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12 Conclusion

It is of course acknowledged that international law is not an exact science, but it surely does not have to appear as bizarre as some of its practitioners have made it appear in recent months?

Baroness Ramsay of Cartvale (Parliamentary Debates, Hansard, 17 March 2003)

Any sacrifice of freedom or the rule of law within States – or any generation of new tensions between States in the name of anti-terrorism – is to hand the terrorists a victory that no act of theirs alone could possibly bring.

Secretary-General Kofi Annan (Statement to the Security Council ministerial meeting on terrorism, 20 January 2003)

Since 9/11 the agenda of the international community has been shaped, and perhaps dominated, by the fight against terrorism. Preceding chapters have explored in detail particular areas of the relevant international legal framework, alongside particular responses to international terrorism post 9/11. This concluding chapter considers the legal framework and practice as a whole, reflecting on certain overarching characteristics of the war on terror and its approach to international legality. It then considers the legal framework itself, and the extent to which the experience of terrorism and counter terrorism have indicated – as some have asserted – gaps and inadequacies in the law, or led to a transformative shift in the international legal order. It suggests that there are no gaping holes in that framework, while highlighting pockets of legal development, tensions and areas where the law may yet be subject to development. The chapter ends by questioning the longer term implications of the war on terror for the rule of law.

12.1 9/11: Tragedy, Opportunity and the ‘War on Terror’ response

September 11 was an international tragedy. It was a crime under international law and, as the Security Council promptly determined, a threat to international peace and security. It was followed by widespread, perhaps unprecedented,
expressions of international solidarity with the United States. The Security Council expressed its willingness to act, and for the first time in history, NATO asserted the right of collective self defence. States and institutions committed their shared determination to cooperating more effectively to combat terrorism and to hold to account those responsible.

It is tempting to speculate that September 11 represented a moment of unique opportunity: for the reassertion of international order over the chaos that the attacks represented; for the consolidation of accountability norms and mechanisms, bolstered by improved multilateral enforcement and enhanced international cooperation in criminal justice; for collective international action to uphold international law and protect international peace and security, improving the credibility and effectiveness of the collective security system.

The ‘war on terror’, however, unfolded differently. Large scale and long term military interventions unfolded in Afghanistan and Iraq, which then gave way to a geographically limitless war on al-Qaeda and associated terrorist networks worldwide. There was overwhelming and uncritical international support for the Afghan intervention in the unique post 9/11 moment.\(^1\) However the resort to self defence was the precursor to a stretching, beyond plausible elasticity, of the notion of self defence to cover pre-emptive action. This was glimpsed in US justifications of the Iraq intervention,\(^2\) published as policy in the United States National Security Strategy,\(^3\) and its on-going practical effect made glaringly clear through burgeoning drone strikes that by the eleventh anniversary of 9/11 were reported to have taken more lives than the 9/11 attacks themselves.\(^4\) Meanwhile the UN collective security system has largely been undermined. The notorious invocation of a broad reaching ‘war’ paradigm has had profound and wide-reaching implications. It has purported to justify exceptional rules – the exclusion of normal standards of protection for detainees or criminal suspects for example, resort to special courts and legal regimes, as well as lethal targeting of persons that would otherwise be labelled extra-judicial executions – inflating and distorting the perceived relevance (and content) of IHL, while marginalizing the relevance of human

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1 See Chapter 5B.1 on questions as to the lawfulness of the use of force, and whether the legal prerequisites of necessity and proportionality of self defence had been met in relation to the objectives of the campaign, in Afghanistan. Chapter 6 notes differing understandings of the objectives in Afghan among participating nations, and specific issues of compliance with IHL. On the acceptance of self defence against non-state actors, see also 12.3.2 below.

2 As Chapter 5B.1 explains, US justifications included reference to self defence while the UK relied on other legal bases.

3 There have been several such US National Security Strategies since 9/11, discussed in Chapter 5. The 2002 strategy was notably explicit in the promotion of a doctrine of pre-emption, which was subsequently deemphasised, though a broad preemptive approach to self defence remains as a matter of policy and in practice: see Chapter 4B.2. Cf the approach of the European Security Strategy adopted by the European Council on 12-13 December 2003, p. 4.

4 See Chapter 6B.2.2.
rights protections for all. More insidiously, it has framed the fight against terrorism as a conflict against an ‘enemy’ to be vanquished, at times apparently at any cost, rather than individuals and groups against whom the full force of the law should be brought to bear.

Alongside the banners of an uncertain ‘war’ against an ill-defined enemy, and of a ‘self defence’ that is no longer purely defensive, flies the ambiguous banner of ‘terrorism’ and ‘associated’ activities. Myriad practices have emerged across the globe, and old practices have continued with a renewed sense of legitimacy, in the name of terrorism prevention, many of which have fallen foul of or jeopardised international standards of protection.

The Security Council’s novel ‘quasi legislative’ role provided the impulse for much of this ‘counter-terrorist’ activity, imposing a broad mandate on states to take measures against terrorism without providing clarity as to the ‘terrorism’ targeted, without emphasising the need for consistency with IHRL and IHL and without effective oversight.5 Amorphous definitions of terrorism, jarring with principles of legality and certainty, have been used to detain political opponents, proscribe dissent, subvert legitimate free speech, or as a basis to prosecute human rights defenders, indigenous leaders, humanitarian organisations, labour organisers, women’s groups, poets, artists and others presumably far removed from the international terrorism the international community resolved to combat in the aftermath of 9/11.6 The impact of the use of undefined and malleable terms such as ‘terrorist’ and states that ‘harbour or support’ them as the basis for wide-ranging prescriptions, has been multiplied over time by expansive approaches to those ‘associated’ with, providing various forms of ‘material support’ or ‘encouragement’ for terrorism.

The Security Council coupled its quasi legislative role with a ratcheting up of targeted sanctions against individuals and groups, with profound impact on individuals, communities and arguably on the Council’s own reputation.7 The ‘draconian’ lack of due process that has been said to characterize the Council’s approach is reflected in national measures such as sanctions, expulsions and other ‘preventative’ orders of varying types which have infringed a wide range of rights without providing reasons or a meaningful opportunity to challenge.8

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5 See e.g. SC Res1373, mandating a host of measures aimed at, for example, preventing terrorism, criminalising it, cutting off funds to terrorists and denying them refugee status. The resolution, identifying terrorism as a threat to international peace and security, continues in force despite vocal opposition, discussed at Chapter 7B.1.2.

6 See Chapters 4B.2.1 and 7B.5 on the breadth of criminal laws and prosecutions for terrorism and ‘associated’ offences.

7 Chapter 7B.1.2 for the ‘executive’ and ‘legislative’ roles of the Council.

8 See e.g. Chapter 7B.7, 7B.8 and 7B.10 for various examples of the denial or limitation of the right to challenge orders that lead to detention, deportation or sanctions which have been criticized as ‘draconian’; see also 12.3 below on ‘arbitrariness.’
Despite the commitment in the wake of 9/11 to a multi-faceted counter-terrorism campaign that would utilise ‘every instrument of law enforcement’ to ensure that ‘justice’ was done, at least in the first few years following 9/11, there was not an enormous, coordinated international criminal law enforcement initiative. The prospect of international jurisdiction was sidelined shortly after 9/11, in apparent deference to national courts, yet national prosecutions were limited and convictions scarce. Failures of international cooperation, including as a result of the United States refusal to share intelligence with foreign courts, has further hampered prosecutions and processes, both for terrorism and counter-terrorism crimes. Paradoxically, criminal prosecutions for terrorism related offences have been impeded in multiple ways by the unlawfulness of states’ responses, rendering evidence inadmissible or of dubious reliability, impeding extradition or mutual legal assistance and with it access to evidence and to suspects, or casting doubt on the legitimacy of criminal processes.

A shifting criminal law paradigm over time – towards an emphasis on the preventive role of criminal law – has spawned new criminal laws, embracing an ever broader range of conduct that inter alia supports, facilitates or contributes to acts of terrorism. Alongside these laws, are expansive powers of investigation, novel criminal jurisdictions, adapted criminal procedures and initiatives to enhance and streamline international cooperation. While developments have in some respects bolstered the normative and institutional framework for enforcing criminal law against terrorism, so far as they themselves fall short of basic principles of criminal law, such as individual responsibility, legality and due process, they in turn threaten to undermine rather than strengthen the rule of law framework.

9 In late September 2001, President Bush stated: ‘We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war to the disruption and defeat of the global terror network.’ J. Harris, ‘President Outlines War on Terrorism, Demands Bin Laden be Turned Over’, Washington Post, 21 September 2001.
10 Bush, ibid. See, e.g., SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), para. 3, where the Security Council ‘[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks’. See also e.g., the UK Prime Minister describing the UK’s role as to ‘construct a consensus behind a broad agenda of justice and security’. T. Blair, Speech in Sedgefield constituency, 5 March 2004. The Security Council, for its part, underscored the justice objective in the immediate wake of 9/11 and has reiterated it repeatedly since then.
11 See Chapter 4B.1.1.
12 Chapter 4B.1.3 on national versus international models of justice post 9/11.
13 See illustrations of non-cooperation, or hampering criminal processes, in Chapters 4 and 10.
14 See obligations of non-cooperation, including non-refoulement, in Chapter 7A.5.10.
15 Examples are provided in Chapter 4B.4 ‘The Strained Relationship between Human Rights, International Cooperation and Criminal Justice’.
16 Chapter 4B.2.3 ‘Modified Procedures and Principles of Criminal Law.’
The vast majority of ‘war on terror’ detainees have not been charged with criminal offences at all, but held in ‘despotic’ detention regimes, epitomised by Guantanamo Bay or CIA secret detention, but reflected much more broadly across multiple states practices. Fundamental questions arise recurrently as to the lawfulness of detention on preventative, security or intelligence gathering grounds, as well as the erosion of procedural safeguards. As judicial and other forms of oversight have expanded their reach, such as through the hard fought habeas litigation of Guantanamo detainees, individuals have been moved further beneath the potential radar of protection, either into US overseas detention where they are denied basic due process rights, or into the captivity of other states for detention by proxy.

