

# Foreword

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It gives me much pleasure to be in a position to recommend this collection of essays to anyone interested in constitutional law, counter-terrorism measures, national security or questions of secrecy and accountability. The various chapters included provide a multifaceted, balanced and highly rewarding analysis of the issues and their intersections.

The semi-autonomous research group on ‘Constitutional Responses to Terrorism’, acting under the auspices of the International Association of Constitutional Law (IACL) has become a great success, particularly thanks to its chair, Professor David Cole, and coordinator, Federico Fabbrini, PhD. This volume of excellent studies is a direct consequence of the operation of the research group and the level of scholarly networking created through it.

The question of secrecy, usually on grounds related to national security, in the context of countering terrorism is one of the most intriguing legal issues that have gained unprecedented importance in our post-9/11 world of global terrorism and global counter-terrorism cooperation. While no constitutional lawyer can deny that the threat of terrorism is real, or that there are situations where it is legitimate to accompany counter-terrorism measures with a degree of secrecy, it is nevertheless the task of this group of professionals to guard constitutionalism against the threat of erosion posed by various deviations from principles of rule of law, transparency and accountability. Therefore, it is also their task to propose solutions that do provide effective responses to terrorism while not sacrificing constitutionalism.

Both in my capacity as an academic scholar<sup>1</sup> and as former United Nations Special Rapporteur on human rights and counter-

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<sup>1</sup> See Lisa Ginsborg and Martin Scheinin, ‘You Can’t Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime’, *Essex Human Rights Review*, vol. 8 (2011) 7–19, and Martin Scheinin, ‘Is the ECJ Ruling in Kadi Incompatible with International Law?’ in *Yearbook of European Law*, vol. 28 (2009) 637–53.

terrorism,<sup>2</sup> I have addressed some major problems in the current international regime of terrorist listings. Through its so-called 1267 Committee, the Security Council continues to list individuals and entities as terrorists associated with Al-Qaida, and to utilize its powers under Chapter VII of the UN Charter to impose upon all states the obligation to implement sanctions against those on the list, including a travel ban and the freezing of assets.<sup>3</sup> Secrecy is one of the fundamental problems in that listing regime. The listing is decided behind closed doors by 15 diplomatic representatives of those states that constitute the Security Council. There are no hearings and no access to judicial review. The threshold for listing is consensus within a political body and therefore not a question of evidence. By and large, the information used by individual states, when forming their own position about the listing of an individual or entity, would be gathered through intelligence and be classified in nature. What is worse is that the actual information is not necessarily shared even within the Security Council, as the mere composition of that body will always cause limits upon the free flow of information between the involved states. Hence, access by national or regional courts to the 'evidence' used by the Security Council cannot be the solution to the various problems related to the terrorist listings. While the creation of the office of a Delisting Ombudsperson<sup>4</sup> and the subsequent extension of the powers of the Ombudsperson<sup>5</sup> are certainly positive steps that subject the terrorist listings to a degree of independent review, these measures will remain insufficient as long as the member states of the Security Council retain the possibility to overrule the delisting proposal by the Ombudsperson.<sup>6</sup>

Let me also refer to those reports where the Special Rapporteur has addressed the role of intelligence agencies and their oversight mechanisms in counter-terrorism measures. Following a 2009 report to the

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<sup>2</sup> See, in particular, the 2006 and 2010 reports by the Special Rapporteur to the UN General Assembly, UN documents A/61/267 and A/65/258, respectively. See, also, the 2011 report to the Human Rights Council, A/HRC/16/51.

<sup>3</sup> The terrorist listing regime was originally created through Security Council Resolution 1267 (1999) to enable sanctions against the Taleban regime of Afghanistan. Through Resolution 1390 (2002) it was expanded into a global list of Al-Qaida and Taleban terrorists. After Resolution 1989 (2011) the original 1267 regime only applies to persons or entities associated with Al-Qaida.

<sup>4</sup> See, Resolution 1904 (2009).

<sup>5</sup> Resolution 1989 (2011).

<sup>6</sup> See, Resolution 1989 (2011), paras. 21 and 23.

Human Rights Council in the issue,<sup>7</sup> the Special Rapporteur was requested to produce a compilation of good practice in the area of intelligence and intelligence oversight. The resulting 2010 report, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism'<sup>8</sup> dismisses the approach of secret regulations in the field of intelligence, identifying as good practice that the operation of intelligence agencies must be based on publicly available laws.<sup>9</sup> While the need for confidentiality of classified information is acknowledged,<sup>10</sup> the report proposes that intelligence agencies are subject to a combination of multiple oversight mechanisms<sup>11</sup> that have, *inter alia*, full access to information.<sup>12</sup> A set of good practices was identified specifically in the area of data protection, addressing also the question of limiting access by the concerned individual to data related to himself or herself, and what complementary mechanisms may be put in place to secure the rule of law and accountability.<sup>13</sup>

The authors and editors of this volume are to be congratulated for taking the discussion further. The answer to the dilemma between transparency and the protection of information vital to national security is not in bypassing constitutional standards or international human rights. Rather, the answer is in more attention to constitutional law, and in making the law better so that it will provide effective tools against terrorism without compromising the principles of constitutionalism.

Florence, 12 July 2012

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<sup>7</sup> UN document A/HRC/10/3.

<sup>8</sup> UN document A/HRC/14/46.

<sup>9</sup> Practice 4. All intelligence services are constituted through, and operate under, publicly available laws that comply with the Constitution and international human rights law. Intelligence services can only undertake or be instructed to undertake activities that are prescribed by and in accordance with national law. The use of subsidiary regulations that are not publicly available is strictly limited, and such regulations are both authorized by and remain within the parameters of publicly available laws. Regulations that are not made public do not serve as the basis for any activities that restrict human rights.

<sup>10</sup> See Practice 8.

<sup>11</sup> See Practice 6.

<sup>12</sup> See Practices 7 and 10.

<sup>13</sup> See Practices 23–6.

