however imply that the Security Council should be considered as an ‘international legislative body’.
34 ‘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 organizations and (at least in theory) by the practice of individuals’. Akehurst, ‘Custom as a Source of International Law’, supra note 31, p. 55.
Generality of practice does not mean uniformity or universality. 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.

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.

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’, 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 by inter-state entities in the field of counter-terrorism since 9/11, and in particular the many statements by states in these fora, provide fertile ground for identifying *opinio juris*. Many of the treaties, judicial decisions or subsidiary sources examined in the study may themselves be indicators relevant to identifying customary law.

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35 *C.d. opinio iuris sine necessitatis*. 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 Reports* 1969, p. 3, para. 77. See Akehurst, ‘Custom as a Source of International Law’, supra note 31, pp. 16-18.


37 On the distinction between custom and usage – ‘a general practice which does not reflect a legal obligation’ – see Brownlie, Principles, supra note 27, p. 6.

38 See part 1.2.2 ‘How International Law Changes’ below.


40 On the other hand in particularly sensitive areas related to national security, practice is predictably opaque, and states may refrain from commenting publicly on the conduct of other states for a host of political reasons. On some areas discussed in the study, political and security sensitivities may therefore pose particular difficulties in discerning the views of states.
While some states will be more active on the international plane, thus more influential on the evolution of customary law, once a customary rule of international law has come into being, all States are bound by it.41

1.3.3 Other sources

Next to treaty law and customary international law, Article 38 ICJ Statute also refers to general principles, judicial decisions and teachings/doctrine of international law as supplementary sources.

i) General principles of Law

‘General principles of law’ is enshrined in article 38 of the ICJ Statute as a source of international law.42 Identifying such ‘general’ principles can be a contentious process, and the content of such principles is ripe for considerable dispute. There are, however, core legal principles that prevail across most if not all domestic legal systems, and are reflected at international level and should inform a holistic approach to the legal framework.43

Those of relevance in the present field would include basic principles of criminal law such as nemo iudex in sua causa, the presumption of innocence, ne bis in idem, nullum crimen sine lege or nullum pone sine lege. Other core principles may include the principles of humanity, the concept of procedural fairness and the right to a remedy, or the principle of ‘good faith’ recognized by the International Court of Justice (ICJ) as touching every aspect of international law’.44

In practice, these ‘general principles’ are particularly important where there may be gaps or weaknesses in the other sources of law, or in novel areas of practice wherein reference to national approaches to the legal principles at stake may assist the interpretation of international law. As noted above,

41 States may, however, in certain circumstances, avoid obligation through persistent objection to the rule, provided that the rule is not a jus cogens rule (see further below). For a discussion of custom and the role of ‘bigger states’, relevant to an assessment of the ‘war on terror’, see V. Lowe, ‘The Iraq Crisis: What Now?’, 52 (2003) ICLQ 859, p. 863. See also Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order, Cambridge, 2004.
42 Article 38 (1) ICJ Statute.
44 Art 2(2) UN Charter; Declaration on Friendly Relations; Border and Transborder Armed Actions (Nicaragua v. Honduras), 1988, p. 105. The ICJ found good faith one of basic principles governing creation and performance of legal obligations. See also Oppenheim’s, International Law 9/11, Ed. (Oxford 2008) p. 39-40.
allegations of gaps and uncertainties have been a defining feature of political discourse post-9/11.

**ii) Judicial Decisions, Jurisprudence and Jurists**

Significant emphasis is placed in this study on judicial responses to terrorism. Judicial decisions are often said not to be sources of law in a strict sense, particularly as there is no system of ‘precedent’ in the international system, thus formally they apply rather than create law. Yet this may fail to reflect the true extent to which international law develops through judicial interpretation, clarification or application.

This study will include judicial determinations from courts and bodies on various levels: international, regional and national. It will include decisions of the particularly influential International Court of Justice (ICJ), or international human rights bodies, on the international level. It will refer also to significant decisions of regional courts and bodies such as the European Court of Human Rights (ECtHR) or the European Court of Justice (ECJ), or of the African Commission on Human and Peoples’ Rights (ACommHPR) or the Inter-American Court on Human Rights (IACHR). On the national level, a plethora of jurisprudence has emerged, from the criminal court practice considered in Chapter 4 to various courts addressing a broad range of issues with human rights implications, discussed in Chapter 11.