The persistent prevalence of torture as a feature of the war on terror, as well as attempts to ‘justify’ it, to ‘balance’ it against national security interests or to erode its safeguards, illustrate how established values have been questioned, and basic standards have been jettisoned, in the name of intelligence gathering in the war on terror. Notably the rendition programme’s policy of enforced disappearance of persons, carefully coordinated across the globe through networks of willing individuals, private actors and state partners engaged in the denial of law’s protection and a subsequent systematic cover-up, illustrates the ‘dark side’ of international cooperation and the multiplicity of actors whose responsibility is engaged in the war on terror. The obsessive pursuit of unfettered ‘intelligence gathering,’ reflected in the driving role afforded to intelligence agencies, and the reduction of individuals to mere objects of ‘intelligence value’ has been described as setting human rights back to a pre-Kantian era in which individuals could be conceived of as mere means to an end. Far from the acts of isolated pariah states, the war on terror

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17 Chapter 7B.7 ‘Restricting Liberty in Liberty’s Name’ and Chapter 8 on Guantanamo Bay.
18 ‘What makes the result a despotic regime is the sense that the detaining authority is presumed to be authorized to detain, yet gains that authority based on its claims about an individual but in the absence of a trial and conviction.’ J. Resnik, ‘War, Terror, and the Federal Courts, Ten Years After 9/11 Conference’, Association of American Law Schools, Section on Federal Courts program, 2012 AALS Annual Meeting, Washington, D.C., 7 January 2012.
19 Arbitrary detention of alleged terrorist suspects remains commonplace in many sites and many states around the world. See Chapter 7B.7 and the limited gains in relation to habeas in Guantanamo (Chapter 8), which have not applied elsewhere, as evidenced by Baghram litigation, for example (Chapters 7B.3 and 11).
20 See eg Chapter 10.2 for an example of allegations of other states detaining unlawfully at the behest of the US, long after the CIA detention centres are reportedly closed.
21 See Chapter 7A.5.2 and 7B.6.
22 See eg Council of Europe Commissioner Marty’s findings of ‘systematic cover up’ by European states, of the rendition programme, in Chapter 10.2.
23 Chapter 10 for the legal framework, including state and individual responsibility, and its application to rendition.
Chapter 12 reveals systematic and recurrent use of torture, complicity in torture, and turning a blind eye to torture, giving rise to the responsibility of many states, in many forms.\(^25\)

It is perhaps the ultimate paradox of the ‘war on terror’ that the horrendous acts of lawlessness witnessed on 11 September 2001 have been relied upon to justify repeated violations and further disregard for the international rule of law. Yet in the face of clear state and individual responsibility, as well as the countless lives that have been destroyed in the course of the long war on terrorism, reparation and accountability remain elusive.

**Reaction to the War on Terror**

In light of the foregoing, it may be difficult to see the ‘war on terror’ as other than an opportunity squandered and the ‘catastrophe’ for the rule of law foretold by some in the aftermath of 9/11.\(^26\) Practice is, however, varied, it has evolved over time, and it remains very much in flux. A significant part of this practice is the extent of the reaction to the nature or excesses of the ‘war on terror’, albeit perhaps belated and, as yet, insufficient. Evidence has emerged over time of an approach which recognises the need for a shift back to a rule of law approach to countering terrorism, and the importance of strengthening rather than discarding the international legal framework.

First, are the indications of egregious violations of human rights and humanitarian law prompting an increasingly resolute reaction from the international community. Perhaps as plausible deniability of the existence and gravity of such violations has faded, criticism of specific practices has become more robust from states, international mechanisms and commentators. This is most striking perhaps in the context of the anomaly of Guantanamo Bay discussed in Chapter 8, where condemnation has become particularly strident over time, from states, international bodies and many other sources, some of them not normally known for human rights advocacy.\(^27\) Condemnation of the extraordinary rendition programme discussed in Chapter 10 also continues to mount with the exposure of facts as to its nature and scope, contributing momentum towards a reluctant but steady reckoning as regards the responsibility of multiple states, and leaving a notable dearth of defenders of the programme or its tactics.\(^28\) Practice has developed more recently, and reactions continue to emerge, in relation to widespread targeted drone killings of alleged terrorists.\(^29\) While there may be little apparent support or acceptance, explicit or implicit, for the legitimacy of the practice, reactions have been distinctly

\(^{25}\) Chapter 3 on forms of responsibility and 7 and 10 for examples.
\(^{26}\) See A. Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, EJIL, 2001.
\(^{27}\) See Chapter 8.C.
\(^{28}\) See Chapter 10.
\(^{29}\) See Chapter 6B.2.2.
muted. At time of writing, expressions of concern regarding the legality of such strikes were gathering pace, however, both within the US and internationally.30

A number of states have backed up their condemnation of war on terror violations of human rights and IHL with indications of their unwillingness or inability to cooperate, to avoid conflict with their international obligations.31 Conditioning cooperation in criminal, military or intelligence matters on compliance with basic international law norms, for example, is one of the critical ways in which international legal obligations in this field can be given effect. What remains uncertain is whether condemnation will also be supported by action to hold to account those responsible.32

The shift of approach is perhaps most evident in the increasing emphasis given to the complementary nature of the obligations of combating terrorism and protecting human security, on the one hand, with respect for rule of law, democracy and human rights, on the other. This was epitomised in the 2006 UN Global Strategy which, like many other declarations and resolutions, describes human rights and security as ‘not conflicting goals, but complementary and mutually reinforcing’.33 This sentiment is amply reflected in international, regional and national level discourse by states since, epitomised perhaps in President Obama’s famous statement that living our values ‘does not make us weaker, it makes us stronger.’34

On the part of the Security Council, among others, apparent blindness to human rights concerns in the glare of security imperatives post-9/11 has given way to consistent reiteration of the complementarity of effective counter-terrorism strategies and respect for the rule of law, of which human rights and international humanitarian law are integral components.35 Thus is reflected in institutional developments, national and international, that reflect the need to ensure effective counter-terrorism measures are consistent with international law, notably in the Security Council counter-terrorism committee’s volte face to embrace, albeit tardily and reluctantly, a human rights dimension

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30 Many initiatives are underway questioning the legal limits of such practices; some are referred to in Chapter 6.
31 See Chapter 7A.5.10 for the legal framework and B.14 for practice post 9/11; see also Chapter 4B on criminal cooperation.
32 For challenges, and developments, see eg Chapters 4B.5, 7B.14, 8C.3 or 10.5.
33 UN Doc. A/60/825, 2006. The global strategy is reflected in the approach across regional bodies, see e.g. ACHPR, Resolution on the Protection of Human Rights in the Fight against Terrorism, adopted at its 37th session, 2005. For more detail see Chapter 7B.1
34 ‘That is why I have ordered the closing of the detention center at Guantanamo Bay, and will seek swift and certain justice for captured terrorists – because living our values doesn’t make us weaker, it makes us safer and it makes us stronger.’ B. Obama, ‘Remarks of President Barack Obama – As Prepared for Delivery, Address to Joint Session of Congress’, 24 February 2009.
35 See Chapter 7B.
as an inherent aspect of its security agenda, echoing the integrated approach of other regional and international political organisations.36

A significant dimension of this shift is the emerging recognition of the full practical implications, and the counter-productivity, of much counter-terrorist activity in the post-9/11 context. On one level, this is seen in the acknowledgment of how abusive practices adopted in the name of preventing terrorism have served as a catalyst or sustaining influence for further terrorism. This is reflected for example in the assertion from the US President who, like others, has himself described Guantánamo as ‘probably the number one recruitment tool’ for fledging terrorists.37 More recently, drone killings have also been described as having “replaced Guantánamo as the recruiting tool of choice for militants.”38 The difficulty in securing suspects or evidence, issues of admissibility or abuse of process challenges in criminal trials, illustrated in chapter 4, are increasingly recognized as ways in which discarding the rule of law has hampered its subsequent enforcement through criminal justice.39

The re-emergence of the international commitment to address ‘conditions conducive to terrorism,’ enshrined in the global strategy and reflected in international and national statements,40 are also relevant here, suggesting a more holistic approach that recognizes the inter-relationship between the human rights and development agendas, on the one hand, and that of terrorism prevention on the other.

There may also be a reaction to the military emphasis of the “war on terror,” both from within the US administration that championed the ‘war on terror’ and beyond. The concept of a “war” on terror or terrorism, once offered as a panacea by the US but rejected categorically by others, is now shunned both inside and outside the US administration.41 While it holds fast to its assertion of a war on al Qaeda and ‘associates,’ this appears to have been rejected by other states.42 Overwhelming and uncritical international support

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36 See further below 12.3.3 highlighting areas of legal (including institutional) development and Chapter 7B.1.


39 Chapter 4B.4.

40 See Chapter 7B.1 on the global strategy, which is also reflected regionally. See eg “Why terrorism? Addressing the Conditions Conducive to the Spread of Terrorism” (Strasbourg, 2007). President Obama’s National Defence University speech, 23 May 2013, reflects the importance of a ‘comprehensive approach’ addressing perceptions of injustice, poverty and other factors.

41 Chapter 6B.1.1.

42 Ibid.
for the Afghan intervention\textsuperscript{43} contrasted starkly to strident and vocal international opposition to the Iraq war, or to the lack of support for the US assertion of the right to use self defence against terrorists worldwide.\textsuperscript{44} The shift of reaction may well reflect shifting policies, that have strained legal principles and other states support or tolerance too far, but there is also greater recognition of the limitations and the dangers of a military-focused response to international terrorism.\textsuperscript{45} In turn, the shift towards an invigorated role for criminal law, including an exploration of its preventive potential,\textsuperscript{46} holds real promise of a shift towards a rule of law framework.

