

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

HELEN DUFFY



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For my mother Rosemary, partner Fabricio and
son Luca

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

The acts of lawlessness committed on September 11, 2001 were swiftly followed by a 'war on terror'. This book sets out the essential features of the international legal framework against which the 9/11 attacks and the lawfulness of measures taken in response thereto fall to be assessed. It addresses, in an accessible manner, the relevant law in relation to: 'terrorism', questions as to 'responsibility' for it, the criminal law framework, lawful constraints on the use of force, the humanitarian law that governs in armed conflict, and international human rights law. It indicates the existence of a legal framework capable of addressing events such as 9/11 and governing responses thereto. It raises questions as to the compatibility of the 'war on terror' with this legal framework, and questions the implications for states responsible for violations, for third states and for the international rule of law.

HELEN DUFFY is the Legal Director of INTERIGHTS, an international human rights law centre. She previously worked as Legal Officer in the Prosecutor's Office, International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague, as Counsel to Human Rights Watch, New York, and as Legal Director of the Centre for Human Rights and Legal Action, Guatemala. She specialises in human rights and international criminal law. She currently lives in The Hague.

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PREFACE AND ACKNOWLEDGEMENTS

This book grew from a paper I wrote for INTERIGHTS shortly after the September 11 attacks. The paper was motivated by the apparent marginalisation of the issue of legality in public discourse on responses to those attacks, and the surprising dearth of legal material published in their immediate aftermath. In the void where there should have been debate on which responses would serve the interests of international justice, peace, security and the rule of law, the confusion and need for clarification of legal issues grew. I was encouraged by those who used that paper in their work, including partner organisations in the many countries in which INTERIGHTS works, to publish an expanded piece that addresses additional aspects of the legal framework and considers it alongside the practice of the 'war on terror' since 11 September 2001.

Since then, international lawyers have become more vocal and there is certainly more published material. International law is no longer absent from political discourse on the 'war on terror', and indeed there may be a newfound alertness to issues of international legality in public debate that is in many respects promising. However at times it seems that there is greater confusion than ever, and with it an increased vulnerability in the international legal order. This book hopes to contribute to addressing the confusion, and the perception of legal vacuum. It is written from the perspective of a practitioner in the field of human rights and international criminal law, where international law, its legitimacy and standing, are essential tools not only to combat terrorism but to guard against future human rights abuse in other contexts.

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

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ABBREVIATIONS

ACHR/American Convention on Human Rights	American Convention on Human Rights, San Jose, 22 November 1969, OAS Treaty Series, No. 36, entered into force 18 July 1978
AI	Amnesty International
AJIL	<i>American Journal of International Law</i>
AP I/First Additional Protocol to the Geneva Conventions	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978
AP II/Second Additional Protocol to the Geneva Conventions	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, entered into force 7 December 1978
BYIL	<i>British Yearbook of International Law</i>
CCPR	Covenant on Civil and Political Rights
DR	Council of Europe, <i>Decisions and reports of the European Commission on Human Rights</i>
ECHR/European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome,