International Law, Security and Ethics

Policy challenges in the post-9/11 world

Edited by
Aidan Hehir, **Natasha Kuhrt** and **Andrew Mumford**

Contemporary Security Studies

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2011
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

Typeset in Times New Roman by
Swales & Willis Ltd, Exeter, Devon
Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
International law, security and ethics : policy challenges in the post-911 world / Edited by Aidan Hehir, Natasha Kuhrt and Andrew Mumford.
p. cm.
1. International law—Moral and ethical aspects. 2. Security, International. 3. War (International law) 4. Terrorism—Prevention—Law and legislation. 5. Self-defense (Law) I. Hehir, Aidan, 1977– II. Kuhrt, Natasha, 1966– III. Mumford, Andrew.
KZ5588.I58 2011
341.6—dc22
2010048777

ISBN13: 978–0–415–60742–1 (hbk)
ISBN13: 978–0–203–81608–0 (ebk)

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Acknowledgements

Aidan would like to thank Sarah, Esmé, Elise and Iris for all their love, fun and support.
Natasha would like to thank James for all his love and support, and Hector and Kitty for their love, and for keeping me 'grounded'.
Andrew would like to thank Hannah for her love, support and encouragement.

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1 Introduction

Policy challenges to international law, security and ethics in the post-9/11 world

Andrew Mumford and Natasha Kuhrt

The discourse surrounding the execution of the 'War on Terror' has revolved around a triumvirate of interdependent issues: security, law and ethics. Indeed, the conduct of the War on Terror has been questioned legally, challenged ethically and has yet to arguably demonstrate a significant security dividend for those states prosecuting it. These three areas are related, each having an effect on the other. This volume is an endeavour to explore the underlying tension in their co-existence. For example, is a security solution necessarily ethically reconcilable or legally justifiable? 'Extraordinary rendition' has, for instance, been utilised as a security measure to remove detained 'enemy combatants' (note the nuanced legal semantics) from conflict zones for secret interrogation in third countries. Ostensibly such a measure could be construed as a necessary step towards extracting timely intelligence, thus contributing to the wider security situation in favour of the counter-terrorists. However, the methods harnessed to fulfil this security objective – hooding, 'water-boarding', and sleep depravation – nullify any security dividend by ethically compromising and legally stretching the entire liberal democratic premise of those polities engaged in the War on Terror. Such conduct runs the risk of creating more long-standing ills than the problems it sought to overcome in the first place.

All these chapters also address to varying degrees the security, legal and ethical approaches to the 'Global War on Terror', and the lack of consensus in many areas as to how to deal with the threats we face. Even the notion of security itself is a contested concept: and the locus of security for that matter – should we focus on human security, i.e. the security of the individual? Should national security take precedence? How can mutual security be assured? All the chapters to a great extent focus on the normative, legal, ethical and political considerations of the topic. The way in which we deal with these threats in policy terms is indicative of the nature and scope of the consensus regarding key issues.

Arguably one of the most worrying developments in the policy realm since 9/11 is the way in which the manipulation of legal codes and the ignoring of ethical norms have been justified in the name of 'security'. This of course contains the underlying normative assumption that security is a state than can be achieved irrespective of legal or ethical conduct. The damage done to the reputation of the United States, and to a certain extent the United Kingdom, through their

prosecution of the War on Terror and their willing authorisation of acts such as prolonged detention (Guantanamo Bay) and unilateral invasion (Iraq) in the name of neutralising security threats, may actually have increased other security threats to these countries in the long term. The potential for this has been carried through the conduit of the global media and internet which has been able to purvey images and stories of incidents such as prisoner abuse at Abu Ghraib or the heavy-handed US siege of Fallujah in 2004. These events were thus able to be interpreted, or indeed manipulated, by various socio-religious groups around the world. The era of globalisation and the instant modes of mass communication that come with it has ensured that that security measures taken by the West have the potential to be recruiting sergeants for those groups keen to exploit any legal or ethical vacuum in which they are enacted. Although not sharing the same legal or ethical code as Western liberal democracies, Al Qaeda has been effective at turning American legal and ethical discrepancies into an effective narrative that attempts to reinforce a perception in the Muslim world of American brutality and deviousness.

