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Aniceto Masferrer *Editor*

Post 9/11 and the State of Permanent Legal Emergency

Security and Human Rights in Countering Terrorism

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Preface and Acknowledgements

This book is devoted to exploring an age-old problem which touches upon people's lives and requires constant deliberation: the necessity of limiting State power to protect individuals, including non-citizens. Accordingly, it is important to recognize human rights which exist prior to the state. These pre-political or natural rights lie beyond the siren song of sovereignty and are not negotiable whether through legislation, executive power (or otherwise). Protecting these rights, as conceived in law, avoids allowing the excessive exercise of State power, a power which is otherwise neither limited nor restrained.

In countering terrorism, the State is not allowed to exercise unrestrained power. It may not rely on a supposed national or popular sovereignty or even on the legitimacy of the democratic process. While establishing limits on State power and law-making may not completely resolve the complex relationship between national security and the protection of fundamental rights, it may moderate the State's often excessive utilitarian approach which, focusing more on the *quantum* than on *quod*, ignores the pre-political dimension of human rights and trivializes – if not ignores – the dignity of each human being, leaving him/her unprotected from the absolute power of Leviathan.

This collective monograph is the result of a research project which started in 2009 and took an important step forward in the context of an International Workshop on 'Security and Human Rights in Countering Terrorism', celebrated at the University of Valencia in July 7, 2010. Later, many Workshop participants and other distinguished scholars became involved and put this project together. I'm grateful to all of them for their generous co-operation and academic excellence. I also give thanks to the *Fundación Universitas* for its support in partially sponsoring this project (www.fundacionuniversitas.org). Moreover, I wish to express gratitude to Mortimer Sellers and James Maxeiner, the Series Editors in the 'Ius Gentium: Comparative Perspectives on Law and Justice', for allowing the publication of this book in their prestigious Springer's collection.

Valencia — Aniceto Masferrer

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Contents

Chapter 1
Introduction: Security, Criminal Justice and Human Rights in Countering Terrorism in the Post 9/11 Era

Aniceto Masferrer

Terrorism violates human rights and constitutes a serious challenge for liberal democracies. Not because terrorists can defeat liberal democracies by force of arms, but because their actions can potentially undermine the domestic social contract of the state by undermining its ability to protect its citizens from attack and undermining the ability of democratic process to solve pressing problems. As Audrey Kurth Cronin has noted, 'the greatest danger [for liberal democracies] is not defeat on the battlefield but damage to the integrity and value of the state'.[1] While the events of 9/11 and the subsequent attacks around the world attributed to Islamist terrorists have led to a renewed focus on the threats and challenges associated with terrorism, the phenomenon is not new. Throughout history, states have had to deal with acts of political violence and terrorism. Democracies, perhaps, have been particularly vulnerable to campaigns of terrorism because of their openness, limits on government and restrains imposed by the rule of law. As Paul Wilkinson has observed, 'it is part of the price we must pay for our democratic freedoms that some may choose to abuse these freedoms for the purposes of destroying democracy, or some other goal'.[2]

In the aftermath of the 9/11 attacks on New York and Washington, many commentators claimed that the world had changed 'forever' with international terrorism

[1] A. K. Cronin, "Rethinking Sovereignty: American Strategy in the Age of Terrorism," *Survival* 44, no. 2 (2002): 134.

[2] P. Wilkinson, *Terrorism versus Democracy – The Liberal State Response* (London: Frank Cass, 2001), 220–224.

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constituting one of the defining global security challenges of the twenty first century.[3] The renewed focus on counter-terrorism law and policy also called into question whether the lessons drawn from previous terrorism emergencies are pertinent to the post-9/11 environment. Indeed, to what extent, if at all, are the principles identified for the liberal democratic response to traditional forms of terrorism applicable to a response to contemporary international terrorism? The historical, political and security implications of 9/11 notwithstanding, many scholars and policy-makers appear to agree that the basic tenets of the traditional liberal democratic response continue to apply to responses to contemporary international terrorism.

This volume focuses on four particular aspects of the liberal democratic response to terrorism an era of perceived permanent emergency. Accordingly, it is structured in four parts which provide a historical perspective, address definitional issues in the context of terrorism and examine specific challenges arising in the field of criminal justice as well as in international law.

