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Principles of Counter-Terrorism Law

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BOOK REVIEW

PRINCIPLES OF COUNTER-TERRORISM LAW

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In the nearly ten years since the attacks of September 11, 2001, the legal framework to address terrorism and terrorist attacks has grown, stretched, and been tested from all angles. Once viewed predominantly—if not exclusively—as a law enforcement issue, counter-terrorism now involves a robust military response along with the accompanying legal issues.[1] The study of counter-terrorism and the law applicable to both terrorist acts and responses to terrorism has, naturally, become widespread at law schools and other institutions of higher learning across the United States and worldwide. *Principles of Counter-Terrorism Law*[2] is a useful and comprehensive addition to this fast-moving field, where new issues arise, cases are decided, and responses are debated nearly daily. It is concise and easily digested, as appropriate for a hornbook, yet it also offers students and other readers a thorough analysis and grasp of the full range of issues triggered by terrorism and counter-terror operations and efforts.

In a clear nod to the war-based framework the United States has taken in combating terrorism over the past decade, the authors of *Principles of Counter-Terrorism Law* devote the first half of the book to the analysis of "the military response." In the second half of the book, the authors, Jimmy Gurulé and Geoffrey S. Corn, address the vast set of non-military tools the United States employs in three parts: "the law enforcement response"; "economic sanctions"; and "civil causes of action." Unlike most exhaustive casebooks on anti-terrorism law, this approach places much greater emphasis on the law that regulates military operations, the use of force, and the legal issues stemming from the application of military force against terrorist groups.[3] As the authors explain, 9/11 brought "a profound philosophical shift in national security policy"[4] from a law-enforcement approach to counter-terrorism to a new

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1 JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW 27–29 (2011).

2 *See id.*

3 *See id.* at vi.

4 *Id.* at v.

situation in which defeating terrorism—rather than managing it—is the order of the day.[5] "The most significant aspect of this reaction [is] the invocation of wartime legal authority to achieve this critical national security objective."[6] The focus and layout of the book matches this philosophical shift.

The benefits of this approach are clear. The introduction of a military or wartime framework brings with it additional *legal* frameworks beyond the inherent questions of executive power, separation of powers, and other domestic questions relating to the use of military power.[7] International law, specifically the law governing the use of force and the law of armed conflict, is a critical piece of the legal framework once the wartime paradigm is invoked.[8] For this reason, the approach that Gurulé and Corn take—a thorough and equal treatment of the legal consequences of a military response to terrorism as well as the law-enforcement and civil approaches—offers readers, both students and faculty alike, an essential set of tools for analyzing counter-terrorism.

The first five chapters address the military response to terrorism, starting from the right to use force, setting out the framework of the law of armed conflict as it applies to counter-terror operations, and then moving on to the key issues of targeting, detention, and trial. In many ways, the first two chapters provide one of this book's great contributions: the focus on a clear explication of the international legal framework that governs the use of force and the conduct of hostilities within the context of the global struggle against terrorism. The legal framework for wartime authority is inherently different from a peacetime framework, and understanding this difference is key to grasping the legal controversies surrounding targeted killing, detention, military commissions, and other issues that have dominated the past decade of debates surrounding post-9/11 U.S. policies and operations.[9]

As a first step, therefore, students and others exploring counter-terrorism law in the post-9/11 world need foundational information about the international legal parameters surrounding the use of force in the international sphere. The first chapter takes the classic United Nations ("UN") framework and applies it to terrorism, particularly transnational terrorism. The UN Charter

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[5] *Id.* at v.
[6] *Id.*
[7] *See id.* at vi.
[8] *See id.* at viii.
[9] *See id.* at viii–ix.

prohibits the use of force by one state against another in Article 2(4),[10] with only two exceptions: (1) multinational security action authorized under Chapter VII of the UN Charter;[11] or (2) the use of force in individual or collective self-defense as recognized in Article 51 of the Charter.[12] Notwithstanding decades of precedent regarding when the use of force constitutes an armed attack sufficient to trigger the right of self-defense, whether a transnational attack by terrorists could constitute an armed attack for such purposes remained an open question.[13] The first chapter analyzes the UN framework in the context of the 9/11 attacks, including questions of proportionate response,[14] the exhaustion of the right of self-defense,[15] and how the Iraq War fits into this framework.[16]