These decisions serve multiple functions in the present study. National courts are organs of the state, and judicial decisions may bring the state into conflict with its international obligations. They provide examples of state practice. International and regional courts also have an important role in shaping the legal framework in various ways. On one very direct level, some decisions are themselves binding, albeit only on parties to the case. They may directly impel national legal change as states and governments implement decisions and judgments, bringing laws as well as practices into line with international legal obligations. They may also shape and clarify through practice the nature of international legal standards and may contribute to customary international law. It is therefore one of the peculiar features of national court decisions that they may both contribute as a source of law and give rise to violations of it.

The study illustrates the ways in which legal standards in this field have developed through judicial decision-making. Decisions of the ICJ and other international courts and tribunals provide authoritative interpretations of the law and are in practice often followed as authority in later cases. The influence of the judgments and decisions of at least some of the international courts and bodies on legal standards is inevitably more relevant to some areas than to others. In the field of human rights, jurisprudence plays a particular role in

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45 Article 59 of the ICJ Statute.
the establishment of legal standards, as amply illustrated by the law set out in the present study. Many relevant areas of the legal framework explored – such as positive obligations, the extra-territorial scope of human rights obligations or state responsibility for human rights violations – reveal what is essentially judge-made law, developed wholly or in large part through judicial interpretation and application of the sometimes relatively skeletal treaty provisions. Judicial decisions in the human rights field and beyond contribute to the elaboration and understanding of the ‘principles’ and interpretative approaches of human rights law that are key to the holistic and effective application of that body of law within a broader legal system.46

In the field of IHL, this is the case to a lesser extent, given the dearth of international bodies specifically charged with applying that body of law. Particularly in the post-9/11 era, however, principles and rules of IHL have been applied by courts in multiple cases, as the study will demonstrate.47 In other areas, such as the use of force, there is much less international adjudication in practice, though ICJ decisions remain authoritative.

In turn, the jurisprudence emerging from these judicial decisions feeds back into the treaty law of the future, as seen in the specific provisions of conventions on issues such as torture or enforced disappearance or aimed at protecting particular groups, which built on human rights jurisprudence.48 On another level, judicial decisions – national or international – may contribute to the formation of customary international law, or provide evidence of the ‘general principles’ of law referred to in Article 38.

As for the legal analyses of jurists, while they do not create law as such, they may ‘ease or impede the passage of new doctrines into legal rules.’49 Article 38 specifically provides that, in order to determine the content of these (treaty-based or customary) rules of international law, recourse may be had to the writings of legal scholars.50 These are referred to in the book as they

46 These principles include an evolutive approach to law as a living instrument, the principle of effectiveness, a purposive and contextual interpretation, and finally a holistic approach in line with broader international law. See Chapter 7A.6.

47 See eg the deliberations of criminal courts such as in the case of Hamdan where US courts had to determine whether material support for terrorism was a crime under IHL at the relevant time, in Chapter 4, or in the processes surrounding the Guantanamo habeas corpus or criminal cases in Chapter 8.

48 The more recent provisions of human rights treaties e.g. the Torture convention or the Convention on Forced Disappearance, discussed at Chapter 7, are more elaborate than earlier general convention and adopted the detailed rules developed through human rights jurisprudence.


50 Article 38(1)(d) of the ICJ Statute specifies that the Court may have recourse to ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.
may provide evidence of the content of customary or treaty law,\footnote{Note that these are not themselves ‘sources’ of law \textit{stricto sensu}, but provide evidence of the content of treaty or customary norms. See Brownlie, \textit{Principles}, supra note 28, p.23.} or illuminate the direction in which the law may be developing.

The study looks beyond the primary sources of international law in the form of treaties and customary law, or the supplementary sources referred to in Article 38, to other potential sources. The prolific development in the field of terrorism and counter-terrorism in recent years has been characterized by the engagement of a particularly diverse group of standard setters. In this field in particular it is therefore critical to consider the role of other actors, and the relevance of other sources, mindful of the fact that these inevitably carry varying weights. While these include the national and international judiciaries emphasised above, close regard must also be paid to the role of the Security Council, and even the different role of non-state actors, in the development of the legal framework.