Part I opens with an analysis of state power and legal responses from an historical perspective. It contains two chapters approaching two different topics related to the crucial theme of how a state counters terrorism without overly encroaching upon the fundamental rights of its citizens. In Chap. 2, Juan A. Obarrio and I explore the notion of sovereignty and the limits of state power in the framework of criminal justice. It is not an easy enterprise to counter terrorism while respecting the rule of law and guaranteeing the security of citizens to the maximum extent possible without violating their fundamental rights. Theoretically, modern constitutionalism emerged to protect citizens from political abuses of power. In practice, however, fundamental rights are not always fully respected since the state is often tempted to exercise its power beyond legal boundaries. To limit the power of the state means to limit its sovereignty. Otherwise, the abuses of power by the state become inevitable. Surprisingly, modern constitutionalism applied limits to the state during an historical period in which sovereignty was regarded, in the realm of political philosophy, as an unlimited notion (Rousseau).

Nevertheless, the notion of sovereignty, being the result of a long development in the Western legal tradition (particularly from the Middle Ages to the sixteenth century), was never regarded as unlimited. The second chapter analyses the limits to the principle of sovereignty in three specific periods. Firstly, in Roman antiquity, when, during the transition between the Republic and the Principality, Cicero weighed the values, principles and institutions of the republic, by resorting to the defence of freedom, the class of the *optimates*, a mixed constitution and to the natural law. Secondly, in the Middle Ages, where, in front of the Emperor, the Papacy, Pact laws

[3] See e.g., P. Kelly, "How 9/11 changed the world," *The Australian* (Sydney), 8 September 2006; R. W. Stevenson, "Cheney says 9/11 changed the rules," *New York Times* (New York), 21 December 2005. For thoughtful analysis see, e.g., R. Jervis, "An Interim Assessment of September 11: What Has Changed and What Has Not?," *Political Science Quarterly* 117, no. 1 (2002): 37–52; T. L. Friedman, *Longitudes and Attitudes: Exploring the World after September 11* (New York: Farrar, Straus and Giroux, 2002).

and the observance of natural law became elements to limit the sovereignty of the monarch. Lastly, in the early Modern Age, the notion of sovereignty – and its limits – was notably developed by Jean Bodin in his most famous work, *The Six Books of the Commonwealth*.

This historical survey is an attempt to demonstrate that the challenge of dealing with emergency is not new, and that the lessons of history demonstrate that unchecked power of the sovereign leads to the demise of liberty.

In Chap. 3, Karl Härter gives a fascinating overview of the history of terrorism by analyzing terrorism as a political crime in eighteenth and nineteenth century Europe. At that time 'terrorism' did not merely exist as a separate, specific phenomenon but was considered as a political crime like treason or the 'crimen laesae maiestatis.' Reacting to different forms of political dissidence, revolt and criminal/terrorist action, the European authorities and states slowly shaped the legal concept of terrorism and developed an anti-terrorism legislation which could be extended to various forms of political dissidence and crime. This development was accompanied by the establishment of different new techniques of policing and anti-terrorism measures which were only partially integrated in the legal system or legally controlled. Particularly in the second half of the nineteenth century this development implied not only the modification of domestic criminal law but also affected fundamental rights and civil liberties already established by European constitutionalism.

On the basis of these general developments Härter's chapter explores especially the impact of the legal concepts of terrorism on 'international criminal law'. Political movements, political dissidents, rebels and anarchist could be labeled 'terrorist' and were considered a trans-border threat. This influenced not only the establishment and intensification of trans-border police activities and prosecution of 'terrorists' but stimulated the formation of international criminal law, particularly with regard to legal assistance, extradition, and asylum. The latter practices were modified by new norms like the assassination or the anarchist clause which restricted the granting of political asylum and extended extradition with regard to political crimes and terrorism. In this respect the legal concepts of terrorism affected fundamental rights and civil liberties on the international level and influenced the development of trans-border anti-terrorism measures and the formation of 'international criminal law'.