A critical component of the ‘reaction’ to the war on terror over time has been judicial, as challenges to the acts of other branches have been adjudicated.\textsuperscript{47} While the judicial voice has perhaps been muffled or unduly deferential to the executive in many cases post 9/11, there is a vast body of practice in which the courts have asserted their role in reining government action back within the limits of the law, and ensuring a measure of oversight and accountability. The impact has been wide-ranging, including impelling legislative and policy change, reasserting and strengthening legal standards, as well as the broader rule of law implications of reasserting the principles of accountability and oversight.\textsuperscript{48} While the post-9/11 legal landscape has undoubtedly been bleak, whether it amounts to the ‘catastrophic’ situation for the rule of law is questionable, and may require consideration through a longer time lens.\textsuperscript{49}

\subsection*{12.2 THE LEGAL FRAMEWORK}

The focus of this study has been on identifying the current state of the international legal framework on terrorism and counter-terrorism, against which the lawfulness of practice falls to be assessed. In identifying the legal framework, preceding chapters have set out the multi-dimensional legal infrastructure of terrorism and counter terrorism. Each of chapters 2-7 identified multiple primary and secondary norms, mechanisms and principles from numerous areas of law that are engaged in the fight against ‘international

\textsuperscript{43} See Chapter 5B.1 on the acceptance of self defence against non state actors, and further below on legal development.
\textsuperscript{44} Chapter 5B.2; see 6B.2.2 on IHL issues arising.
\textsuperscript{45} See eg SC Res. 1963 (2010), fourth preambular paragraph.
\textsuperscript{46} Chapter 4B.1.2 ‘Terrorism Trials’.
\textsuperscript{47} This national and international litigation has been notably prolific in relation to the adjudication of human rights issues, which is the focus of Chapter 11, and to some extent IHL. Criminal law is addressed through the criminal process in Chapter 4. In other areas such as the use of force, the scope for adjudication is inevitably more limited.
\textsuperscript{48} Chapter 11.
\textsuperscript{49} See further below, 12.4. A. Cassese, \textit{Terrorism is Also Disrupting Some Crucial Legal Categories of International Law}, EJIL 2001.
terrorism,’ which together form the applicable legal framework. The case studies in chapters 8-10 then looked across that framework and illustrated how diverse areas of law co-apply and intersect. The practice highlighted has illustrated both the extent of non compliance with and obfuscation of the legal framework, as well as on occasion tensions or controversies within the framework itself.50

This study highlights the extent to which one phenomenon, international terrorism, is addressed through a multiplicity of areas of law, and myriad overlapping sources of law. The framework on terrorism and counter-terrorism has naturally included an overlapping and multidimensional group of treaties, including bilateral, regional and multilateral terrorism conventions, extradition treaties, human rights and IHL conventions, which bind parties to them, some of which constitute the broader reaching norm-making treaties with significance beyond the parties to them. In many places the obligations referred to reflect also customary international norms, identified through state practice and opinio juris, as well as through the role that the many other sources – international organisations, treaties, judicial decisions, the work of expert bodies inter alia – play as identifiers of customary international rules in this field. A number of the norms identified have also been consider to enjoy special *jus cogens* status, with implications both for the normative significance and opprobrium attach to the rules, and their resistance to change. While obligations inevitably vary, much of the legal framework on which the analysis in preceding chapters is based is therefore shaped around core, well established international norms, binding on all states.

This framework is fleshed out by reference to other sources. Judicial decisions of many national, regional and international courts have also been relied upon in various ways: they themselves provide examples of state practice, they impel such practice (as states and governments implement or respond to decisions and judgments), and they themselves shape the legal framework, through the application and development of the law.51 ‘General principles of law’ have been drawn on to complete the legal framework, particularly in areas of uncertainty.52

Security Council resolutions have assumed special significance, bolstering the more traditional sources of international law with binding proscriptions

50 See e.g. Chapter 10 on issues arising regarding aiding and assisting and complicity in international law.
51 For developments in the legal framework post 9/11 see 12.3.2. below.
52 These are included as a source of law in Article 38 of the ICJ Statute. As noted in Chapter 1, these may be particularly important where there are perceived gaps, weaknesses or areas of uncertainty, and the principles of note in this study have included the presumption of innocence, nullum crimen sine lege, legality and proportionality. On proportionality, as a general principle, see “The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German-Australian Comparison” City University of Hong Kong Law Review Volume 2:1; [2010] UNSWLRS 35.
in the post 9/11 world, with follow up and oversight from the Council’s Counter-terrorism Committee. The General Assembly has lent its imprimatur of universality to many of the obligations in this field, while the framework is considerably illuminated through soft law standards which, while not binding and inherently divergent in their roles and weights, assist as tools in the interpretation of binding standards, and potentially herald areas of future legal development. The myriad activity in this field includes declarations and resolutions of international or regional bodies, the work of the International Law Commission, General Comments by human rights bodies including the HRC and CAT, the significant detailed work of UN entities and experts such as numerous special rapporteurs or working groups, and the ‘softer’ expert groups’ recommendations ranging from high level summit outcomes to detailed principles and standards on specific issues of law. Many of the soft law sources relied upon have also been given close judicial consideration, thus firming up the soft law standards in the course of the legal dynamics of the international system. The result is a detailed and growing body of law, which must be understood by reference to many branches of international law and multiple, overlapping and reinforcing sources, yet which is at its core based on basic principles of law.

53 Resolutions are referred to for different legal purposes: Chapter 2 and 7 discuss broad reaching obligations on state imposed through eg SC 1373 among others, whereas other resolutions effectively impose sanctions on individuals and create obligations for states in this respect. By contrast, as discussed in Chapter 5B.3 resolutions have been relied upon not for imposing obligations but providing a legal basis for the right to resort to force.

54 Soft law standards have also assumed significant roles in identifying practices, impelling legal debate by states, providing an expert view of legal obligations and assessments of the lawfulness of practices in a timely manner.

55 Eg The high level International Summit on Democracy, Terrorism and Security, Madrid, 2005 looking at causes of terrorism as well as democratic responses may be an example.

56 As noted in Chapter 1, a broad range of sources can be referred to as ‘soft law’ standards, and recognition is due of their differing degrees of authority and weight. Among those particularly relied upon include ground-breaking reports of Special Rapporteurs, UN working groups or regional bodies such as the Council of Europe, while regard is also had to e.g. the ICJ Eminent Jurists report; the Chatham House Principles on the Use of Force in Self Defence; the Leiden Principles on Counter-terrorism; Principles on the Right to Information and National Security; the Declaration of the Madrid Summit on Democracy, Terrorism and Security.

57 E.g. the ILC Articles on State Responsibility have been cited as relevant to human rights obligations in this area in national and international jurisprudence; see eg the A and Others case on admissible evidence (Chapter 11). See also the Ahmed case before English courts where reports of the Special Rapporteur on Terrorism and Human Rights and of the Joint Parliamentary Committee on Human Rights were closely analysed, though ultimately not followed (see Chapter 4B.4 and Chapter 10). This reflects what may a trend on the part of judges national and international to have regard to broader non binding but authoritative comparative and soft law standards.

58 See ‘legal principles’ in Chapter 1. Note that much of the controversy in this area since 9/11 has related to the denial of the basic principle of legality, or other underlying principles of law, though there have also been areas of complexity.
12.2.1 No Gaping Holes in the International Legal Framework

A common feature of discourse in the aftermath of 9/11 has related to the inadequacy of the international framework. Suggestions have emerged recurrently of normative gaps, or the ill-equipped, quaint or outmoded nature of the international legal order, as exposed by the challenges of international terrorism. The law examined in some detail in preceding chapters essentially belies this analysis. Inevitably as explored further below, in a dynamic area of practice, there are times where the law may not be clear, and areas where the law may be developing or where it would benefit from such development. The suggestion that the war on terror practices discussed in this thesis occur in a normative void, however, or that what appear to be violations are in fact a manifestation of deficiencies in the legal framework itself, are not compelling.

Allegations of gaps, uncertainties and inadequacies in the law may of course reflect resistance to being constrained by the law, rather than the absence of applicable law. They may also stem, in large part, from the failure to consider, in its entirety, the full detailed and multi-dimensional range of norms, principles and processes that make up the legal framework.

One of the most noted ‘gaps’ in the international legal order in this area relates to the lack of a comprehensive terrorism convention. Yet while this has had significant implications in terms of the malleability and susceptibility of the terrorism label to abuse, and in terms of cooperation, it does not betray a significant normative gap, as explored in chapter 2. Sectoral conventions, ratification and implementation of which have been greatly strengthened post 9/11, cover many areas of terrorism. The rules regarding ‘terrorism’ in Chapter 2 must be understood not only by reference to specific terrorism related rules, but also by reference to: those existing norms in the criminal law field that provide individual accountability for serious crimes under international law and reflect the obligation of cooperation in the investigation and response to international crimes (Chapter 4); IHL where a specific form of terrorism in armed conflict exists and other norms prohibit the conduct we commonly refer to as terrorism, when arising in armed conflict (Chapter 6), norms governing whether a state can be held responsible for a range of acts and omissions (Chapter 3); obligations on states to protect the life and security of persons within their jurisdiction, which mandate state action against terrorism (Chapter 7); and to the law on friendly relations between states and the use of force (Chapter 5) that imposes obligations on states to prevent the use of their territory by terrorists and provides for (and limits) the possibility of resort to force to address the terrorist threat. The legal framework, significantly bolstered by the Security Council’s quasi legislative role in this field, enables states to
take necessary measures to combat terrorism, and imposes wide-ranging obligations on them to do so.