\textit{iii) Security Council and General Assembly}

The principle political organs of the UN have played active roles in the development and implementation of the legal framework surrounding terrorism and counter-terrorism in recent years.\footnote{While other bodies may also influence legal development the focus here is on the Security Council and General Assembly, which have particular roles and influence. See e.g. World Summit Outcome document, 24 October 2005, A/RES/60/1, para. 80, and in relation to terrorism, paras. 81-90.} Security Council resolutions in the field of terrorism have assumed a perhaps unusually significant role, in light of the use of Chapter VII binding powers to set down elaborate measures that states are legally bound to take in relation to terrorism, which the Council found to constitute a threat to peace and security. This has been described the Security entering its ‘legislative phase’,\footnote{Paul C. Szasz, ‘The Security Council Starts Legislating’, 96 A.J.I.L. 901 (2001). José E. Alvarez, ‘Hegemonic International Law Revisited’, 97 A.J.I.L. 873, 874 (2003); S. Talmon, ‘The Security Council as World Legislator’, A.J.I.L, Vol. 99:175 (2005).} which it did most notably in Security Council Resolution 1373.

There is academic discussion over whether Security Council resolutions, which are of course not included in Article 38, should be treated as separate sources of law at all. Objections are various, but understandably include the ‘unrepresentative and undemocratic’ nature of the body, rendering the Council arguably unsuitable for international law making.\footnote{Talmon, ‘The Security Council’, supra note 53, p. 179.} The fact remains, however, that under the Charter, the Council does have a unique role in issuing binding decisions, and in light of post 9/11 practice explored in this study, the significance of that exercise of power can hardly be doubted.\footnote{See eg Chapter 7B.1 on the wide-reaching impact of SCRes 1373.}
Somewhat paradoxically perhaps, just as Council activity is relevant to an assessment of emerging obligations, it is also in the frame as regards emerging violations. As noted in Chapter 7, the question of whether the Council is obliged to respect the international legal framework, and whether it has done so, is a matter of controversy post-9/11. It may be argued that key resolutions such as SC Resolution 1373 simultaneously created one set of legal obligations, while effectively violating others, creating difficult issues for states as regards conflicting obligations.\(^{56}\)

General Assembly resolutions have quite a different role in the legal architecture. Such resolutions are not mandatory in the same way as Council Chapter VII decision, but they may nonetheless, in certain case, have significant normative value, as the ICJ and others have recognized.\(^{57}\) Assembly resolutions have particular authority and universality, as the Assembly represents the entire community of states and as such may reflect the communis opinio of the international community and give expression to the prevailing international ideology in a manner that no other international body does. As such, despite an overshadowing by the Council’s activism in this field post 9/11,\(^{58}\) the General Assembly is generally considered to be the principal UN organ engaged in standard setting and its resolutions make a potentially significant contribution to the body of general international law.\(^{59}\)

\(\text{io) Other ‘softer’ sources?}\)

A ‘subsidiary role’ in the determination of the content of international law may also be attributed to the corpus of resolutions of other international organisations, declarations and non-binding international instruments commonly referred to as ‘soft law.’ While they are not binding \textit{per se}, and have not been relied upon as definitive statements of the law, they may give more detailed expression to some of the binding prescriptions and prohibitions of international law and provide evidence of customary law.

\(^{56}\) See Chapter 7.B.1 on the controversies around whether the Council can be said to have any such obligations, as well as potentially conflicting states’obligations and litigation in Chapter 11.

\(^{57}\) See, e.g., \textit{Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)} (ICJ Reports 1986, 99-100 and 102) noting the relevance of the attitude of states towards certain General Assembly resolutions as acceptance of the validity of the rule or set of rules declared by the resolution themselves. Where there is broad consensus they may provide a strong indication of custom: see ICJ, Advisory Opinion on the \textit{Legality of the Threat or Use of Nuclear Weapons} (ICJ reports 1996, 70-71).