Based on a historical definition of terrorism, Härter analyses the legal responses to political violence in Central Europe from 1789 to 1914. In this period of the emerging constitutional state (*Rechtsstaat*), authorities responded to various phenomena of political dissidence and violence regarded as political (or even terrorist) crimes by introducing a range of measures including criminal justice, punishment and prevention.

Thus, political violence was used to assert a state of emergency, to legitimise emergency laws and to develop substantial legal elements of political crime, which in the long run gained importance for the legal conceptualisation of 'terrorism' and the implementation of legally based counter-terrorism measures. They concerned the conceptualisation of the 'terrorist' group as 'criminal association' (including the criminalisation of membership, support and participation in concomitant activities), the planning and commission of violent crimes (including the penalisation of

preparatory acts and the concept of anticipatory crimes), the control and criminalisation of public activities (press, writings, speeches, assemblies, propaganda) and the transnational level with regard to the restriction of asylum and the extension of extradition. In consequence, the legal responses to political violence facilitated and legitimised extended surveillance, policing and suppression of oppositional groups, dissidents and the labour movement, which could be labelled and criminalised as the breeding ground of political violence or even as 'terroristic'. Härter's chapter demonstrates exemplarily that the legal conceptualisation of terrorism as a political crime could implicate the extension of 'social control' and the constraint of civil rights.

Part II contains two chapters exploring definitional aspects of terrorism. Ben Saul's chapter, analyses, among other questions, whether there is now an accepted definition of terrorism in general international law. His chapter is particularly timely in the wake of a decision by the UN Special Tribunal for Lebanon, which recently declared the existence of an international crime of transnational terrorism.

Saul concludes, however, that there is insufficient evidence of a customary international law definition of terrorism, largely because there is too much inconsistency and divergence in the material sources of law such as international and regional treaties, national laws and judicial decisions, and United Nations resolutions. There are nonetheless good international public policy reasons for defining terrorism, to protect important community values and interests. In Saul's view, those policy reasons can illuminate the proper approach to the technical problem of defining the elements of terrorism, particularly in ways which do not interfere with other important global values, such as human rights and humanitarian law. In this context, the chapter explores the advantages and costs of defining terrorism in certain ways.

In Chap. 5 Mariona Llobet illustrates that a key challenge in contemporary discourses on this subject lies in identifying the limits between terrorism and war. She observes that there appears to be considerable confusion between the concept of terrorism and the concept of war in the post 9/11 era, especially in the context of military action in Iraq and Afghanistan.

Llobet analyses the link between terrorism and war from three distinct but interrelated perspectives. Firstly, terrorist practices are also performed by the armed forces and organised groups of resistance in wartime. However, she argues that, as a phenomenon, terrorism should not be confused with war or warfare guerrilla.

Secondly, Llobet explores whether the threat of contemporary international terrorism is a manifestation of some sort of criminality, or, by contrast, represents a new form of warfare. The chapter considers the consequences of taking into account one or the other approach, as each would lead to the application of two opposite legal models. If it is a crime-focused model, the fight against terrorism should be conducted within the legal mechanisms established by the principles of criminal justice to prevent and punish any kind of crime in peacetime. If it is a war-focused model, the provisions of the law of armed conflict should be applied.

Finally, Llobet questions the premises of our response to the 9/11 events. She asks whether it is admissible to respond to crime (terrorist attacks) with war (such as the events in Iraq and Afghanistan). She argues that to justify legally our response we should consider terrorist violence not as a form of crime but as an armed attack from abroad that legitimises the resort to war.

Part III analyses some specific topics whose common trait is whether it may be possible to confine counter-terrorism within criminal law justice principles, that is, to effectively combat terrorism without diminishing both the rule of law and fundamental rights.

Clive Walker, in Chap. 6 explores three basic questions regarding how the substantive law has been impacted upon by terrorism. In other words, in Walker's view, terrorism presents several severe challenges for the criminal law of any state which must deal with its impact, and his chapter tackles three vital questions, with illustrations primarily from the laws of the United Kingdom.