A famous refrain of the war on terror has been the claim that the fight against terrorism is “a new kind of war,” “not envisaged when the Geneva Convention was signed in 1949,” and rendering ‘quaint’ or ‘obsolete’ the terms of IHL in favour of “a new paradigm” of conflict. IHL provides a definition of armed conflict and its application must be considered in light of concrete scenarios, in Afghanistan, Pakistan, Yemen, Mali or beyond. The refusal of the international community of states to embrace a global conflict with al Qaeda and associates groups, explained in preceding chapters, does not, however, reveal the inadequacy of that framework, but rather disagreement as to its content, purpose and the desirability of legal change to embrace a more nebulous concept of geographically limitless armed conflict with loosely defined groups or associates. While the debate on whether or not there can be or is a war with al Qaeda or others reveals substantial differences of view, notably on either side of the Atlantic, caution is due not to equate the existence of such differences with unsettled law, still less with gaps in the legal framework.

IHL makes provision for much of the allegedly virgin territory of the war on terror in its substantive provisions as well. Notably, novel resort to an allegedly unprecedented category of ‘enemy combatants’ belies the existence of long-standing rules on unprivileged belligerency, and on the targeting or treatment upon detention, of persons who take up arms and engage in conflict. While such rules are at times controversial and their implications in particular situations subject to dispute, the framework does not support the notion that the law is silent.

The rules on the use of force between states provide other examples where the adequacy of the legal framework has been questioned and, as noted below, where there may have been some movement in state practice and opinion, and of customary international law. Where the collective system proves insufficient, international law recognises the right of states to use force unilaterally in their own defence, while deliberately strictly limiting the circumstances in which such exceptional measures are permitted, to avoid unraveling the fundamental nature of the prohibition. If the international legal framework does not enable states to use force at times when the state determines it should do so, this may be indicative of the framework working, not the reverse.

International human rights law, marginalised in much political discourse around the ‘war on terrorism,’ and at times dismissed as ill-equipped to address the challenges of international terrorism, provides a detailed body of law, derived from decades of experience in responding to terrorism from Colombia to Chechnya, Ireland to Israel, Somalia to Sri Lanka and beyond. It has been further developed and consolidated in response to the legal and political challenges of the counter-terrorism post 9/11. IHRL does not straightjacket states in the fight against terrorism, but obliges effective counter-
terrorism and adjusts and accommodates in multiple ways to the challenges posed by terrorism, national security concerns, emergency or armed conflict.\textsuperscript{60} It also provides limits to its flexibility, however, constraining responses within a broad rule of law framework that requires that restrictions on rights be governed by law, no more than is genuinely necessary, and subject to judicial oversight. The insistence that certain standards – prohibiting ill-treatment or extra-judicial executions for example – be maintained at all times shows not the naivety, rigidity or inadequacy of the framework but the determination by the international community that certain responses, whatever the challenges, are beyond the pale of international legitimacy.

It is suggested that a holistic look at the framework, in light of all applicable law, reveals a fairly comprehensive framework of rule and principles ripe for application in concrete situations. While there are no gaping holes in the legal framework there may inevitably be areas where the law has changed post 9/11 and undoubtedly areas of controversy where such legal change may unfold in the future.

12.2.2 Legal change post 9/11? A ‘Grotian’ moment, or pockets of legal development?

In the wake of 9/11, alongside the emphasis by politicians on the unparalleled threat and unprecedented challenges, were rapid suggestions of a transformative paradigm shift in the international legal order. Some have suggested that 9/11 was a ‘Grotian’ moment of international legal transformation, while others spotted ‘turning points’ and defining ‘constitutional’ moments.\textsuperscript{61} As a dynamic instrument that evolves largely through practice, international law is always in a state of flux. The intensity of international responses to terrorism post 9/11 make this an area ripe for evolution. However, as has been noted: “[i]t is always easy, at times of great international turmoil, to spot a turning point that is not there.”\textsuperscript{62}

Custom develops through shifting general practice of states and \textit{opinio juris}. Change is generally slow and requires a certain consistency of practice. Particular difficulties may attach to identifying customary international norms in a rapidly evolving area, particularly one as politically fraught as that of the ‘war on terror’ post 9/11. Care must undoubtedly be taken not to read precipitously into divergent practice and poor compliance an unraveling of legal

\textsuperscript{60} The interpretation of IHL alongside IHRL in genuine armed conflict situations ensures a legal framework that adjusts to the realities of particular situations, while ensuring that deviation from generally applicable rules is no more than is justified by those exigencies.

\textsuperscript{61} See Michael P. Scharf, “Seizing the “Grotian” moment”: Accelerated Formation of Customary International Law in time of Fundamental Change available at: http://works.bepress.com/michael_scharf/1

\textsuperscript{62} Ibid.
norms themselves. Divergence of views does not itself change the law, still less where those views, or the practice giving effect to them, is found only in one or two states, even hegemonic ones.

The war on terror practices and the reactions to them discussed in this thesis suggest that, despite the enormity of the attacks and their political repercussions, 9/11 may not have had the anticipated transformative or paradigm-shifting effect on the legal order. Rather, it may reveal isolated pockets wherein there is some claim to legal shift, others where there is surprisingly little movement, and a more substantial number of areas where established legal principles have been reasserted, clarified or developed through the interpretation and application of the law in the course of the war on terror.

The most noteworthy way in which the framework has not developed post 9/11 is in relation to the definition of terrorism itself. Post 9/11, the conclusion of a global definition and convention seemed inevitable. Yet, as explained in Chapter 2, no general terrorism convention has been agreed despite the priority afforded to combating terrorism on the international agenda. Over time, greater clarity around the term may have emerged through guidance from the United Nations provided parameters of a definition, but this contrasts with the plethora of national level definitions adopted, and in any event it does not purport to provide a legally binding definition of terrorism. Variations in the elements of national and international terrorism definitions suggest that this is an area of considerable diversity, rather than consistency, of practice, giving strong reason to doubt the suggestion that a definition of terrorism, still less the crime of terrorism, has emerged under customary international law.

By contrast, perhaps the strongest claim to normative shift lies in relation to the use of force against non-state actors. As Chapter 5 explores, the overwhelming support for the use of force in self defence against al Qaeda in Afghanistan, apparently without attribution of its acts to the state, is often cited as evidence of legal shift towards the right to self defence being triggered by non-state actors. While this development in the law may have been supported by other practice, international resolutions, state practice and expressions of support in relation to Afghanistan provided the clearest evidence of, and a decisive contribution to, the recognition of a shift in customary international law. The support for the possibility that an armed attack can be carried out by a non-state actor, sufficient to trigger the right to self defence (if the other conditions for self defence such as necessity and proportionality are met), is however quite distinct from some of the assertions of the right

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to use of force preemptively against terrorists, on a potentially worldwide basis, which has not garnered support.

In certain other areas where a paradigm shift has been claimed, there would appear to be a similar lack of widespread practice in support. In respect of the underlying issue of the existence or not of a conflict against al Qaeda and associates globally, the claim to acceptance of a shifting paradigm of conflict must be questioned, in light of the resounding international rejection as set out in chapter 6. While the post 9/11 context may have clarified certain issues of IHL, and perhaps obscured others, there is little indication of a radical shift in international legal standards.

9/11 has prompted greater activity, political and normative, than perhaps any other single event, and the impact on the legal framework is undeniable. Most notably, the burgeoning of terrorism laws on the domestic level has transformed at least national legal frameworks. On the international level, however, what has emerged may be described as smaller pockets of legal development.

Normative development has taken many forms and developed in many directions. Most obviously, there are some examples of new or revised interstate agreements, such as those on international cooperation, terrorist financing or nuclear terrorism. As noted in relation to the 'reactions' to the war on terror above, in many areas there have been reassertions of rules and principles of the legal framework, and with them, in some cases, the development or elaboration of those norms. This was illustrated repeatedly in the chapters concerning human rights and the role of the courts where, in the face of alarming claims such as purported 'justifications' for torture, the reaction has generally not been a wavering approach to standards but a strong reassertion of the absolute nature of the torture prohibition. Practices of arbitrary or secret detention, explored in the case studies on Guantanamo Bay or rendition, may ultimately have led not to the acceptance of those practices but to an underlining of their unacceptability and the elaboration of safeguards. The abundant judicial practice in the counter-terrorism context may have had an important role in this process, in some cases lending weight to normative strengthening by contributing to evolving international customary norms.

64 See Chapter 4B.3.
65 See Chapter 2.1.
66 See Chapter 11. Examples may include eg jurisprudence on the extra-territorial scope of state responsibility for human rights violations (eg Al Skeine & Ors v UK, ECHR), or the nature of states positive obligations on detention (eg Sabbeh &Ors v. Egypt, ACHPR) or the cases before the European Court of Justice, among other courts and bodies, on the inter-relationship of the legal framework on sanctions or peace and security and human rights (eg Kadi and other cases).
67 This is seen eg in the development of the jurisprudence on non-refoulement (to arbitrary detention or flagrant denial of justice for example) or the reassertion of safeguards against torture set out in Chapter 7 as well as thorough other soft law initiatives.
Conclusion

While evolving jurisprudence may ultimately have strengthened protection in some areas, or eroded it in others, it has certainly contributed to a more elaborate framework of law through interpretation and application of treaty obligations in the counter-terrorism context in recent years. In addition, new ‘soft law’ has proliferated in a range of areas from the financing of terrorism to human rights standards, once again providing a more detailed – albeit non-binding – frameworks.

To understand changes in the legal framework one must also look beyond normative development as such, to ways in which the norms have been accepted and implemented and the system strengthened. Perhaps more significant than new conventions is the increased number of ratifications of existing sectoral anti-terrorism conventions, which contributes to providing a far more comprehensive normative framework for cooperation against international terrorism than existed before 9/11. The framework has likewise been strengthened through enhanced implementation, including improved modalities of cooperation as discussed in Chapter 4.