\(^{58}\) See e.g. Chapter 7.B.1

\(^{59}\) First among noteworthy examples in this field might be the GA Resolution adopting the 2006 UN Global Strategy: see World Summit Outcome Document, 24 October 2005, UN Doc. A/Res/60/1; UN General Assembly Resolution on Global Counter-Terrorism Strategy, UN Doc. A/Res/64/297.
Care is due in this respect, not least given the plethora of activity in this field in recent years, and the broad range of ‘Principles,’ ‘declarations’ or ‘standards’ of differing degrees of authority and weight that are increasingly relied on as ‘soft law’ standards. Those given emphasis in this study include work of UN entities and experts such as special rapporteurs, working groups and other UN mechanisms, and selected expert groups. In this fast moving and at times challenging field of law and practice, reports such as those of the UN special mechanisms, have had a leading role in identifying practices, but also in impelling legal debate by states, and influencing other standard setting. The authoritative non-binding work of the International Law Commission on state responsibility provides another example that has been drawn on, and in turn has been closely relied upon by judicial organs in recent years.60

In the field of terrorism and counter-terrorism, the sources of law considered are, like the various branches or areas of law, inter-connected, fluid and often mutually reinforcing. Primary sources evolve not only at diplomatic conferences but also through practice and interpretation, with subsidiary sources contributing to the development and formation of customary international law or the interpretation of treaties. Soft law sources may firm up through the practice of judicial decision making, which in turn may influence future treaty development. Security Council resolutions may be based on treaties – for example SC 1373 built on the Financing Convention – and vice versa. Together this varied and complex arrangement of sources, while different in nature, source and legal weight, forms a detailed international normative system on terrorism and counter-terrorism, which is not cast in stone but constantly evolving.

1.4 HOW INTERNATIONAL LAW CHANGES

International law is not static, and the international law governing terrorism has been a particularly dynamic field in recent years. Every legal system needs to be able to develop its rules to take into account the evolution and changing exigencies of the society it regulates.61 The international legal system is

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60 See generally J. Crawford, A. Pellet, and S. Olleson (eds.), The Law of International Responsibility: Oxford Commentaries on International Law (Oxford: Oxford University Press, 2010). See also Chapter 4 discussion on how such rules have been relied on domestically (e.g. in the Ahmed case, abuse of process) or in Chapters 7 and 11 (the A and Others, admissibility of evidence) or in Chapter 10 on state responsibility for receipt of intelligence. This reflects what may a trend on the part of judges national and international levels to have regard to broader non-binding but authoritative comparative and soft law standards, as well as the ‘transjudicial’ reference to decisions of different systems.

61 Within domestic legal systems, the task of keeping the law ‘up to date’ is generally carried out by the legislative power and, in varying ways, by the judiciary.
characterised by the absence of a body entitled to create (and to modify) legal rules binding on all its subjects. Just as international law is mainly created by States, as set out above, so is it generally changed by them. Thus while the core part of this book (Part Two) has chapters that deal first with the framework and subsequently with its application in practice, it is recognised that it is impossible to entirely dissociate the legal framework from its application through ‘practice’, as the relationship between the two is symbiotic.

The process through which treaty-based rules of international law change is quite straightforward (even if securing the necessary political consensus may be anything but).\(^6\) By contrast the process relating to the modification or ‘abrogation’ of rules of customary international law is somewhat more complicated. Just as customary international law comes into existence when most States of the international community follow a certain course of action believing that it is required by a legal norm, so may customary rules lose their binding force, and change, where the consistent and general practice of states, and the opinio juris supporting them, ceases. In this respect, the peculiarity of the international legal system lies in the fact that ‘violations of the law can lead to the formation of new law’.\(^6\) Discussion of the practice of states in responding to 9/11, and reactions to those responses, assumes particular significance in a system where departure from existing legal standards, and responses to the same, may ultimately impact those standards.\(^6\) The book highlights areas where it may be that the law has shifted as a result of states practice post-9/11.

However, several points of caution are worthy of emphasis in this respect. The first is that, of course, not every violation of an international rule leads to a change in the law.\(^6\) Likewise, the fact that particular states may reject or argue against the existence of an established customary law rule should not be considered as unravelling the rule itself. In most cases, not even consistent patterns of violations by a number of States imply that a rule has been

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\(^6\) A treaty, or some of its provisions, may be subsequently amended by the parties through the adoption of another international agreement. See Article 31, VCLT 1969.