The first question concerns the appropriate overall role to be served by the criminal law in regard to counter-terrorism as compared to other potentially coercive exercises of state power, such as executive (ministerial) measures. One way or another, governments are not willing to stand impassive while terrorists kill citizens and subvert the proper working of democracy. Indeed, governments are given every encouragement to be energetic in their responses, with UN Security Council Resolution 1373 of 28 September 2001 pronouncing that 'States should ... take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts ...'. It follows that criminal law is part of the weaponry of counter-terrorism. Many governments have seen it as their prime response, some have even relied on criminal law as their exclusive response, but some have mixed criminal and non-criminal responses, such as detention without trial. Reasons are suggested why criminal law responses are ethically superior.

The second and third questions relate to the modes of application of the criminal law within counter-terrorism and, closely-related, how far criminal law may be altered from its 'norm' or paradigm format in the pursuit of those functions and yet retain sufficient recognisable characteristics essential for legitimacy. One may take the articles of the European Convention on Human Rights as authoritative guides for the 'lowest common denominator' of due process.

Within that context, universal standards must contend with six identified adaptations of criminal law to counter-terrorism. First, and most evident in recent years, criminal law can allow for prescient intervention before a terrorist crime is completed. Second, there can be net-widening, so that peripheral suspects can be neutralised. Third, criminal law can reduce obstructive 'technicalities'. Fourth, the criminal law can be used to mobilise the population against terrorism – to force them to assist in counter-terrorism work. Fifth, the criminal law can serve a denunciatory function. Sixth, the criminal law can bolster symbolic solidarity with the state's own citizens and with the international community.

Walker shows that the challenge of terrorism can be the trigger for a variety of rational and effective legal responses within criminal justice and that not all 'special' laws must invariably be viewed as illegitimate. Nevertheless, criminal justice solutions to counter-terrorism are not all without costs to the values of criminal justice. He maintains that the state should not assume that a criminal justice preference in counter-terrorism represents an unquestionable victory for societal values.

In Chap. 7, Francesca M. Galli starts with the common place recognition that, since 11 September 2001, countering terrorism has become one of the biggest priorities of the international community, the common trend among different jurisdictions

being the adoption of fierce and authoritarian measures to prevent and suppress the terrorist threat in the name of a widespread call for further security.

In her view, the current changes are to be seen in the broader picture of developments in criminal justice in Western Europe in recent years to address an allegedly mounting insecurity in the need to be tough on crime: the current normalization of extraordinary means and, in particular, the emergence of an "us and them" approach to criminal justice, which German legal writers call *Feindstrafrecht*, (enemy criminal law)

Galli points out that this authoritarian model of preventive criminal law would deny human rights and legal guarantees (the 'citizen's criminal law') to those who are seen as sources of extreme danger because of their suspicious behaviour. She makes some general suggestions as to what could and should be done to counter the existing trends and with a view of re-establishing the primacy of the criminal justice system and limit the recourse to exceptional measures to cope with the terrorism threat.

Kent Roach, in Chap. 8 denounces that the fall-out from 9/11 and the blurring distinctions between secret intelligence about security threats and evidence of terrorist crimes of preparation has placed a focus on the use of secret evidence against terrorist suspects. He affirms that attempts have been made to use secret evidence in a variety of contexts including proceedings at Guantanamo, immigration proceedings resulting in administrative detention in the United Kingdom and Canada and in control order proceedings in the United Kingdom and Australia. All of these uses of secret evidence have been legally and politically controversial.

He maintains that much of the debate about secret evidence has centred on correctives such as the use of security cleared counsel or special advocates to challenge the evidence and the use of active and expert judges to challenge the secret evidence/intelligence. In Canada, reliance on expert judges was found to be constitutionally insufficient in the *Charkaoui* case and a regime of special advocates was created. At the same time, however, reliance on special advocates in British proceedings has been challenged and narrowed by various requirements imposed by the House of Lords and the European Court of Human Rights that require the gist of the allegations to be disclosed.

Roach takes a broader approach to the secret evidence debate in light of these developments. In examining the problem of secret evidence, he notes an increase in the use of secret evidence since 9/11 most notably at Guantanamo Bay and when immigration law has been used against terrorists. He stresses, however, that secret evidence has been both legally and politically controversial. Its use in military commissions has been successfully challenged as has its use in Canadian security certificate immigration detention proceedings.