In turn, the enhanced ratification and implementation are supported by institutional and capacity building developments. Nationally, examples may include the establishment of focal points for international cooperation or domestic reform in some states to ensure a framework of accountability for intelligence agencies. Internationally, the notable shift of approach by the Security Council counter-terrorism committee and other regional and international political organisations towards embracing a human rights dimension as an inherent aspect of its security agenda, and the new or enhanced international and regional entities dedicated to strengthening the prevention of terrorism within the rule of law, have the potential to bolster the international

68 See e.g. R. Baker, Customary International Law in the 21st Century: Old Challenges and New Debates, European Journal of International Law, Volume 21, Issue 1, Pp. 173-204 describing the acceptance of the jurisprudence of the international criminal tribunals as “slowly begun to be elevated into norms of customary international law,” and noting that “the debate over whether consistent state practice and opinio juris are the only building blocks of customary international law is over, because clearly, for better or for worse, they no longer are.”

69 See Chapter 7A.5.3 on the repeated reference in the counter-terrorism context in recent years as to the prohibition of arbitrary detention constituting a jus cogens norm by e.g. the working group arbitrary detention, special rapporteurs and commentators.

70 Chapter 11 explores the role of the courts, though other examples are found in Chapters 7B, 8 and 10.


rather than a radical shift in the legal order, these may evidence a decisive move towards making obligations *vis a vis* countering terrorism a reality.

12.2.3 Areas of tension and possible future development?

While there may not be gaping holes or seismic shifts in the legal framework, it would be naive not to recognize that the war on terror practice has exposed tensions and challenges for the legal framework. While it goes beyond the scope of this study to speculate on where normative development will come from over time, the following are among the areas where the law may well evolve informed by the on-going global fight against terrorism.

One such area where future attention is inevitable is in relation to the legality of the use of drones, robotic or other weapons systems that have proliferated in recent years, as highlighted throughout the study, in particular in Chapter 6. Considerable international attention is being set on questions around the inherent lawfulness of particular modern weapons systems and, perhaps more productively, on how existing rules and principles should be applied in the evolving landscape.

As has been noted, the extent to which the legal framework can or should accommodate targeted killings outside of armed conflict must be seriously doubted, not least given the nature of the right to life and the *jus cogens* nature of the prohibition on extra-judicial executions. Proposals for new conventions between states allowing for such killings on their territory would not remedy the unlawfulness under human rights law or IHL, just as suggestions for judicially endorsed lethal ‘warrants’ or other safeguards, for example, could have no plausible traction within a framework of international law. Undoubtedly, the right to life has been under serious attack in recent years and it remains to be seen to what extent calls for fuller international attention to legal standards may lead to an unraveling of a fundamental prohibition or a reassertion of fundamental principles.

A related question which the war on terror has highlighted, and where evolving practice may influence standards in important respects, is in relation to whether and in what circumstances there is an obligation under IHL (or

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73 E.g. Examples may include the dedicated Special Rapporteur on terrorism and human rights, the UN Implementation Task Force to give effect to the UN Global Counter-terrorism Strategy’s commitment, and potentially the CTC Technical Assistance team or Task Force on Money Laundering.


75 See e.g. President Obama, National Defense University speech, 23 May 2013 on the discussion of safeguards on drone killings outside areas of “hostilities”; it is unclear e.g. how such areas of hostilities would be defined.
under IHRL read in light of IHL in armed conflict) to capture rather than kill persons taking part in hostilities.\textsuperscript{76} Another specific area which may be ripe for clarification, as suggested by the ICRC, is in relation to the minimal standards applicable in NIAC, which may be clarified through the ICRC elaboration of minimal standards, or through practice.\textsuperscript{77}

On this issue, as on others, as the question of co-application and interplay of legal regimes (as between IHL and IHRL or peace and security and human rights and IHL) continues to be given effect, including by the increasingly role of human rights bodies in giving effect to these concurrent obligations, the complex issue of interplay deserves to be further clarified.\textsuperscript{78}

Much of the controversy in the war on terror, as addressed further below, has stemmed from an overreaching approach to armed conflict and the applicability of IHL, or selectivity in its application. While the idea of a perpetual global war with al Qaeda and others may have few supporters,\textsuperscript{79} definitional and classification challenges around the nature of the parties to a non-international armed conflict look set to continue, particularly as lines between organised criminality and conflict will continue to be blurred in practice in particular situations from Mali to Mexico and beyond.

Terrorism and the multi-actored, coordinated nature of aspects of counter-terrorism have brought into sharp focus areas of controversy concerning the law of state responsibility. Among the issues raised by international cooperation in unlawful war on terror practices is whether and how the legal framework embraces, or might embrace, the responsibility of states for ‘complicity’ in international wrongs through forms of cooperation that may fall short of the concrete support and knowledge required of ‘aiding and assisting’.\textsuperscript{80} Practice is unfolding in relation to responsibility for the receipt of intelligence obtained through serious human rights violations, for example, or the uncertain implications for the ability of states to try an individual whose rights have

\textsuperscript{76} Ch 7 B.3, War and Human Rights and Chapter 6B.2.2 Drone Killings, which both highlight developments in practice, evolving US positions and reactions, judicial developments, critique from within the UN and experts and the ICRC Guidance on DPH, all of which may come to influence legal development and support an obligation to capture rather than kill wherever feasible.

\textsuperscript{77} See Chapter 6B. See also 7B.3 on interplay between IHL and IHRL, noting that perceived gaps may be addressed through an adequate approach to applying IHRL mindful of the realities of conflict.

\textsuperscript{78} As noted above the question of whether there is an obligation under IHL (or under IHRL read in light of IHL in armed conflict) to capture rather than kill and if so in what circumstances has been discussed in Chapter 7B.3.

\textsuperscript{79} See Chapter 6B.1 on the position of other states. While the US’ assertion of a conflict with al Qaeda and associates continues, see President Obama’s recognition of the need to shift from a perpetual war paradigm in the National Defense University speech, 23 May 2013.

\textsuperscript{80} See Chapter 10.
been violated by other states. Controversies also attend the high threshold for the test for attribution and the challenges it poses in particular contexts, whether in terms of state responsibility for terrorism, or for abusive acts of private security companies in the counter-terrorism context, as discussed in Chapter 3. It remains to be seen whether criticism of the current framework, or its consideration in light of post 9/11 practice, may ultimately impel future legal development in this field.

While the human rights framework in the counterterrorism context is elaborate, the war on terror has also illuminated certain areas of that body of law that may deserve greater clarity as regards states obligations in the context of counter-terrorism. Examples may include the due process rights applicable to inter-state transfers, where human rights systems adopt differing approaches, the extra-territorial reach of human rights obligations in relation to privacy which remain underexplored, or the guarantees regarding data protection, where the law remains skeletal.

In these areas, as in others, the law is a dynamic tool which will continue to respond to rapidly unfolding practice. Differences of view as to how that development should unfold, and proposals for change, are an inevitable and healthy part of any legal system. In no credible system of law, however, can they provide a pretext for non-compliance with those aspects of legal framework which subjects dispute, still less for the blanket subjugation of international law to domestic interests.

12.3 THE ‘WARM ON TERROR’ AND INTERNATIONAL LEGALITY: SOME ESSENTIAL CHARACTERISTICS

While there may be a detailed legal framework governing terrorism and counter-terrorism, the practice of counter-terrorism in recent years reveals certain recurrent approaches to that framework that are worthy of reflection. Highlighted in turn below, these might be described as: i) selectivity, and a fragmented approach to the framework; ii) exceptionalism and its insidious creeping reach; c) a ‘purposive’ interpretation of the law and the undermining of its authority and binding force; and d) arbitrariness and lack of process. It is suggested that these approaches are manifestations of an overarching characteristic which is the erosion of the principle of legality itself. They are

81 Eg. The abuse of process claim that arise increasingly in practice: Chapter 4B.5. For examples of this ‘shared responsibility’ of states and issues arising in the context of rendition, see Chapter 10.
82 Chapter 7A.5.10(iii).
83 In the context of revelations of massive surveillance, e.g., the US asserts that privacy protections do not apply, while the extra-territorial scope of human rights obligations in this context is uncertain and has not been explored by human rights bodies.
84 See Chapter 7A.5.7 and B.13.
the antithesis of the principles – among them clarity, fairness, due process and accountability – that underpin a ‘rule of law’ approach to addressing international terrorism.

12.3.1 Selectivity and Fragmentation

A recurrent feature of the relationship between the ‘war on terror’ and international law has been selectivity – in respect of which law applies, to whom and for whose protection. Selectivity is the antithesis of universality, and is itself a slight on the legality principle.

Selectivity has been most obviously manifest in the resistance to the role and relevance of international law as a constraint on all states. In its most caricatured form, such double standards were seen in the first US National Security Strategy after 9/11 wherein international law was mentioned only once, as a vehicle by which ‘rogue states’ were defined, yet was entirely absent from the lengthy exposition of the US policies – such as the doctrine of pre-emptive force – itself of, at best, dubious legality. While the language of rogue states has gone, allegations of double standards linger. State Department reports, condemning arbitrary detention, torture or impunity by particular states, juxtapose starkly alongside the travesties of the ‘war on terror’.

Likewise, it is noteworthy that since September 11 states have not infrequently invoked international law as directly or indirectly providing a pretext for taking action against other states or individuals. Examples include references to non-compliance with Security Council resolutions on Iraq, the failure by Afghanistan to surrender bin Laden, or Pakistan’s failure to prevent terrorists being active on its territory. The emphasis given to human rights violations by the Taleban or Saddam Hussein regimes provide less direct examples. Yet ironically these ‘enforcement missions’ have often themselves violated the international standards in whose service they purported to act.85 The message appears to be that while international law is important for other states, it cannot constrain the exercise of the United States’ unique power.

A selective approach to international law is apparent also in the scope of persons protected by the law. In its extreme form, this was manifest in the suggestion that some states, or some people, were so ‘evil’ or dangerous that they are rendered beyond the protection of law.86 Another example cited in previous chapters is the stark contrast between the emerging recognition of

85 On the rejection of a right to use force to ‘enforce’ violations by other states, see Chapter 5. Chapter 9 notes the reference to the rights of victims in justifying the killing of Bin laden. The notion of the innocence of victims should not be relevant to the right to reparations and to accountability.

