

# 1. Countering terrorism and crossing legal boundaries

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## BACKGROUND

The decennium of counter-terrorism legal responses since 9/11 provides a suitable waypoint at which to take stock. Those terrorist attacks in the United States, followed by atrocities such as the Madrid train bombings of March 2004, and the July 2005 killings in London have profoundly altered and reshaped the priorities of legal systems around the world. The 'new' terrorism<sup>1</sup> has even been perceived at times as threatening the lives of democratic nations, resulting in a declaration of 'the war on terror' by US President George W Bush<sup>2</sup> and the lodging of a notice of derogation from the right to liberty by the United Kingdom.<sup>3</sup> The depth of the crisis is revealed by the fact that the US war on terror persists today in law and action. The label has fallen from favour<sup>4</sup> and has narrowed in focus,<sup>5</sup> but

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<sup>1</sup> See B Lia, *Globalisation and the Future of Terrorism* (Routledge, 2005); P Neumann, *Old and New Terrorism* (Polity, 2009); IO Lesser et al., *Countering the New Terrorism* (RAND, 2009).

<sup>2</sup> <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>, 20 September 2001 (last accessed 10 April 2013).

<sup>3</sup> Council of Europe Secretariat, 18 December 2001; Human Rights Act 1998 (Designated Derogation) Order 2001 (SI no.3644). The notice was withdrawn for the UK from 14 March 2005: <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=10/04/2013&CL=ENG&VL=1> (accessed 10 April 2013).

<sup>4</sup> The labels are now officially 'Overseas Contingency Operation' (<http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/overseas.pdf>) for foreign activities or 'Countering Violent Extremism' (<http://www.dhs.gov/topic/countering-violent-extremism>) for homeland security (both last accessed 10 April 2013).

<sup>5</sup> It now applies solely to action against Al Qa'ida and its allies: US President, *National Strategy for Counterterrorism* (2011) p 8.

military action beyond the bounds of recognised international humanitarian law<sup>6</sup> is palpable in the forms of military detention and trials at Guantánamo Bay and an increasing reliance on lethal force against the enemies of the state as delivered from unmanned aerial vehicles (drones). The United Kingdom's derogation notice was withdrawn in 2005, but its government recently claimed that conditions justify its resurrection,<sup>7</sup> and, in the meantime, special measures like executive control orders and Terrorism Prevention and Investigation Measures are applied.<sup>8</sup> Though the United States is an outlier amongst Western states because of the dominance of its military response, almost all other jurisdictions have taken heed of the United Nations calls for action against terrorism<sup>9</sup> by proliferating counter-terrorism laws. Indeed, many have followed the blueprint of the United Kingdom's legal definition of 'terrorism' and measures built upon it.<sup>10</sup>

There are many ways of analysing the legal responses to terrorism. Approaches adopted include national and comparative detailed and thematic analysis and critique, philosophical, political and historical groundings, and the application of qualitative and quantitative methodologies in order to assess impacts. Unfortunately, much of the legal academic discourse in the past decade has been produced by authors who have lacked the appreciation that all these different perspectives are necessary for a sound appreciation of terrorism and counter-terrorism. As a result, they regularly fail to understand that counter-terrorism did not commence for many jurisdictions on 9/11 or that most terrorism activity remains grounded in ethnic or nationalistic causes rather than related to the jihadi doctrines associated with Al Qa'ida and its adherents.<sup>11</sup>

The same criticisms cannot be levelled against the contributors to this book. The chapters are therefore enriched with studies of the comparative, historical, philosophical and political, as well as assessments of

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<sup>6</sup> See H Duffy, *'War on Terror' and the Framework of International Law* (Cambridge University Press, 2005).

<sup>7</sup> Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (2009–10 HL 86/HC 111) para 11.

<sup>8</sup> See C Walker, and A Horne, 'The Terrorism Prevention and Investigation Measures Act 2011: one thing but not much the other?' [2012] *Criminal Law Review* 421.

<sup>9</sup> See especially UNSCR 1373 of 28 September 2001.

<sup>10</sup> See Terrorism Act 2000, s 1; Lord Carlile, *The Definition of Terrorism* (Cm 7052, 2007); K Roach, *The 9/11 Effect* (Cambridge University Press, 2012).

<sup>11</sup> For the position within the European Union, see Europol, *TE-SAT 2012 EU Terrorism Situation and Trend Report* (2012).

impact. Our offerings to this effect were formed not only by individual study but also through collective exchange which was initially facilitated by a workshop, 'Democratic States' Response to Terrorism under the Rule of Law: A Historical and Comparative Approach to the Protection of Human Rights and Civil Liberties in the Fight against Terrorism', which took place on 14–15 July 2011 at the International Institute for the Sociology of Law, Oñati, Spain. This hospitable setting further ensured that account could be firmly taken of insights from Continental Europe, to be set alongside what are usually the more prevalent discourses from common law jurisdictions. In this way, we have sought to produce one of the first books to explore the implementation of counter-terrorism measures from such a strong comparative perspective and with such a diversity of backgrounds and interests.

## RATIONALE OF THE BOOK

What unites the contributions to this book is an understanding that the new codes of counter-terrorism laws have constantly and often acutely challenged traditional legal concepts. The emergent counter-terrorism legal catalogue thereby transcends traditional ethical, legal and organisational boundaries of legal categorisation and poses fundamental questions about the values at the heart of each affected legal system, both in domestic and international law. This book identifies the new tensions and analyses and criticises the often unwanted outcomes within common law, civil law and international legal systems.