Roach argues that we should not ignore the political controversies caused by secret evidence and secret trials which invoke images of Kafka's *The Trial*. He cites evidence from Canada that suggests that sympathy may have grown for some terrorist suspects precisely because they were held on secret evidence. He also cites the criticisms of the UN's terrorist listing regime as found in the *Kadi* case from the European Court of Justice and other cases following in its wake.

Roach also argues that there are many more proportionate alternatives to the use of secret evidence. They include not only the use of security cleared counsel or special advocates to challenge secret evidence as is done in the United Kingdom and Canada, but security clearances for lawyers representing terrorist suspects, the use of public interest immunity proceedings to prevent the disclosure of unused intelligence in criminal prosecutions.

More fundamentally, Roach argues that those who collect intelligence must become more willing to live with disclosure even if that requires innovative use of witness protection and adjusting Cold War mentality that suggests that the sources and methods of intelligence should remain secret forever.

Leandro Martínez-Peñas and Manuela Fernández-Rodríguez, in Chap. 9, consider the techniques employed by the United Kingdom as one of the most experienced Western democracies in fighting terrorism. They describe how the UK has faced terrorist threats for over half a century. These threats began with political and religious violence in Northern Ireland in the Ulster counties and thereafter segued into global jihadist terrorism. The authors describe how, in the twenty-first century, the British government has deployed legal formulas and measures that it had applied in the 1970s and 1980s to counter political violence in Northern Ireland and adjusted them to address modern challenges posed by groups linked or inspired by Al Qaeda. Exclusion orders, extended periods of detention or increasing executive powers and usurping judicial review and authority are some of the measures attempted in Britain's contemporary counter-terrorism efforts.

In their view, extending law enforcement or executive authority denigrates individual rights and freedoms unnecessarily and ultimately have a transcendent impact beyond the purpose for which they were created. For example, they show how the use of excessive legislation and anti-terrorism standards to combat jihadist financial backing seriously impeded Icelandic banks that had nothing to do with terrorism.[4]

In Chap. 10 Simon Bronitt and Susan Donkin show how Australia has significantly altered its legal frameworks for responding to terrorism in the decade since 9/11. Although the risk of attack on Australian soil is comparatively remote, the global and local political imperative has led to the creation of a new corpus of terrorism law, with more than one hundred new offences and powers enacted at the federal, state and territory level.

Their chapter explores the historical development of these laws focusing particularly on the normalization of derogations from fundamental tenets of criminal law. These deviations include creating novel offences that criminalise acts perceived to be remotely preparatory or conducive to terrorism, as well as modifications to procedural and evidential rules such as reversing the presumption of innocence. In Bronitt's and Donkin's view, the use of civil regulatory measures relating to the suppression of terrorist financing, preventive detention and control orders are also a feature of this legal response. Although heavily influenced by reforms in the UK, as

[4] For a different view on that matter, see Lennon, G / Walker, C, 'Hot Money in a Cold Climate' [2009] Public Law 37–42.

a New World legal hybrid, they demonstrate that Australia has developed its own distinctive legal response, which reflects its complex federal structure (in which criminal law is divided between Commonwealth, States and Territories) and, some unusually for a liberal democracy, the absence of an entrenched bill of rights.

Marinella Marmo, in Chap. 11 offers an insightful reference to a point in time when Australian senior judges were caught between their perceived role and mission, and what achieved abroad by their colleagues in the field of transnational crimes with special reference to the fight against global terrorism. Her methodology is a combination of interviews with Australian senior judges collected in the years 2005–2006, and primary and secondary sources with the scope to compare and contrast the empirical data. The outcome of this methodology shows that, while the perceived role and rhetoric aim to protect human rights, the results are not as radical as in other international cases.

Even if there is a sense that the Australian sample of senior judges, in the years 2005–2006, are alerted and concerned about reinforced state powers in the fight against terrorism, Marmo's chapter reveals rather conservative self-reflections on the role and function of the judiciary. It is revealing to see that most judges interviewed by her expressed views about their role that are in contrast with the judicial approaches embraced by their counterparts abroad, especially in reference to the US Supreme Court and the House of Lords in the UK during the same time frame.

