



Helen Duffy. *The 'War on Terror' and the Framework of International Law.* Cambridge: Cambridge University Press, 2005. li + 488 pp. \$62.00 (paper), ISBN 978-0-521-54735-2; \$130.00 (cloth), ISBN 978-0-521-83850-4.

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War and Peace or Crime and Punishment?

The United States' war on terrorism is both an ongoing military action and a vital legal battleground. Perhaps the most controversial aspects of the Bush administration's series of responses to the attacks of September 11, 2001 have surrounded the application (or lack thereof) of international law within the conflict. Politicians, diplomats, and scholars continue to wrangle over the legal aspects of fighting terrorism on a war footing and over the relevance or limitations of long-standing international humanitarian law (IHL) and international human rights law (IHRL) to this war. These considerations are likewise vital for historians of diplomatic history. International law serves as a crucial lens to understand the institutional, transnational, and historical contexts of the war on terror. Furthermore, it is essential to balance a study of the Bush Administration's novel constitutional interpretations regarding executive power and military adventurism during the war on terror with an understanding of their international resonance and constraints.

Helen Duffy seeks to enter that debate by bringing an understanding of the law back into the critique of foreign policy formulation in the war on terror and into the war on terrorism itself. Duffy focuses on the United States as the principal architect and actor in a "war on terror" that she archly views as an illegitimate and illegal policy choice (signaled by her persistent use of quotation marks to diminish it). She describes the marginalization of international law since the 2001 attacks and what she sees as the missed opportunities for enhanced reassertion of the rule of law. She is confident, and labors unconvincingly in this book to argue, that existing and long-standing international laws are robust enough to counter terrorism without the use of force. In Duffy's view, terrorism is an issue best dealt with as a crime to prosecuted,

not as an act of war. She scrutinizes and perceives no limitations or gaps in the network of international laws that would inhibit the defeat and/or detention of terrorists around the world.

Meticulous if dense legal reasoning underlies her questionable central argument that responding to terrorism with military force is in fact virtually always unlawful in conception and execution. Her essential distinction is between actors that obey international legal standards as she presents them and those that do not. Duffy especially warns against the cascading effects of responding to lawless non-state terrorism with what she characterizes as state directed "unlawfulness with impunity" (p. 1) in everything from military action to detention of suspected terrorists. She forcefully emphasizes adherence to law instead of political or ideological rhetoric on the part of policymakers, but a decidedly ideological perspective of her own colors her legal discussion.

The 'War on Terror' and the Framework of International Law acts as an advocacy brief as well as a scholarly monograph. This book provides lengthy discussion of the laws and agreements governing application of force in anti-terrorism, IHL, and IHRL, and could be useful to foreign policy scholars without a strong grounding in the latter two issues in particular. The book helpfully includes a table of cases and a chronological table of international conventions dealing with terrorism linked to the discussion in the text.

The book has three major sections which provide broad coverage of Duffy's attempt to reassert the centrality of international law in the response to terrorism. Duffy first discusses terrorism as a problem in international law and then proceeds to dismiss the military responses to the specific terrorist attacks of September 11. Parts 2 and 3 of the book provide a

detailed discussion of IHL and IHRL which is of enhanced interest given the recent revision of American standards for treatment of so-called enemy combatants (a category that does not exist in international law). These sections provide solid context for understanding IHL and IHRL norms in her specific case study of prisoners held by the United States at Guantanamo Bay.

In part 1, Duffy recounts the surprisingly numerous international debates over a broad definition of terrorism. Terrorism as a tactic has, of course, been around for a long time, but it has not been well defined in the generic terms of international conventions. Specific terrorist acts have been defined in at least twelve different international and regional conventions dealing with bombing and finances. Yet it is not only the specific laws defining terrorism that are open for interpretation, argues Duffy. She also describes the difficulty of determining state and non-state responsibility under international law for terrorist acts through a detailed discussion of the relevant case law.

Duffy takes a notably austere definition of responsibility of states for non-state terrorists operating from within their borders. She demands a strict adherence to a clear legal standard before linking a state (failed or otherwise) to a terrorist organization operating from its territory. Duffy finds no legality in the international, unilateral use of force except for a narrowly defined self-defense, and rightly rejects the Bush Administration's fabrication of preemptive defense in its National Security Strategy of 2002. Oddly, however, she concludes that even after a terrorist attack there is not an uncomplicated legal basis for the use of force even if such force is UN-sanctioned according to established procedures.