The second stage of the foundational background necessary to analyze targeting, detention, and trial, among other issues, is in the discussion of the law of armed conflict in Chapter 2. As the authors note, the decision to invoke wartime authority in response to the 9/11 attacks and engage in a robust military response to terrorism brought the law of armed conflict into direct application.[17] To understand when it applies, whether it should apply to counter-terrorism operations, and how it applies, this chapter provides a brief overview of the purposes of the law of armed conflict and the triggering mechanisms for its application. In particular, this chapter explores the "fit" between the law of armed conflict and counter-terror operations—both whether military operations against terrorist groups fall within the traditional categories of armed conflict and the consequences of a determination that the operations do not.[18] Although the debate over the application of the law of armed conflict to counter-terrorism continues on many levels, the Supreme Court's decision in *Hamdan v. Rumsfeld*[19] put an end to the characterization debate, at least in the

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[10] U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

[11] *See* U.N. Charter art. 42.

[12] *See* U.N. Charter art. 51.

[13] *See* GURULÉ & CORN, *supra* note 1, at 8.

[14] *Id.* at 15–16.

[15] *Id.* at 16–18.

[16] *Id.* at 18–19.

[17] *Id.* at 28–30.

[18] *See id.*

[19] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

United States, by holding that the conflict with al-Qaeda is a non-international armed conflict under common Article 3 of the Geneva Conventions.[20]

With this background in hand, the military response section then continues to tackle the difficult—and still constantly debated—questions of targeting, detention, and trial. Each of these questions first demands the application of traditional law of armed conflict categories, such as combatant and civilian, to terrorists.[21] In the areas of targeting and detention, Chapters 3 and 4 marry an explanation of traditional frameworks for targeting and detention to the exigencies and complications of today's conflict with al-Qaeda and other terrorist groups.

Questions of targeting turn, at the most basic level, on the distinction between armed conflict, which triggers the authority to use deadly force as first resort, and law enforcement, in which deadly force is reserved as a last resort. Chapter 3 on "Targeting Terrorists with Military Force" thus addresses when terrorists are legitimate targets within an armed conflict framework and the legal framework that governs targeting, including the principles of distinction, proportionality, and military necessity. Chapter 4 on detention draws on the same law of armed conflict framework of categorizing persons as lawful combatants and mixes an explanation of combatant and prisoner of war status in the traditional framework with an analysis of U.S. jurisprudence both pre- and post-9/11. The reader is taken on a quick tour of the critical cases forming the core structure of the U.S. system of detention of enemy belligerents[22]—previously called "enemy combatants" until that term was phased out at the start of the Obama Administration.[23] In addition to covering procedural and treatment issues, Chapter 4 gives the reader the jurisprudential and international legal foundation to understand the linkage between preventive detention in the war with al Qaeda and traditional law of war detention.[24]

A prisoner of war ("POW") is traditionally held in protective custody and cannot be prosecuted for lawful acts during combat; the law does, however, provide for prosecution for crimes committed during captivity and for pre-

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[20] *Id.* at 630.

[21] *See* GURULÉ & CORN, *supra* note 1, at 70–81.

[22] *See id.* at 97–103.

[23] William Glaberson, *U.S. Won't Label Terror Suspects as "Combatants,"* N.Y. TIMES, Mar. 14, 2009, at A1.

[24] *See* GURULÉ & CORN, *supra* note 1, at 104–14.

capture violations of the law of war.[25] As discussed in the chapters on targeting and detention, however, terrorist operatives do not qualify for POW status.[26] The final chapter in "The Military Response" section, Chapter 5, addresses the use of military commissions to try persons captured and detained in the course of the "War on Terror." Like the previous two chapters, this chapter blends a discussion of the traditional use of military commissions with an analysis of how that framework can apply to counter-terrorism. It also analyzes the three most controversial crimes subject to the jurisdiction of the military commissions—conspiracy,[27] material support for terrorism,[28] and murder in violation of the law of war[29]—and shows how the claim for subject-matter jurisdiction over these crimes is tenuous at best under the law of armed conflict.