\(^6\) See, e.g., the global terrorism convention negotiations which have been a long fraught and inconclusive process, by contrast to the specific conventions that have been concluded and ratified relatively speedily.


\(^6\) While not purporting to provide an in-depth analysis of potential changes in the law, which will undoubtedly engage international scholars for years to come, this book highlights areas where early indications are that the law may change, or be clarified, through recent events, and other areas where, despite disregard for the law, legal change is unlikely.

\(^6\) The factors include the nature of the rule, the number of states ‘violating’ and the reactions of other states. In respect of certain rules, such as those relating to the use of force for example, the ICJ has noted that the fact that states do not express opposition to the practice should not, generally, be taken to confirm its lawfulness. However, expressions of opposition can help to clarify the lack of opinio juris, and avoid the perception of acquiescence in the breach. See J. Charney, ‘Universal International Law’, 87 (1993) AJIL 529 at 543-5.
superseded. The ‘obligatory quality’ of a rule of customary law is lost only if the behaviour of those States which refuse to comply with the rule, and the consistent reactions of other States, are supported by the belief that the rule is no longer binding.67

Second, some customary rules of international law are particularly difficult to modify. This is due to their status as peremptory norms of international law or \textit{jus cogens} norms, which have been defined as ‘substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values’.68 As rules which aim to protect values considered fundamental by the international community as a whole, \textit{jus cogens} rules have the additional characteristic of creating obligations \textit{erga omnes}, i.e. ‘obligations owed by a State towards the international community as a whole’.69

Examples of the norms considered in this book that would clearly enjoy \textit{jus cogens} status include the prohibition on torture or the waging of aggressive war, and arguably many more of the norms at the core of the study and illustrated through the case studies, such as basic principles of human rights or humanitarian law.70 Another norm which conflicts with a \textit{jus cogens} norm is invalid. The significance of \textit{jus cogens} in practice in this area is clear from, for example, judgments of various bodies in recent years which have looked closely at the compatibility of Security Council resolutions mandating sanctions against individuals with \textit{jus cogens} norms.71

Another consequence of a norm having \textit{jus cogens} status72 is the fact that it can be modified ‘only by a subsequent norm of general international law

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67 The ICJ, determining the content of the customary rules prohibiting the use of force and intervention in the internal affairs of another State, has stated that the fact that the prohibition was frequently breached was not sufficient to deny its customary character. See \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)}, \textit{ICJ Reports} 1986, p. 14, para. 186. On reactions to the war on terror, see Chapter 12.

68 See ILC Commentaries to Articles on State Responsibility, Commentary to Article 40(3).


70 See e.g. discussion of these norms in Chapters 5 and 7.

71 \textit{jus cogens} has had real implications in the war on terror. See, e.g., A. Bianchi, ‘Human Rights and the Magic of Jus Cogens’, 19 Eur. J. Int’l Law 3 (2008), pp. 491-508; see also \textit{Kadi} decision, where the Court of First Instance of the European Communities (CFI) indirectly reviewed the legality of Security Council anti-terror resolutions against the background of human rights peremptory norms, discussed in Chapter 7.

72 The fact that the international community as a whole recognises a rule of general international law as a peremptory rule has important consequences for international responsibility; see Chapter 3.1.
having the same character’. In practice, determining that a *jus cogens* rule no longer exists, or that its content has changed, would require near ‘universal’ state practice and strong evidence indicating that the value it protects is no longer considered a fundamental one by the international community.

1.5 THE LEGAL FRAMEWORK AS AN INTERCONNECTED WHOLE

Finally, it bears emphasis that while each of the following chapters explores a different aspect of the legal framework, they are inherently interconnected. This book demonstrates the extent to which an understanding of the international system of law requires that it be seen as a whole, with each of the branches of international law understood by reference to the core principles from which they derive and to one another. The complex dynamic relationship between areas of law and sources has practical consequences, as this book will illustrate. It requires, in relation to any particular set of facts that we look beyond the simple identification of an applicable rule to consider a diverse range of different sources and potentially applicable norms, and their inter-relationship.