As a consequence, Marmo argues that there is a transition in visibility of senior judges on the international scene in the area of transnational crimes. And even if Australian judges come across as being more conservative and less dedicated to question new state powers, Marmo discusses a new level of judicial assertiveness, 'a mission that connects judges of different jurisdictions' in the fight against terrorism.

In Chap. 12, José M. Atiles-Osoria explores the United States' response to political violence by Cuban exiles and Puerto Rican extreme right-wing organisations during the pre and post 9/11 era. Grounded in the scholarship on critical studies on terrorism, it takes as a point of departure the fact that studies on terrorism fall short of analysing concepts such as threat of terrorism and political violence within the framework liberal democratic state. He argues that mainstream studies on terrorism have underestimated the role of the state as potential terrorist actor.

The chapter is divided into three sections. The first section traces a depiction of the historical and socio-political conditions that determined the formation of Cubans exiles' organisations in the U.S. The second section provides an outline of some of the terrorist actions perpetrated by these organisations against Puerto Rican independence movements. The third part addresses the positions and responses adopted by the governments of the U.S. and PR in the post 9/11 era. The overall aim of the chapter is to show how counter-terrorist policies implemented by democratic states in pre and post 9/11 are not equally effective or consistent when dealing with actions that contribute to their geopolitical interest and the control of left-wing and independent movements.

In Atiles-Osoria's view, when dealing with situations where the state can be either complicit or supportive of terrorist practices, we are left with a theoretical void. That arises from the treatment of the liberal state as a silent and invisible body.

Atiles-Osoria shows the constant tension between the exercise of state terrorism, the support to terrorist organisation and the guarantee of the human, civil and political rights in the colonial case of Puerto Rico (PR).

Finally, Part IV examines selected international law challenges in the area of counter-terrorism.

In Chap. 13 Christopher Michaelsen focuses on the interpretation and role of derogation clauses in an era of permanent legal emergency. Such derogations can be found in the International Covenant on Civil and Political Rights as well as the European and American Conventions. While the State parties may not derogate from the entire treaty, they may legally suspend their obligation to respect and enforce specific rights contained in the respective convention during times of war or other public emergency. The international treaties do not provide any definition of what constitutes a public emergency. However, the respective monitoring organs, the European Court of Human Rights and the Human Rights Committee in particular, have developed certain requirements that need to be met before a state party can lawfully derogate.

Michaelsen reviews relevant case law and other sources on the matter in order to provide a framework for the analysis of whether, and to what extent, the derogation clauses remain adequate in an era of international terrorism. In the aftermath of the 9/11 attacks, the vast majority of states did not invoke derogation clauses in spite of the fact that, in many instances, anti-terrorism legislation developed to counter the perceived new threat raised serious concerns in relation to their compatibility with international human rights obligations. An exception to this trend was the United Kingdom which derogated from both the European Convention and the International Covenant. These derogations were subsequently challenged in English courts – including the House of Lords – as well as before the European Court of Human Rights in Strasbourg.

It is true that both the House of Lords and the Strasbourg Court confirmed that a public emergency (within the meaning of Article 15 of the European Convention on Human Rights) existed in the United Kingdom. Michaelsen's chapter, however, challenges these findings. He argues that contemporary international terrorism does not qualify as a public emergency for both theoretical and factual reasons. He then discusses the implications of this finding and argues that it may be most appropriate to consider abolishing the derogation clauses altogether. While this may be political not feasible at this stage, honest and detailed discussions on the issue should be initiated in the framework of the Council of Europe.

In the final chapter Mark Kielsgard reviews the current literature and jurisprudence on the legitimacy of the use of military force against terrorism under international law. Kielsgard examines the nature and history of national self-defence in the context of international law and counter-terrorism. He recounts and analyzes state practice, Security Council initiatives, international jurisprudence, and scholarship in order to shed light on the limitations imposed by the United Nations Charter, in particular Article 51. He explores historic trends and specifically addresses the issues of state attribution (or targeting non-state actors) and the degree of immediacy (including anticipatory self-defense) necessary to justify the use of force in