Notwithstanding the U.S. invocation of an armed conflict framework and the great focus in the media and academic debates on the application of the law of armed conflict to counter-terror operations,[30] counter-terrorism involves far more than simply the application of military force and military jurisdiction. The natural counter to a military response is a law-enforcement response, the traditional approach to counter-terrorism before 9/11.[31]

In Part II, the authors provide a thorough overview of the components of the law enforcement response to terrorism, beginning with the framework for gathering intelligence information. Intelligence is the lifeblood of counter-terrorism and the United States has a robust and comprehensive set of laws and paradigms for intelligence gathering.[32] To that end, Chapter 6 introduces the reader to the Foreign Intelligence Surveillance Act ("FISA"), explaining the nature of the statutory framework and how FISA, as amended, has become a major tool for the gathering of intelligence information.[33] After detailing the process for applying for court orders, issuing court orders, authorizing wiretaps, and compelling the production of business records,[34] this chapter

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[25] *See* Geneva Convention Relative to the Treatment of Prisoners of War arts. 82–108, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[26] *See* GURULÉ & CORN, *supra* note 1, at 106.

[27] *See id.* at 181–85.

[28] *Id.* at 189–92.

[29] *Id.* at 185–89.

[30] *See id.* at 27–64.

[31] *Id.* at 27–28.

[32] *Id.* at 205 nn.1–5.

[33] *Id.* at 27.

[34] *Id.* at 208–23.

then examines the range of legal challenges to FISA, such as standing requirements[35] and constitutional challenges under the Fourth Amendment.[36] National security letters, which round out the intelligence-gathering tools in Chapter 6, have been another major means used by the federal government as a law-enforcement response, especially in the post-9/11 years, when Congress expanded the parameters of this tool through broader definitions and wider agency authority while at the same time creating judicial review procedures and enforcement mechanisms for challenging the requests.[37]

Attention may be focused on military detention and prosecution of suspected terrorists, but the prosecution of suspected terrorists in federal civilian courts continues apace.[38] The primary provisions for prosecuting international terrorists are the material support statutes, discussed at length in Chapter 7.[39] After explaining the statutory framework, this chapter then discusses the authority to designate an entity a "foreign terrorist organization" ("FTO").[40] Numerous cases have challenged both FTO designations and the material support statutes in general over the past several years, on a wide range of legal grounds.[41] One of the most recent cases, *Holder v. Humanitarian Law Project*,[42] raised a number of those challenges directly, including freedom of association and freedom of speech under the First Amendment, vagueness, and scienter.[43]

Just as intelligence is the lifeblood of counter-terrorism, so financial resources are the lifeblood of terrorism. To that end, the United States and other countries have enacted a comprehensive web of domestic and international economic sanctions to freeze terrorist resources and drastically curtail their ability to plan and launch attacks.[44] As noted in Chapter 8, starving terrorists and terrorist organizations not only prevents terrorist attacks, but it also helps generate new leads to identify previously unknown terrorists, terrorist cells, and terrorist financiers.[45] The blocking of assets under the

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35 *Id.* at 223–27.
36 *Id.* at 228–36.
37 *Id.* at 241–49.
38 *See id.* at 257.
39 18 U.S.C. §§ 2339A, 2339B (2006).
40 GURULÉ & CORN, *supra* note 1, at 261–63.
41 *See id.* at 261–63 nn.38–51.
42 Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).
43 *Id.* at 2712.
44 GURULÉ & CORN, *supra* note 1, at 295–96.
45 *Id.* at 295.

International Emergency Economic Powers Act[46] and Executive Order 13224[47] is analyzed in detail. The Act authorizes the President to declare a national emergency to deal with a particular threat and then block the transfer of any property in which a foreign national has any interest.[48] The Executive Order, signed directly in response to the attacks of 9/11, authorizes the Secretary of the Treasury to block the property of designated members of al-Qaeda, affiliated groups, Islamic charities suspected of funding al-Qaeda, and other similar entities.[49] The legal challenges to such sanctions, which have sprouted in the past several years, are analyzed extensively in this chapter.