The 'War on Terror' challenged many seminal legal and moral norms and has had a profound impact on the trajectory of international law. While international law on the use of force has always been the source of debate, the nature of the contemporary contestation is uniquely holistic. Since the end of the Cold War, the nature of security challenges has changed radically, as has been recognised by the UN, governments and academics around the world. In that period, some aspects of international law have changed as a result – chiefly the use of enforcement powers under Chapter VII of the UN Charter by the UN Security Council. Yet, those changes were often surrounded by intense debate. And where the Security Council could not agree, security challenges remained, giving rise to major areas of contestation about the ethics, law and praxis of, first, humanitarian intervention, and, later, self-defence and other aspects of war. The debates on humanitarian intervention in the 1990s exposed significant divisions on the legal prescriptions against external interference in the affairs of sovereign states and led to calls for the wholesale reform of international law and, in some cases, the subversion of existing legal tenets. The September 11 attacks and the subsequent launch of the War on Terror added a new dimension to this debate on the nature and utility of international law due to the demands from some quarters for a change in the laws governing self-defence. The War on Terror thus constituted a merging of issues that had arisen in debates on humanitarian intervention and UN enforcement action in the 1990s with pressure for a new understanding of self-defence, which challenged the relevance of existing instruments and interpretations of international law. It was clear that existing law was often ill fitted to the new era. It has also become clear that practitioners judged a need to act, despite the tension with existing law. The imperatives of action were entwined with two frameworks of wrong and right – ethics and law, with each corner of this triangle influencing the other in debate and decision. This volume explores the nexus of these issues through a set of studies comprising new research and new thinking in a complex and, as yet, largely uncharted terrain.

This collection focuses on the different ways in which the laws governing the use of force and the conduct of warfare – in terms of both self-defence and

humanitarian intervention – have therefore become subject to intense scrutiny and contestation and many sources of division remain unresolved in the sphere of contemporary security. This book analyses the nature of these debates and focuses on key issues that have led to the unprecedented contemporary questioning of both the utility and composition of international law on the use of force as well as the practicability and morality of using force. This collection identifies the sources of division and addresses the capacities of security policy, international law and moral reasoning to adapt to the changed international environment. The chapters comprise a mixture of analyses of specific issues such as counter-terrorism, self-defence, humanitarian intervention and cyber attack, as well as broader reflections on the role of international law and ethics in contemporary international relations.

In Chapter 2 Nigel White details how international law has come to accommodate counter-terrorism issues before and after the 9/11 attacks. Despite long-standing difficulties in achieving global consensus on a definition of terrorism, White argues that common ground has now been found, therefore making contemporary counter-terror initiatives more amenable to international law. Urging that the UN Security Council deal with individual instances of serious cases of terrorism, rather than taking a more blanket legislative approach, White argues that states should rely on a mixture of cooperation and lawful coercive techniques (which would not include rendition, torture, or arbitrary detention) to ensure that suspected terrorists are brought to trial, working within existing bilateral, multilateral and regional cooperation regimes. He concludes that the criminal justice paradigm should be strengthened by consolidating the raft of treaties, agreeing a definition, and by allowing both the International Criminal Court and the Security Council to play a role in the counter-terrorism treaty regime.

Andrew Mumford argues in Chapter 3 that there is a popular misconception in our understanding of Al Qaeda and analysis accordingly needs to shift away from the tactical level of terrorism to strategic level of insurgency. Acts of terror, such as 9/11, should not be the primary guide by which we define Al Qaeda. Their international aims, presence and operational scope possess traits of a global insurgency. Localised insurgencies where Islamist groups are the chief protagonists of violence should be seen as parts of the whole *jihad*. Accordingly, Al Qaeda is more potent as an entity when its dispersed hubs are acting semi-autonomously in pursuit of a shared strategic goal. In policy terms what is clear, he argues, is that Al Qaeda's conflation of terrorism as a tactic and insurgency as a strategy necessitates a hybrid response. The transcendence of state boundaries in the international *jihadi* insurgency, both operationally and ideationally, has meant that the national security of states, and broader global peace and security, now has to be interpreted interdependently. In order for the Al Qaeda threat to be adequately suppressed there is an obvious need for domestic counter-terrorism to be conjoined with a wider, transnational politico-military counter-insurgency strategy.

James Connelly and Don Carrick analyse the War on Terror in a moral dimension in Chapter 4. In essence they argue that the rule of law and the demands and constraints of morality must be restored to their rightful place in the scheme of

international security. Highlighting the flawed assumption that there is an automatic equivocation between law and morality, Connelly and Carrick argue that an understanding of Just War Theory cannot be sustained if it suggests that a war or invasion can take place upon the completion of a legal check list in the absence of fully developed moral reasoning. The authors assert that simply because war is being fought in a 'time of terror', we should be wary of any sort of profound change to the rules or criteria of *jus in bello*.

Within the context of the evolving nature of the character of the body of law and the character of war in the decade since the War on Terror was initiated, James Gow and Rachel Kerr explore in Chapter 5 how four particular issues have tested the interface between law and war: the transition of self-defence to the notion of 'targeted killings'; the issue of detaining quasi-Prisoners of War and the Geneva Convention; rendition, torture and abuse; and the juridification of armed conflict. These issues demonstrate the difficulties of operating in situations such as that encountered in Iraq where lines between war fighting and policing and between combatant and non-combatant are increasingly blurred. The law, Gow and Kerr argue, which has already begun to change, will continue to evolve in relation to such changes in armed conflict and the political environment as the War on Terror continues.

In Chapter 6, Aidan Hehir analyses the nature of discretion in the behaviour of the Permanent Five members of the UN Security Council (P5). He argues that because the P5 exercise a high degree of discretion when applying international law, an inconsistent level of global response to intra-state conflicts and crises is pervasive. Hehir explores how possible reforms to the UN system could impact upon the way in which humanitarian intervention is considered and conducted, ultimately concluding that without an independent international military force and an independent mechanism empowered to determine when this force can be deployed then the perceived legitimacy of international law will steadily erode.

In Chapter 7, examining humanitarian intervention and peacebuilding, Natasha Kuhrt suggests that while Iraq and 9/11 may indeed have impacted negatively on the human security agenda which is increasingly posited as an alternative narrative to state security, there is room for optimism. This lies in the growing recognition that the third pillar of the R2P, 'responsibility to rebuild' may be a means of preventing states from sliding back into conflict. The occupation of Iraq, while contentious, did not prevent approval of a UN Peacebuilding Commission at the 2005 Summit. However, problems remain in that peacebuilding can so often be viewed as a quasi-imperialist venture and, of course, the link with a kind of preventive intervention which conflates human rights abuses and a terrorist threat is dangerous. The War on Terror has highlighted the continuing preoccupation with national security, yet there is an opportunity for greater dialogue between the human security agenda and the individual security agendas of states. By returning to the core values of the Charter and emphasising the notion of a positive peace, embodied in the peacebuilding norm, Kuhrt argues that the original consensus which established the UN Charter may be partially regained.

Chapter 8 sees James Gow note how the prospect of internationally accepted norms for pre-emptive self-defence raises severe legal, ethical and security

dilemmas. Locating the premise of self-defence in international history and law, Gow goes on to assess how the 9/11 attacks radically shifted the way in which the United States could legitimise a resort to military action under the guise of the 'War on Terror'. His chapter deconstructs notions of pre-emption, prevention and immediacy in international relations and international law, as well as contextualising contemporary discussions of necessity and proportionality. Gow utilises three hypothetical scenarios of self-defence in order to illustrate the role, impact and consequences of the above issues in contemporary global security and reflect upon the nature and meaning of 'armed attack' as a catalyst to acts of self-defence.

Thomas Jones aims in Chapter 9 to radically invert traditional understandings of the legal regime regarding the use of force. In particular, Jones argues that the jurisprudence that has developed around the right of self-defence included in Article 51 of the UN Charter has created an overly restrictive and unworkable legal regime for states to defend themselves against these uses of force. Jones concludes that by putting reasonable and flexible, but still robust, legal restrictions on the use of force in self-defence, states should feel compelled to argue for the legality, and therefore the legitimacy, of their uses of force within a construct where the parameters are clear and the requirements are difficult to discount.

Computer network attacks have become an increasingly prevalent mode of security breach in the twenty-first century. In Chapter 10 Elaine Korzak analyses whether cyber attacks can be interpreted as a use of 'force' in contemporary international relations, or perceived as a modern form of armed attack. The chapter also assesses the impact of cyber attack upon humanitarian norms. Ultimately, Korzak states, international law regulating cyberspace has not kept pace with the rapid advances in information technology over the past few decades, requiring states to fundamentally assess the legal frameworks they have in place to mitigate the impact of so-called 'eWMDs'.

All these chapters suggest that using the existing body of international law may well be insufficient: the Just War Tradition is a unique area where ethics, politics, law and security are conjoined, although it has tended to be rather too state-centric. The question of legitimacy is key, in particular where law is flimsy or non-existent, or state practice is inconsistent. Ethical considerations then come to the fore. However, the current lack of consensus on even what constitutes a 'just' world order is concerning. Moreover, the increased emphasis on national security after 9/11 has tended to take precedence, which suggests not only a failure to understand the fact that the new threats know no borders, but also tends to mean a move away from collective security and a common understanding of rules and norms. Collectively, the chapters in this book hold that the very *in*security felt by the West, especially the United States, since 9/11 should not be conjoined with the antonyms of the other factors in the triumvirate: *il*legal and *un*ethical. If indeed a 'war' on terrorism can be won, progress will certainly be stultified if it comes at the price of compromising the legal and ethical principles that uphold not only our societies but the broader international order.

Part I

Framing the issue

2 Terrorism, security and international law

*Nigel White**

Counter-terrorism involving actions against non-state groups such as Al-Qaeda falls outside the traditional state-to-state structures of international law. However, with the developing concern for human rights protection and the notion of individual responsibility for international crimes, international law has extended its reach to cover terrorism and counter-terrorism. Early arguments in the League of Nations era that an international court should be created to try terrorists did not succeed, and it was not until the 1960s that the United Nations (UN) turned its attention to the matter when faced with Palestinian terrorist atrocities. The Cold War approach was to try and tackle the issue in a state-based, consensual manner, reflecting the traditional values of international law. The post-Cold War era saw new trends by both governments and international organisations in the form of executive-led security/military approaches that challenge international legal paradigms, while also seeing other more consensual, multilateral instruments which take a criminal justice/human rights approach. The development of more coercive responses alongside consensual ones was accelerated by the events of 11 September 2001 (9/11).

Despite there now being a number of instruments and methods of counter-terrorism, there are still few fixed points in international law concerning terrorism reflected in the lack of agreement over the definition in the Draft Comprehensive Convention. The freedom fighter/terrorist debate signifies that, to some extent at least, international law will continue to oscillate between the security imperative requiring coercive measures to tackle the terrorist threat and concern for protecting the human rights of those rightly or wrongly suspected of terrorism. This chapter, however, does conclude that there are signs of consensus, and that there can be agreement on fundamentals and so it may be possible to develop a counter-terrorism response that comes within the rule of law.

In general it must be borne in mind that human rights laws have flexibility within them that should be able to accommodate security concerns, and that derogation is allowed from a number of human rights in genuine cases of emergency. Also if

* This chapter is based on evidence given to the All Party Parliamentary Inquiry into Tackling Terrorism, 22 May 2007.

terrorist acts are committed during an armed conflict, international humanitarian law has a variety of mechanisms for dealing with it. In other words, the law should be able to accommodate the security imperative of being able to effectively combat terrorism and thus protect the lives of civilians as the likely targets of terrorist attacks. Within this framework the chapter tackles a number of key issues in the area of international law and terrorism; issues which highlight the aforementioned tension between achieving security and respecting international law, including human rights. It attempts to identify whether a reconciliation of these sometimes competing objectives is possible.

Multilateralism in the Cold War

During the Cold War, international legal responses to terrorism, especially Palestinian terrorism of the 1960s and 1970s, were possible but they were limited. In that period international law relating to terrorism generally respected the principles of state sovereignty and non-intervention by specifying crimes (hijacking, seizure of ships, placing on board aircraft explosive devices, attacks on airports, on oil platforms and nuclear facilities . . .), and enforcing the law by means of a number of treaties.[1]

Treaties are consensual – states can choose whether to ratify them or not. Furthermore, the treaty crimes created were to be enforced by a 'prosecute or extradite' formula, meaning that the state holding the suspects could decide whether to prosecute them itself or extradite to states willing to prosecute. Add to this an acceptance of prosecutorial discretion by the holding state, and its sovereignty was respected. State sovereignty was also respected by these treaties because the crimes created were to be enforced by national criminal justice systems, not by any international court or body.

Thus terrorism in the Cold War period was largely responded to by a criminal justice approach as opposed to a military approach, although Israel provided the main exception to this. Israel regularly struck at terrorist targets using military force at a time and in a manner of its choosing, and was normally condemned for this. Similarly when the US responded to Libyan terrorism in 1986 by using military force, it was condemned by the General Assembly for breaching international law.

The post-1945 world order initiated by the UN Charter seemed to remove the concept of 'war' from the lexicon of international law. This meant that for the norms of the Charter to apply there had to be a 'threat or use of force', which was prohibited except for self-defence or action authorised by the Security Council. In the period 1945–89, again with the possible exception of Israel, states did not accept the idea in law of a continuing war against terrorism or terrorists in which there would be intermittent blows and counter-blows ranging across decades.

The post-Cold War period has seen a concerted effort by a number of powerful states to expand the law concerning terrorism. This has been done by supplementing, sometimes replacing the criminal law approach of the 1960s and 1970s with a collective security, occasionally military, approach. Acts of terrorism are seen not