These inter-connections between norms will be highlighted throughout this book – at times requiring that the law set out in a subsequent chapter be pre-empted and at others that aspects of foregoing chapters be revisited. It will highlight tensions that arise, such as between IHRL on the one hand and IHL or peace and security law on the other. The intersection of different areas will be highlighted throughout the chapters, explored in more detail in relation to particular scenarios in the case studies, and returned to in the concluding chapter.

As will be illustrated more fully in the body of the study, it has been the selective application of particular branches or norms of the legal framework (notably from the law applicable in armed conflict), while ignoring other applicable norms (notably core human rights law) as well as underlying principles from IHL itself, which has characterized war on terror. The fragmented approach has fed the notorious claim that some people lie beyond laws protection, caught in legal protection gaps that do not in fact exist.

73 Article 53, VCLT 1969. Nor can they be modified or derogated from by agreement between States: Articles 53 and 64, VCLT 1969 make clear that a treaty which conflicts with a peremptory norm is void.

74 These interconnections are drawn out further in the concluding chapter.

75 See eg as Chapter 8 Guantanamo.
1.6 STRUCTURE OF THE THESIS

This thesis consists of three parts. The first sketches out preliminary issues of law relating to ‘international terrorism’ and ‘international responsibility’ for terrorism. The second, more substantial, part explores the lawfulness of certain responses to international terrorism. It considers the criminal law response, and the law governing resort to armed force between states, as well as the law governing how responses may be executed, with chapters on human rights law and international humanitarian law applicable in armed conflict.

While the focus is on the legal framework pertinent to the particular area of law, in these chapters of Part Two the ‘legal framework’ section of each chapter (Part A) is followed by an ‘application’ section (Part B), which highlights key issues regarding the treatment of that framework in the ‘war on terror.’ These sections explore practices post-9/11 that illustrate certain characteristics of the ‘war on terror’ and its relationship to international law. While the practice highlighted is necessarily a selective illustration of issues arising, the framework sections, by contrast, provide the law by which new measures may be assessed as they emerge, as they do almost daily, in this rapidly unfolding area. Chapters 2-7 therefore set out the legal infrastructure of terrorism and counter terrorism, identifying norms, mechanisms and principles from numerous areas of law that are engaged in the fight against ‘international terrorism’.

In Part 3, case studies look across the areas of law, illustrating how they co-apply, intersect and take effect in practice in relation to particular controversial factual scenarios. The case studies illustrate also the extent of non-compliance with and obfuscation of the legal framework, as well as on occasion highlighting tensions or controversies within the framework itself. Chapters 8-10 focus on detentions at Guantanamo Bay, the killing of Osama bin Laden and extraordinary rendition respectively. A further chapter explores judicial responses to the war on terror, and explores the role of the courts in adjudicating the human rights challenges that ‘war on terror’ has given rise to. The final chapter set out conclusions of the research as regards the legal framework, explores overarching characteristics of the practice of the war on terror, and questions its longer term implications.

76 The most central, and the lengthiest, chapters setting out the law and illustrating its application or disregard follow this bifurcated structure – in relation to criminal justice, the use of force, humanitarian law and human rights law.
77 See, e.g., Chapters 3 Responsibility and 10 Extraordinary Redition on complicity in international law.
1.7 OVERVIEW OF CHAPTERS

The political significance of the “terrorism” label since 9/11 is beyond dispute, and is explored throughout the study. Chapter 2, Part One begins however by addressing the legal significance of ‘terrorism’ as a concept in international law. It considers the renowned lack of a global convention defining ‘terrorism’, while sketching out international and regional developments (before and after September 11) towards a generic definition of terrorism, and the proliferation of conventions addressing specific forms of terrorism. While it is doubtful that there is an accepted definition of terrorism under treaty or customary international law at the present time, the chapter introduces other international legal norms that do, however, address the prohibition on terrorism and obligations in respect of it.

Chapter 3 addresses responsibility under international law. It assesses first the responsibility of states for acts of international terrorism, and the basis on which acts perpetrated by private individuals, networks or organisations (such as al-Qaeda or ‘associated groups’78) may be attributed to a state (such as Afghanistan post-9/11). It distinguishes attribution of responsibility for terrorist attacks themselves from responsibility for other wrongs, and considers the consequences of each, under international law. It also assesses the extent to which private individuals or organisations – so-called ‘non state actors’, such as al-Qaeda or individual members or associates thereof – may incur responsibility under international law. The final section considers issues of state responsibility arising in relation to responses to international terrorism. Specifically, it explores how the multi-actored, transnational complexity of the ‘war on terror’ has sharpened focus on the significance of shared state responsibility where a state acts through or in cooperation with other states. It explores also state responsibility where the state acts through private contractors, on the other. It considers the right, or in exceptional circumstances the responsibility, of other states to take measures in response to international wrongs carried out in the course of terrorism, or indeed in the name of counter-terrorism.79

In Part Two, Chapter 4 considers international terrorism and responses thereto through the prism of criminal law. Part A first describes the crimes that may be committed through acts of international terrorism, outlines relevant principles of criminal law that determine who may be held responsible and considers which courts or tribunals can exercise jurisdiction and in what circumstances. Second, it considers the implementation and enforcement of

78 See Chapter 6 IHL.
79 Many wrongs committed in the name of counter-terrorism, such as the unlawful use of force, arbitrary detention, torture or extraordinary rendition, are highlighted in subsequent chapters.
criminal law, in particular law and practice in respect of international cooperation in criminal matters.

Chapter 4 Part B considers the application of the criminal law model in practice since September 2001. It notes the apparent dearth of criminal law responses in the wake of 9/11, and the transformation of laws and practice over time. It explores normative developments, revealing a trend towards the ‘preventive’ role of criminal law, and an exceptionalist approach to criminal law and procedure in the field of terrorism in recent years. Examples include expanded terrorism related offences and modes of liability, modified principles and procedures in the investigation and prosecution of terrorism, and innovations in international cooperation. It considers the relationship between those developments and other legal obligations, notably in the field of human rights law, and the implications for the criminal process itself. Finally, while the focus is on international terrorism, it also notes that the international criminal law paradigm is relevant also crimes under international law committed in the name of countering terrorism, and the dearth of practice to date in holding individuals criminal responsible for ‘war on terror’ crimes.

Chapter 5 considers the exceptional circumstances in which the use of force may be lawful in response to international terrorism. These concern self-defence or pursuant to Security Council authorisation under Chapter VII of the UN Charter. While discussing whether there are other possible justifications the focus is on those justifications that have been advanced in practice. In various contexts since September 11 where reliance on an expansive approach to self-defence against terrorism has dominated. The Chapter therefore explores in most detail the scope of, and limits on, the right to self-defence in response to international terrorism. Chapter 5, section B considers this legal framework in light of the use of force post-9/11. The lawfulness of the use of force in the interventions in Afghanistan and Iraq post-9/11 is considered, and the ongoing assertion of the right to use force across borders, particularly in targeted killings of alleged members of al-Qaeda and associated groups around the globe.

Chapter 6 considers the relevance, scope and nature of international humanitarian law (IHL) applicable during armed conflict to the international fight against terrorism. It assesses the legal nature of ‘armed conflict’ and key norms of IHL that apply in it, notably those that govern legitimate targeting, permissible methods and means of warfare, humanitarian protections and the responsibility of states party to the Geneva Conventions to ensure compliance with IHL standards.

In light of this legal framework, Chapter 6, section B explores the issue that has dominated, and stymied, legal discourse since the launching of the so-called ‘war on terror’: to what extent is there or can there be a global a war with al-Qaeda and associated groups? It also addresses, secondarily, the nature of those armed conflicts that have arisen post 9/11, and particular issues of IHL arising. The compatibility of practices arising in the purported global
Introduction

‘armed conflict with al Qaeda and associated groups,’ including in relation to the treatment of “enemy combatants,” detentions and drone attacks on alleged members of al-Qaeda and associates worldwide are also considered.

Chapter 7 considers the international human rights law (IHRL) framework of relevance to the ‘war on terror’. It discusses where, when and to whom the human rights framework applies. It highlights the inherent flexibility of IHRL and the ways in which it accommodates and is responsive to security imperatives and the challenges of international terrorism. Specific rights implicated by terrorism and counter terrorism are then addressed.