Specifically, Duffy is not convinced that the Taliban and Afghanistan could have been held legally responsible for the al Qaeda attacks in 2001. She claims that the culpability of the Taliban in aiding the September 11 attacks is unclear, citing only her own interpretation of the international conventions in this regard and ignoring the documentary record entirely. She does not think the United States was lawful in attacking Afghanistan in 2001 because she believes this attack resulted from a political, rather than legal, decision, and because it had vital consequences that eroded what she sees as precise legal standards for responsibility. Widespread, if not universal, diplomatic support do not factor in her tight analysis of the in-

ternational legal issues involved. Duffy further rejects the notions that the attacks of September 11 created a new standard covering state responsibility for non-state acts, that the American attack on Afghanistan was in congruence with the self-defense requirements in Article 51 of the United Nations Charter, and that the use of force was proportionate.

Duffy's argument is flawed both in its failure to understand the justifiable use of military force in response to the September 11 attacks and in its problematic assertion that terrorism is properly dealt with only as an international crime. Duffy does not, for example, recount historically the multiple and ongoing failures of the international law enforcement approach to terrorism in the pre-September 11 era. Without examining the accessible evidence, she questions whether the Taliban was in fact coordinating with al Qaeda and breezily dismisses the conclusions of the United States, the UN Security Council, NATO, and the European Community that the attacks of September 11 constituted an armed attack for the purposes of self-defense under Article 51. Her argument is weakened by this refusal to consider this recognition of the self-defense character of American military acts as is clear in the historical record and detailed by other scholars.^[1] Disturbed as she is by the uniformity in international opinion supporting the American war in Afghanistan, Duffy chooses to ignore it.

Duffy consciously and ahistorically conflates the justified, proportionate, and UN-authorized U.S. attack on Afghanistan with the much more deeply problematic and unnecessary attack on Iraq in 2003 in order to discredit both. She constructs an oddly anachronistic approach to the early phase of the war on terrorism in Afghanistan out of justifiable concern over the conception and execution of the invasion and occupation of Iraq as well as the treatment of so-called enemy combatants in both wars. Duffy explicitly insists on reinterpreting the Afghanistan campaign in light of later events, and therefore fails to appreciate the actual historical context which functioned in 2001-2002. In her desire to establish the illegality of all military actions in the war on terror, she irons out the complexities of the historical situation at least as thoroughly as she rightly skewers George W. Bush for eliding the legal complexities of his actions in Iraq and in the detention of combatants.

Equally problematic is the way Duffy directly and

sweepingly equates the illegality of terrorism under international law with a presumed illegality of excessive counter-terrorist activity on the part of the United States. Indeed, she stresses an obligation of states to oppose “unlawful responses” to terrorism on the part of the United States (p. 70). Duffy’s theme of the allegedly numerous “crimes committed in the name of counter-terrorism” (p. 98) is a persistent one throughout the book. What is lacking in this discussion (although one senses is not lacking in the spirit if not the letter of international law covering terrorist acts), is not only a blanket refusal to accept the decisions of the UN Security Council, NATO, and the EU and other international institutions authorizing and legitimizing these acts under the law. What is lacking is a sense of moral distinction.

Duffy is on firmer ground describing the application of IHL and IHRL in battle and detention. She examines the nature and background of the rules for armed conflict, focusing on the notions of humanitarianism, proportionality, and military necessity. Her discussion of the system of detention and trial of suspected terrorists and her critique of the Bush administration’s willful violation of international law in this regard is strong and well supported. American vio-

lations of IHRL through selective adherence are as egregious as they are misguided and unprecedented. On this point Duffy is certainly persuasive.

Duffy cartoons the entire “war on terror” as the invented fiction of lawless policymakers and demands an extremely strict adherence to clear and restrictive legal standards for the United States and other nations acting against terrorism. Yet she flatly refuses in turn to recognize international diplomatic decisions that favor such military responses as a result of unprecedented events such as those of September 11.

Diplomacy within the context of established multilateral institutions mitigates the strictures she perceives in international law. Perhaps the clearest example of the dangers of arbitrarily breaking international law in the interests of expediency and cavalier arrogance, as the Bush administration has done over the previous five years, is that such acts then open to question all legitimate uses of force in the necessary fight against terrorism.

Note

[1]. Mary Ellen O’Connell, “Re-Leashing the Dogs of War,” *The American Journal of International Law* 97.2 (2003): 450-52.

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