86 See e.g. statement by then legal adviser John Yoo that some people are beyond the legal framework, header to Chapter 8, or President Bush’s 2002 ‘axis of evil’ speech, Chapter 5.
the rights of ‘innocent’ victims of terrorism to compensation, and the vanishing-
ly slim record of reparation to victims of counter-terrorism, even those emerging from simple mistaken identities. The creation of categories of deserving and suspect victims is anomalous to the notion of universal human rights in general, and to basic customary principles of reparation in particular.

A more specific contrast emerges from the decision that the most senior officer charged with torture at Abu Ghraib could not be prosecuted on due process grounds (given the failure to read him his rights), while individuals secretly detained and tortured for years are prosecuted despite this, before military commissions with limited due process and where they will be subject to the death penalty if convicted. While rights should be denied to no-one, the selectivity in the reverence of defence rights is striking. The misplaced emphasis placed on the relevance of ‘nationality’ in respect of core rights, as in relation to drone killings or detention rights, is perhaps another example of a selectivity of protection that has no basis in the legal framework and further erodes the inalienability of basic rights and the universality of international legal protection.

In short, a perception emerges of international law that protects ‘us’ but not ‘them’, and constrains ‘them’ but not ‘us’. The impact on the universality and legitimacy of international law, and the credibility of offending states to invoke international law and to call others to account by its standards, is profound.

Another form of selectivity arises in the ‘pick and choose’ approach by which only particular areas of law, or particular rules therein, are acknowledged as applicable. A fragmented or atomised approach to the law has been a common feature of international legal discourse since 9/11 – and risks presenting a misleading portrait of the normative framework, suggesting gaps, anomalies and inconsistencies where they may in fact not exist.

Much US policy in this area relies on IHL, in line with the putative ‘war’ paradigm, and an expansive approach to self defence, with an emphatic blindness to the role of IHRL. In the context of justifying its positions on targeted killings, or its asserted right to detain people that may pose a threat, the policy reasons why the US would cite *jus ad bellum* or IHL and ignore IHRL.

87 Chapter 7.B.14. Chapters 8 on Guantanamo and Chapter 10 on extraordinary rendition both contain examples of mistaken identities involving no culpability whatever on the part of the victim of unlawful detention or torture.

88 Chapter 8.B.4.4

89 See eg Justice Department White Paper, 2013, on targeting US citizens and surrounding debate. See also Why citizenship should not be the main focus of targeted killing J Hafetz, al Jazeera, http://www.aljazeera.com/indepth/opinion/2013/03/20133107748511377.html. On controversy concerning UK orders stripping of citizenship before drone attacks and unlawful detention, see “British terror suspects quietly stripped of citizenship… then killed by drones” Independent,
are plain. There can, however, be no legal justification for a blanket rejection of the relevance of human rights law.

Another example might be the blindness of the Security Council to the full range of international obligations when it mandated measures pursuant to peace and security post 9/11, though as noted above the fragmented approach has been rejected since. In the implementation of these obligations, states have on occasion sought to deny the relevance of other obligations under human rights, refugee law or IHL.\footnote{On the difficult issues of interplay arising, see Chapter 7B.3.} Conversely, a similar critique may be leveled at the blind application of IHRL by the ECtHR, without due reference to the relevance of IHL in genuine armed conflict situations.\footnote{Chapter 7 discussion – see e.g., the al Jedda case in relation to ECtHR’s approach to applicable law in Iraq.}

In addition to the selective regard for certain areas of law, and neglect of others, is the lack of internal consistency; where for example IHL has been invoked to displace IHRL, IHL has itself in turn been applied selectively. An example highlighted relates to targeted killing of suspected al-Qaeda operatives, where IHL standards are invoked to justify targeting which would be unlawful outside armed conflict, but not accepted as applicable to protect similarly situated persons in the event that they are detained. The claim that detainees are dangerous criminals rather than POWs has been made to question the appropriateness of affording them the protection of IHL, while a claim that they are ‘combatants’ had been made to justify the non-application of criminal law and human rights guarantees.

Finally, a fragmented approach is evident also in the failure to have due regard to underlying legal principles, focusing instead on ‘uncertainty’ around what are presented as inadequate or outmoded ‘technical’ legal rules. The debate on the status or rights of prisoners was one example, where the discussion revolved unduly around particular provisions concerning classification of detainees, while largely ignoring fundamental principles such as equality, humanity and non-arbitrariness,\footnote{See eg the emphasis on non-arbitrariness in the UN Secretary General’s definition of the rule of law, which include “equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” Report of the Secretary-General: “The rule of law and transitional justice in conflict and post-conflict societies” (2004).} and the fact that basic rights apply to all persons irrespective of status.

12.3.2 Exceptionalism and its creeping reach

An exceptionalist approach to international law has taken many forms in the fight against international terrorism, purporting to justify exceptions to normally applicable legal regimes, norms or processes. A certain degree of ex-
exceptionalism is anticipated in the legal framework itself, in that the law adjusts to exceptional circumstances. Thus for example the framework of IHRL allows for derogation from certain human rights provisions, the limitation of enumerated rights on ‘national security’ or ‘public order’ grounds, and for adjustment through the co-applicability of IHRL and IHL in time of armed conflict. Curiously perhaps, the derogation exception in human rights law, which allows for broad but not limitless suspension of certain rights, has hardly been relied upon by states in the war on terror.93 Instead, as noted above the practice of some states shows a broader reaching challenge to the applicability of IHRL entirely.

The designation of the ‘war on terror,’ later referred to as a global conflict with al-Qaeda or associated groups, represented an attempt to create an overarching exception to normally applicable rules and criteria.94 In the context of a putative conflict waged against an unclear opponent, on a ‘global battlefield’ with no identifiable geographic or temporal limits, the exception is vast and indeterminate.95 An uncertain range of persons suspected of an uncertain range of forms of associations with the uncertain phenomenon of terrorism are brought within the exception and subject to exceptional rules on targeting or detentions under IHL that are intended for a much narrower, definable and specific situation of armed conflict under international law.

The restrictive approach to the territorial scope of human rights provisions, and denial of the applicability of obligations when the state acts outside its own territory (despite human rights jurisprudence to the contrary), is another manifestation of an exceptional approach that seeks to exclude the applicability of aspects of the human rights framework.96

The Security Council’s determination that ‘terrorism’ itself constitutes a threat to international peace and security, adopted in a broad brush rather than differentiated, context specific manner, may be seen as a further manifestation of an exceptionalist approach to the phenomenon of terrorism.97

An exceptionalist approach is seen recurrently in criminal law, where exceptional laws, penalties or procedures are brought to bear in ‘terrorism’ cases that mirror the development of a ‘law of the enemy’ approach to criminal law.98 Chapter 4 illustrates how even core principles on which the criminal justice process depends, such as the presumption of innocence or the right to trial before an independent and impartial tribunal, have been jettisoned by numerous states around the world in the course of terrorism trials.

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93 Chapter 7B.4. The notable exception was the UK which derogated in respect of detentions within the UK under article 5.
94 On inter-relationship with IHRL, see Chapter 7B.3.
95 Chapter 6.B.1.1.
96 Chapters 7A.2.2 for the legal framework, and 7B.2 for issues arising post 9/11; see cases in Chapter 11.
97 Chapter 5 on such threats, and Chapter 7.B.1.
98 Eg Chapter 4 and Chapter 7B3.
Exceptions have a tendency to expand and to normalize, as the war on terror amply illustrates. While exceptions should be strictly construed, a persistent and insidious feature of the post-9/11 landscape has been the creeping reach of exceptional justifications. They have crept downwards, taking root in the way a range of issues are approached until the exception becomes embedded in the norm. They have also crept outwards embracing an ever more diverse and broader range of actors, facts and circumstances, until the situations embraced are not (or are no longer) exceptional, and may bear little relation to the original justification.

One manifestation of this phenomenon is seen in the ever expanding forms of ‘association’ with and ‘support’ for terrorism. Thus an indeterminate range of individuals and activities, including even activities acknowledged as \textit{per se} innocent, can be swept within an exceptional international framework intended for, or justified by reference to, the ‘worst of the worst’.\textsuperscript{99} The extent to which malleable terrorism laws, aimed at upholding the rule of law, have become a weapon to suppress political dissent, social organisation, even attempts at humanitarian or educational support, often providing a new legitimacy to old autocracy, is borne out by the practice reflected in previous chapters. ‘Mission creep’ whereby rules or approaches from the terrorism context are employed for other purposes is illustrated in preceding chapters, including increased surveillance powers or security controls, justified by security threats then employed far beyond them, bypassing normally applicable frameworks of protection and process.\textsuperscript{100}

Likewise, self defence is an exception to the prohibition on the use of force. It has not, however, been construed narrowly, as exceptions should be, but extremely expansively. While self defence in Afghanistan was considered justified in light of the exceptional prevailing circumstances of the 9/11 attacks and imminent threat of further attacks, self defence has since been stretched to purportedly justify force far beyond those sort of exceptional circumstances.

The extent to which terrorism poses an exceptional threat is increasingly subject to debate as the struggle against terrorism unfolds, and some assert that the menace of al-Qaeda or others diminishes.\textsuperscript{101} 9/11 may well have been an exceptional moment in history for many reasons, but it may be doubted whether the acts of al-Qaeda, associated groups or acts of terrorism

\textsuperscript{99} Chapter 4B2 on examples of criminalising even well intentioned ‘material support’ for those considered terrorists; the best known example from the jurisprudence of US courts is \textit{Holder v. Humanitarian Law Project}, 561 U.S. (2010).