Chapter 7, section B seeks to illustrate some of the many overarching and specific questions that arise in relation to the application of this legal framework post-9/11. Three broad groups of issues that go to the relevance and applicability of the framework, as well as challenging issues regarding interplay of legal regimes, are addressed. These are the relationship between security and human rights; the applicability of human rights obligations to states acting abroad, and the applicability of human rights in the ‘war’ on al-Qaeda (and its interplay, where appropriate, with IHL). The chapter also highlights specific post-9/11 practices that violate or strain the human rights framework. Among the many issues highlighted are: broad anti-terrorist legislation and the implications for the principle of legality, profiling practices in light of equality norms, the implications of listing and delisting of terrorist suspects, the erosion of the right to privacy and the multifaceted attacks on the protection against torture and inhuman treatment. More general questions relate to the marginalisation of human rights law and mechanisms in the immediate aftermath of 9/11, and whether there is a discernible trend back towards a more central role for human rights protection in the on-going ‘war on terror’.

Part III consists of three case studies that ‘apply’ the legal framework discussed in preceding chapters. Chapter 8 relates to the detentions in Guantanamo Bay, Cuba, which came to symbolise the arbitrariness of the ‘war on terror,’ as a vehicle to consider some of the legal issues highlighted in Chapters 6 and 7 and the interconnections between them. It considers the lawful bases for prisoners’ detention and the basic procedural rights to which they are entitled under IHRL and IHL, as well as issues arising from their trial by military commission. The chapter concludes by questioning the implications of the Guantanamo Bay anomaly – for the US, for other states, and for the rule of law more generally.

Chapter 9 presents the second case study, focusing on the killing of Osama bin Laden, and the appropriateness, from a legal standpoint, of the prompt assertion in its wake that ‘justice ha[d] been done’. It considers the lawfulness of his killing, on available facts, with regard to the various areas of international law at stake, including the jus ad bellum, jus in bello and the nature of the right to life under human rights law. International legal issues arising
in relation to the subsequent disposal of bin Laden’s corpse in the Arabian
sea are also raised.

Chapter 10 considers the practice of ‘extraordinary rendition’, led by the
CIA but made possible by a complex network of other states and private actors.

More than any other practice, it highlights issues regarding multiple actor
responsibility. The chapter explores the potential implications of many areas
of law, and which states may be responsible in respect of which forms of
participation in the programme, and areas of tension or uncertainty in this
respect. It considers efforts to secure justice and accountability for rendition,
and the implications of the rendition programme and the impunity that has
surrounded it to date.

Chapter 11 explores the role of the courts, with a focus on the adjudication
of human rights claims in respect of which litigation has been most volumi-
nous. It highlights limitations placed on the judicial role in various guises
since 9/11. Despite this, it assesses judicial responses to have emerged from
the war on terror by reference to significant cases. It analyses the role and
potential impact of that human rights litigation in an area where transparency,
accountability and reparation for victims of the war on terror has proved
elusive.

The concluding chapter 12 looks across the array of law and practice that
has been highlighted in preceding chapters. Considering the legal framework
as a whole, it reflects on the nature of the normative order governing terrorism
and counterterrorism. It will suggest that it reveals no gaping holes in the legal
framework, nor the transformative shifts post-9/11 that some heralded at the
outset of the ‘war on terror’, while acknowledging areas of tension and un-
certainty that have emerged, and pockets of legal development. It identifies
certain overarching characteristics of the ‘war on terror’, which it will suggest
are the antithesis of the principles that underlie a rule of law approach to
counter-terrorism. By exploring the legal framework, and state practice in
respect of it post-9/11, the book finally questions the – as yet uncertain – long-
term implications of the war on terror for international legality. It ends by
highlighting some of the challenges that face the international community if
we are to meet the commitment that has now been made on paper to move
from a ‘war on terror’ blighted by illegality to an effective, rule of law
approach to counter-terrorism.

\[80\] Chapter 4 deals separately with the practice of criminal trials.

\[81\] See e.g. UN Global Strategy supra note 59.