This U.S. framework for domestic economic sanctions goes hand-in-hand with the international sanctions enacted by the UN Security Council in the immediate aftermath of 9/11 and builds on the sanctions against the Taliban dating back to 1999.[50] After first declaring that international terrorism poses a serious threat to international peace and security in Resolution 1368[51]—the trigger for Chapter VII action[52]—the Security Council established a detailed system which demanded the freezing of terrorist assets by all States and a Sanctions Committee to oversee this regime.[53] Chapter 9 details thoroughly the framework and procedures before addressing the major challenges to the UN Sanctions regime presented in two recent cases before the European Court of Justice: *Kadi*[54] and *Al Barakaat*.[55] In further explaining the legal controversy surrounding the international sanctions regime, this chapter gives the reader the tools to analyze one set of non-military tools available to the international community in combating terrorism.

Until this point, the military, law-enforcement, and economic responses to terrorism outlined in *Principles of Counter-Terrorism Law* focus on governmental and international options and paradigms for addressing terrorism. The final section introduces the victims of terrorism by highlighting the use of civil liability and private actions against terrorists and their

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46 50 U.S.C. §§ 1701–1706 (2006).

47 Exec. Order No. 13,224, 75 Fed. Reg. 81717 (Sept. 23, 2001).

48 50 U.S.C. §§ 1701(a), 1702(a)(1)(B) (2006).

49 Exec. Order No. 13,224, 75 Fed. Reg. 81717 (Sept. 23, 2001).

50 GURULÉ & CORN, *supra* note 1, at 331.

51 S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

52 U.N. Charter arts. 39–51.

53 GURULÉ & CORN, *supra* note 1, at 342 (citing S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999)).

54 Case T-315/01, Kadi v. Comm'n, 2005 E.C.R. II-3649.

55 Case T-306/01, Yusuf & Al-Barakaat Int'l Fund v. Council of Eur. Union & Comm'n of Eur. Communities, 2005 E.C.R.II-3535.

sponsors.[56] Dating as far back as the Alien Tort Claims Act,[57] enacted in 1789, and including recent statutory enactments such as the Antiterrorism Act of 1991,[58] the Torture Victim Protection Act[59] and the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act,[60] Congress has legislated a number of statutes authorizing civil liability for personal injury or death caused by acts of terrorism. Such lawsuits can promote key goals in the fight against terrorism, as Chapter 10 explores in great depth: recovery of damages for victims, seizing of assets of terrorists, and deterrence, particularly for the individuals and organizations funding terrorist attacks. Just as economic sanctions cut off the flow of money to terrorists, civil judgments can help disrupt terrorist financial networks.[61] For all these reasons, this section is a critical component of the overall and far-reaching coverage of the entirety of counter-terror options and responses addressed in this book.

After a comprehensive discussion of the theories of liability, main cases, and legal challenges to liability under these civil statutes, Chapter 10 comes full circle to examine whether civil liability—as presently conceived in the United States—can achieve the goals set forth at the beginning of the chapter.[62] Indeed, several obstacles exist: terrorists rarely have property in the United States, which makes attachment of judgments unlikely; foreign sovereign immunity precludes prosecution in cases in which a State has not been designated as a State sponsor of terrorism; and sensitive diplomatic and foreign policy interests often drive the U.S. government to block the attachment of frozen assets.[63]

Principles of Counter-Terrorism Law is a welcome addition to the literature on the law relevant to counter-terrorism for its comprehensive coverage of the issues and clear explication of the legal questions and controversies. The analysis of all facets of counter-terrorism law, from the military to the economic to the role of civil liability, gives the reader a truly bird's-eye view of this growing and important area of domestic and international law.

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56 GURULÉ & CORN, *supra* note 1, at 367.
57 28 U.S.C. § 1350 (2006) (originally enacted as Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73).
58 18 U.S.C. §§ 2331–2339D (2006).
59 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)) .
60 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–1611 (2006).
61 *Id.* at 368.
62 *Id.* at 428–29.
63 *Id.*