\textsuperscript{101} See e.g. Chapter 5 on the nature of the threat, its immediacy and source(s). Official US indications in early 2013 suggest that US soil has never been safer; see e.g. State of the Union address of 2013, President Obama acknowledged the need to pursue the ‘remnants’ of al Qaeda, National Security Strategy 2013, and 23 may 2013 speech. Different considerations clearly apply in different states.
more broadly would meet the same criteria. Yet 9/11 casts a very long shadow that colours the approach to quite distinct, myriad acts and threats of international terrorism since then.\textsuperscript{102} There is a risk of broad ranging, disparate acts and threats being treated as emanating from one source, and being brought within the exceptional category in respect of which exceptional treatment is sought.\textsuperscript{103}

The justification of exceptional approaches to certain types of cases because of the label that attaches to them, rather than on a case by case basis as justified by the application of clear, foreseeable law to particular facts, risks undermining international legal responses to terrorism.

12.3.3 ‘Purposive’ Legal Interpretation and Undermining the Authority of Law

War on terror practice has also raised questions as regards the interpretation, or the manipulation, of international law.\textsuperscript{104} International law and practice provide interpretative principles which assist in the application of the law, particularly in novel contexts.\textsuperscript{105} What has euphemistically been referred to as the ‘purposive interpretation’ of the law by states or their legal advisers, in line with the policy of the day, has been a feature of the post 9/11 landscape. The most notorious example was ‘the torture memos’ from the US Justice Department, which redefined torture and provided justifications for it that have been lambasted as spurious, untenable interpretations of the law.\textsuperscript{106}

\textsuperscript{102} See e.g. the discussion of the ‘continuing’ threats and attacks in chapter 5.

\textsuperscript{103} See discussion of this phenomenon, in the justification for resort to self defence against terrorists worldwide, in Chapter 5.


\textsuperscript{105} Art 69, VCLT. Human courts have developed specific principles of relevance, including 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.

\textsuperscript{106} Chapter 7B; see generally P. Sands, \textit{Torture Team: Rumsfeld’s Memo and the Betrayal of American Values} (Palgrave MacMillan: New York City, 2009).
Another example in another but related field was the controversial, ‘evolving’ advice of the UK Attorney General on the lawfulness of the Iraq invasion.\(^\text{107}\)

International practice recognizes the legitimate role of the ‘purposive’ interpretation of law, to ascertain the underlying purposes of the law and to give effect to it, which inevitably involves political and value judgment and embodies considerable flexibility.\(^\text{108}\) On many of the issues explored, there will inevitably be a range of plausible interpretations as to the law, the purposes it serves and how to ensure its effectiveness. Within the legal framework, there is natural inherent flexibility, and this will inevitably be exploited to some degree by states and policy makers. War on terror practice raises the question as to where the line is drawn, however, between interpretations of law, and its enslavement to politics. Stretching ‘interpretation’ and legal opinion beyond plausible limits can only undermine the role of legal advisers and potentially the credibility of the law itself.

Other examples emerge in the war on terror as to the marginalization of that legal advice that was not consistent with policy objectives.\(^\text{109}\) Where the law could not be made compliant, one troubling approach was to suggest, as was done at the outset of the war on terror, that international law would be respected ‘so far as consistent’ with the domestic agenda.\(^\text{110}\) The implicit refusal to adhere to the law when it is not perceived to be in the national interest is inconsistent with basic international legal principles\(^\text{111}\) and inevitably undermines the binding authority of the law.

12.3.4 Arbitrariness

A persistent characteristic that has emerged from the treatment of international law in the ‘war on terror’ is arbitrariness and the lack of due process. Pro-

\(^{107}\) See Chapter 5.


\(^{109}\) See eg evidence to the Iraq Inquiry in the UK, Chapter 5.

\(^{110}\) See eg Memo from Alberto Gonzales to President Bush, ‘Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban’, 25 January 2002, or Former US President Bush, Memorandum, ‘Humane Treatment of al Qaeda and Taliban Detainees’, 7 February 2002. It refers to being “a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.’ Note that the language of “supporting” international law, but implicitly not being constrained by it, is also reflected in the 2013 Draft National Security Strategy.

\(^{111}\) A state cannot justify non-compliance with international law by reference to its domestic law is one of the most basic principles of the international order.
tecting against arbitrariness is at the core of the rule of law. Yet quite different manifestations of the promotion of unfettered executive discretion in matters of security emerge from across the spectrum of responses to 9/11. Meanwhile, as exceptional categories have drifted and expanded, as noted above, so have protections and safeguards shrunk.

The suggestion that matters such as the status of detainees and lawfulness of detention were exclusively ‘military’ matters not susceptible to judicial determination (rejected by the US Supreme Court), or the refusal to meet the obligation under IHL to have a competent tribunal determine detainees’ status, provided early illustrations. The exclusion, or marginalisation, of the role of judicial oversight has however taken many forms, from the denial of access to a court for habeas corpus, to summary extradition procedures, to replacement of regular impartial and independent courts with ad hoc tribunals, to restrictions on the fair trial guarantees that make the judicial process meaningful or the removal of international law as a source of law for the courts in terrorism related cases.

A rather different manifestation of the unstructured exercise of broad-reaching powers, without safeguards or oversight, is seen in the essential unilateralism that has characterized the use of military force in response to terrorism since 9/11. The interventions in Afghanistan and Iraq, and most graphically the National Security Strategy advanced by the US, may reflect the refusal of certain militarily powerful states to be beholden to a collective security system that they do not control. The European Security strategy by contrast, while corresponding quite closely to its American counterpart in the assessment of risks and threats, emphasises multilateralist responses within a framework of collective security.

While there has been a shift towards the ‘individualisation’ of international obligations through Security Council sanctions imposed directly on individuals, rather than the traditional approach of acting through states, there has not been a corresponding shift to ensure the right of individuals to challenge the Council’s decisions. The lack of any fair process prompted the establishment of the Ombudsperson on delisting, and calls for further reform of the Council to ensure the rights of individuals and greater accountability of the Council,
but the deficit remains. On the national level too, measures including sanctions, expulsions and other ‘preventative’ orders of varying types have infringed a wide range of rights, without providing basic information or a meaningful opportunity for challenge to those affected. A critical dimension of the role of the courts discussed in Chapter 11 has indeed been to reclaim and reassert that very role, and its democratic credentials, and to impose process and oversight in this environment of widespread arbitrariness.

12.3.5 Secrecy, the Refusal to Look Back and the lack of Accountability

Access to information enables public scrutiny of government action, safeguards democratic participation and guards against future abuse. Yet in many ways the war on terror has been, and remains, an exercise in clandestinity. This is epitomized by the extent of secrecy surrounding the rendition practice, designed and implemented to ensure that no information came to light, and followed by a concerted and systematic cover up. However it comes in many other guises. These include the protracted refusal for many years to reveal information as to who was detained at Guantanamo and why. While that has ceded, wide-reaching gagging orders on numerous detainees continue, precluding any information about the detainees, however innocuous, from reaching the public eye. The censoring of the military commission process for references to detainee abuse, prosecutions and disproportionate penalties imposed on journalists and whistleblowers, or the invocation of state secrecy to completely block ab initio access to justice for victims of torture or secret arbitrary detention exemplify a defensive and absolutist approach to

116 See Chapter 7B.8 on the development of the Ombudsperson to counter the procedural arbitrariness and the national, regional and international cases in Chapter 11.
117 See e.g. Chapter 7.B.7, though curtailing due process runs across many of the issues raised in Chapter 7.
118 In Chapter 11, see e.g. Lord Bingham’s classic expression of the democratic role of the courts in A&Ors.
119 President Obama stated that he is interested in looking forward, not backwards, discussed in e.g. Chapter 7.B.14.
121 Council of Europe Committee on Legal Affairs and Human Rights, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, 7 June 2007, Chapter 10.
122 This protracted refusal spanned many years but has now been lifted; see Chapter 8.
123 See the case of Abu Zubaydah (Abu Zubaydah v Poland, ECHR application 26 March 2013) highlighted in Chapters 10 and 8.
124 Chapter 8B.4.5
125 On the prosecution of Bradley Manning ‘whistleblower’ on war crimes in Iraq, nominated for the Nobel Prize but prosecuted by the U.S., see http://www.bradleymanning.org. See also Chapter 7 on freedom of expression.
secrecy, at odds with the careful balancing enshrined in the legal framework. An overreaching approach to national security and state secrecy, evident across the practice of several states, obscures the legitimate role for protection of national security information, creates distrust, delegitimizes counter-terrorist efforts and impedes the rights to truth, justice and accountability.

Closely linked to the fortress approach to information and secrecy outlined above is the lack of reparation, and of accountability, that continues to characterise the war on terror. Reparation is a basic principle of international law. It serves multiple restorative purposes – for the wronged, for society to learn from the past and to ensure non-repetition, and for the rule of law that requires reassertion in the face of egregious wrongs.

The imperative of accountability, and its significance on multiple levels, is also firmly reflected in the international law and practice set out in this study. Accountability is recognized as one of the cornerstone principles of the ‘rule of law’. The priority the international community has afforded to it has led to the elaborate system of international criminal justice, with its national and international elements, set out in Chapter 4.

“Justice,” as invoked in the ‘war on terror’ however, assumes peculiar form. It was hailed for example when Osama bin Laden was shot to death, and mounted on the sign for ‘Camp Justice’ in Guantanamo which houses the controversial military commissions. Yet justice is notably absent for the crimes committed in the name of counter-terrorism and for their many victims. The resistance to accountability in relation to crimes committed in the name of the war on terror, and the unwillingness thus far to look back, learn, account and repair, is a striking characteristic of the war on terror to date. It poses a challenge to the credibility of the framework of international law, and to the prospects of moving to a rule of law approach to countering terrorism in the future.

126 Chapter 7B.14, 10 and 11 on state secrets, or the A&Ors v UK case for one of many examples of judicial reasoning on the balance between protecting genuine national security information while protecting human rights in Chapter 7.B.7 and 11.

127 Chapters 3 and 7A.4.2.

128 See Chapter 7 on reparation, and the illustration of rendition in Chapter 10. The UN rule of law initiative website gives priority to justice and accountability and reparation as dimensions of the rule of law, see http://www.unrol.org/article.aspx?article_id=3

129 Chapter 4, 6, 7, 8, and 10; Secretary General 2004 Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies” (2004), UN Doc. S/2004/66) and UN Rule of Law website, ibid.

130 Ibid.

131 See Chapter “The Killing of Osama bin Laden: Justice Done?”
12.4 CHALLENGES AND IMPLICATIONS: THE WAR ON TERROR AND INTERNATIONAL LEGALITY

The overview of the framework of international law provided in these chapters suggests that the applicable law contains no gaping holes. It is not inherently outmoded or ill-equipped to deal with the challenges of international terrorism. It is not excessively complex, nor inaccessible, still less irrational. It is not blind to, but responds to accommodate, in various ways, security challenges of the type epitomised by 9/11. The law has not undergone revolutionary change, but it has gradually evolved since 9/11 and will continue to do so. While there are areas for legitimate disagreement as to its interpretation, areas where the law may be unclear and legal development desirable and/or underway, what 9/11 exposed – and the ‘war on terror’ confirmed – was not so much the inadequacy of law but the fragility of respect for it, and the pressing challenge of enforcement.

The approaches to the law, through the selectivity, exceptionalism, legal distortion, arbitrariness and lack of accountability outlined above, are the antithesis of the core rule of law principles upon which the system is based. Systematic violations of core norms shake the foundations of the legal order. As we grow accustomed over time to widespread violations of legal norms, and exceptional approaches, the risk of desensitisation, normalization and acceptance of the inevitability of such an approach grows. In a ‘war on terror’ in which one debates the legitimacy of extreme violations such as waterboarding, targeted killing or indefinite detention without charge or trial, ‘softer’ responses in the form of inhuman treatment, denial of basic fair trial rights, the quashing of political dissent or the right to privacy, for example, appear almost trivial. The distortion of law and respect for it so far as politically convenient ultimately jeopardize the universality, integrity and the authority of the legal order.

The extent of the corrosive effect and the long-term impact of the ‘war on terror’ on legality, remains to be seen. Much depends on how the international community continues to address the fundamental challenges that terrorism and counter-terrorism currently pose.

A key challenge to be faced in the road ahead is plainly to ensure that the scourge of terrorism be addressed, and that this is done effectively. The prevention, investigation and prosecution of serious acts of violence are themselves obligations under international law. While there may be growing divergence of view as to the true nature of the global terrorist threat and its priority for the international community as compared to other challenges,¹³² images of

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¹³² Official reports give vastly different views on this. Some official reports suggest al Qaeda and associated groups are greatly depleted, or that American soil has never been safer (Draft 2013 National Security Strategy). Understanding the nature of the threat is essential to the
terror attacks around the globe from Bali to Baghdad, or Madrid to Mogadishu, pay chilling testament to the need to meet the challenge of terrorism prevention. This sits alongside the need to critically assess, on an on-going basis, the real nature of existing threats and the effectiveness of strategies to address them.

The focus on prevention, including by addressing the causes and contributing factors to terrorism, is consistent with the implementation of the UN global strategy. The effectiveness of particular strategies of prevention, while essentially a political matter, is also linked to lawfulness. Measures that in fact propagate further terrorism, or that impede crucial counter-terrorism initiatives, cannot be justified as legitimate restrictions on rights in the name of terrorism prevention. The counter-productivity of signature features of the war on terror, notably Guantanamo, Extraordinary Rendition or drone strikes, has been noted. One of the war on terror paradoxes is that international cooperation and criminal justice action against international terrorism has been hampered by abusive practices themselves taken in the name of ‘counter-terrorism.’ Practice set out in this book indicates the pragmatic as well as principled importance of countering terrorism in accordance with the rule of law.

The challenge ultimately is to ensure that this effective counter-terrorism strategy unfolds in a way that restores, rather than further undermines, the rule of law. Promoting respect for international law is essential to ensuring that the ‘war on terror’ does not score a devastating own goal by eroding permanently the rule of law and ‘deliver a victory to terrorists that no act of theirs could achieve.’ Ultimately, the characteristics referred to above must be addressed, and the principle of legality – the clarity and coherence of law, its universality and the principle of due process inherent therein – must be reasserted.

Confidence must be restored in the capacity, relevance and credibility of international law, as providing an essential legal framework which, while imperfect, is equipped to address the normative consequences of 9/11 and its aftermath. International law is perhaps more present in political discourse since the ‘war on terror’ than before, but lingering perception of the ‘bizarre’ or inept nature of international law should be countered. In areas where the law is unclear, the challenge of clarifying the normative framework, while remaining true to its essential norms and principles, should be met. The application of the legal framework and the necessity, appropriateness and proportionality of responses.

133 See Chapter 7A on the necessity and proportionality requirement; measures that are not effective to achieve their legitimate aim they pursue cannot constitute necessary and proportionate restrictions on rights. Some rights can never be restricted.

134 See ‘Reactions’ at Ch.12.1 above.

135 Former Secretary General Annan’s quote cited at the outset of the chapter.

136 See statement by Baroness Hale cited at the outset of the chapter.
proliferation of responses to terrorism raises the challenge of ensuring that the on-going development and interpretation of the law is coherent rather than fragmented. Proposals for normative change, which in any vibrant system of law will inevitably follow developing practice, should therefore be encouraged so far as they pursue and are constrained by the principles of the rule of law. Differences of view on the law and proposals for legal change must, however, be distinguished from the erroneous view that there is currently no effective system of law. The distinction between the law as it is, and the law as some would wish it to be, must be reasserted.

Second, essential to reasserting the principle of legality is underlining the universality of law, demonstrating that core rules of international law apply to all states, for the ultimate protection of all persons. The continued recovery of the central role of international human rights law, and clarification of its universal application, whenever (including in times of crisis or conflict), wherever (whether at home or abroad) and in relation to whomever the state exercises its authority or control over will contribute to this process. The perceived universality of the international system depends on the law applying to, and constraining, the more powerful as well as the less. The harm done through selectivity and perceived double standards is readily evident in frequent statements by states, underming the authority of the U.S. (or its supporters) to opine on or criticize violations by other states in light of ‘war on terror’ crimes.

The law is safeguarded by its application according to procedural principles and effective oversight. Addressing the challenges facing the undermining or marginalising of role of courts and legal mechanisms, national and international, in the area of national security is clear. Ensuring the procedural fairness of sanctions or other measures taken against individuals, whatever their provenance, is essential. As regards collective security mechanisms, there is plainly a new imperative around the old debate on reform of the Security Council, and the need for systems that command international respect and more effectively enforce the rule of law, while ensuring essential restraint on the otherwise unfettered exercise of power of any one state. The perceived arbitrariness of international law should be countered by strengthening the infrastructure of mechanisms to give effect to it. This includes ensuring the standing, authority and resources of mechanisms charged with ensuring compliance with human rights in counter-terrorism.

A critical question is what impact the experience of the war on terror will have on shifting policies and practices, in terms of what states do directly and on their cooperation relationships with others. Repudiation of unlawful practices of the past is important and there are positive examples in the practice
explored in this book.\textsuperscript{137} The war on terror has graphically illustrated the dark side of international cooperation, and there are indications of reform and of a more cautious or questioning approach by states to ensure that they do not become complicit in such wrongs in the future, though the extent of this remains open to question. The willingness of states to conditioning cooperation in criminal, military or intelligence matters on compliance with basic international law norms, and to demonstrate the priority afforded to such compliance, may prove critically important.

States’ reactions have been explored throughout the thesis. Robust responses have rejected some of the worst excesses, as highlighted in relation to Guantanamo, and resisted lasting erosion of legal standards, though in relation to targeted killings the willingness to defend the legal framework is less readily apparent and the implications as yet unclear. The emerging emphasis that has been given to the role and responsibilities of third states in the face of serious violations of international law, and the positive obligations to act individually or collectively, are of potentially critical importance to a rule of law approach. As seen from the legal framework highlighted in various chapters, such responsibility is reflected in established and developing law and practice on state responsibility, human rights, humanitarian law and international criminal law. It remains to be seen whether it can impel states to take more seriously their positive obligations of cooperation to end or to prevent the sort of egregious wrongs that epitomize the low points of the war on terror.

A critical challenge is to ensure accountability in accordance with law. The concept of the rule of law is ‘deeply linked to the principle of justice, involving an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.’\textsuperscript{138} The denial of justice to victims of egregious violations of terrorism or in apparent response thereto should be replaced with an approach that gives effect to their legal rights. The impunity currently afforded to the multiplicity of individuals responsible for egregious crimes should be replaced with full and fair accountability within the established framework of international law. The willingness and ability of the international community to consistently hold to account states, and individuals, who have violated fundamental international norms, whether through grave acts of ‘terrorism’ or in the name of counter terrorism, is crucial to the rule of law approach.

The commitment to learn lessons and to grapple with the need to repair, to restore and to account, is far from certain. The disregard of the international

\textsuperscript{137} These include Obama’s repudiation of torture upon taking office, or new UK Consolidated Guidance on intelligence relationships making clear that intelligence agencies should not cooperate with torture abroad. See Chapters 7B5 and 10. See also ‘reactions’ to the war on terror at 12.1 above.

framework during the ‘war on terror’ may be allowed to stand – with few implications for wrong-doing nations and without individual accountability – and to further erode the essential legitimacy of the law, and of those that purport to enforce it. Or, it may yet be that the excesses of the ‘war on terror’, and the alacrity with which legal standards were jettisoned in the name of security, will serve as an alarming reminder of the dangers of a ‘fast and loose’ approach to international law. It will be the extent of the international community’s commitment to clarify and strengthen international law, not only by reiterating standards but by ensuring that they are respected, that will define where the pendulum stops, and the ultimate impact of the ‘war on terror’ on the international rule of law.