These challenges of crossing boundaries can be seen at every turn and at every time. The initial responses to 9/11 involved fundamental questions about whether the appropriate juristic categorisation should be 'war' or 'crime', a controversy which should have entailed deep reflection upon the very concept of 'terrorism' and the goals behind its ascription.<sup>12</sup> The implementation of counter-terrorism law has further been infused with discourse about the boundaries between conflicting political and social values. This discourse is usually depicted as a struggle between state security and the liberties and freedoms of the individual citizens of the state. It leads to the advocacy of the prioritisation of one value over the other (usually of security over rights) or of the

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<sup>12</sup> For the dangers of not doing so, see Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Ten Areas of Best Practices in Countering Terrorism* (A/HRC/16/51, 2010) paras 26–28.

reconciliation of security within the paradigm of human rights (by way of claims to security from external threats and the maintenance of civil peace and the sanctity of life) or even an ultimate synthesis within the promotion of what was once radically called the ‘commonwealth’ and now more often takes the indistinct yet Promethean guise of ‘human security’.<sup>13</sup>

These dichotomies in turn generate deep-seated debates within individual legal systems. They include the proper roles of lawyers and courts and how they can be effective in circumstances of secrecy, subterfuge and emotion. They include the legitimate boundaries of crimes, challenged by the enactment of a far-reaching set of counter-terrorism laws which have brought into existence a range of ‘terrorism offences’ by which a conviction can be sustained even in the absence of violent action or intent.<sup>14</sup> A related issue is the extent to which counter-terrorism should infiltrate (some might say infect) regular criminal process in order to modify its transaction so as to deliver the ‘right’ result.

Next, there is the boundary between international law and national enforcement. Even without distinct international normative standard-setting around the concept of terrorism, the attacks of 9/11 propelled the UN Security Council to signal significant international demands in terms of legal compliance, though, at the same time, that compliance encouraged rather than replaced the exercise of national security sovereignty.

There are also important changes to institutional boundaries. ‘National security’ was often used prior to 9/11 as an incantation to place off limits any forms of transparency or accountability, whether legal or political. However, the expanding boundaries and coverage of national security into everyday life, as well as the functional and institutional melding between policing and spying, have encouraged a reaction on the part of judges to judicialise counter-terrorism and on the part of politicians to politicise counter-terrorism. The current era thus stands in contrast to previous eras when non-justiciability<sup>15</sup> and political party consensus<sup>16</sup> ruled the treatment of terrorism issues. For all these reasons, institutional

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<sup>13</sup> See A Zwitter, *Human Security, Law and the Prevention of Terrorism* (Taylor & Francis, 2011).

<sup>14</sup> But not in Canada: *R v Khawaja* 2012 SCC 69.

<sup>15</sup> See A Kavanagh, ‘Constitutionalism, counterterrorism, and the courts: changes in the British constitutional landscape’ (2011) 9 *International Journal of Constitutional Law* 172.

<sup>16</sup> See AW Neal, ‘Terrorism, lawmaking, and democratic politics’ (2012) 24 *Terrorism & Political Violence* 357.

boundaries have been redrawn – not just between police and security agencies but also between the executive, legislature and judiciary.

In summary, our book offers an analysis of this important theme of crossing legal categories, a recurrent issue which underlies, pervades and bedevils counter-terrorism laws. It thereby draws together what might sometimes appear to be disparate strands of arguments to make explicit the common patterned impact of counter-terrorism. We offer examples and critiques of some of the key debates but cannot hope to cover all.

No single jurisdiction can claim to have identified the correct stance to take in regard to these categorical boundaries. Some have clearly passed a long way over a boundary line and altered fundamentally their legal outlook. Some have learned to regret that journey and have returned to a more nuanced position. Some have strained to remain respectful of previously accepted categories. Therefore, our book relates the findings from several jurisdictions. As mentioned previously, we have sought to emphasise the inclusion of some of the Continental European jurisdictions, especially Spain, which are not commonly discussed in the legal literature about terrorism, despite their prolonged and instructive experiences.

## CORE THEMES AND CONTENTS

Within the overall theme of crossing boundaries, our book has been organised into four substantive elements. Part I deals with ‘Crossing legal boundaries in conceptual categories’. It seeks to address the broader themes which frame legal counter-terrorism, before moving to controversies within legal systems.

In Chapter 2, Mariona Llobet Angl  asks, ‘What does “terrorism” mean?’ She observes that the word ‘terrorism’ is currently fashionable around the world. However, a universal criminal concept of ‘terrorism’ does not exist in common across our Western legal community. As a result, the term may be used by confronted polities in order to make their opponents appear as criminals or worse. Thus, Al Qa’ida, Hamas or the state of Israel, and the separatists from Chechnya or the state of Russia, may all be depicted as terrorists according to some people, and freedom fighters according to others. Moreover, academicians, politicians and the mass media confuse terrorism as a criminal phenomenon and terrorism as a political method. Therefore, political terrorism is mixed up with organised crimes, such as drug dealing or the Mafia, with war, with crimes against humanity, and with violent legitimate resistance. Therefore, she questions whether Vito Corleone, Pablo Escobar, Hitler, Stalin,

Pinochet or bin Laden are all exponents of the same phenomenon. Her chapter seeks to offer some clarification between these proponents of violence and between the various categories of overlapping activity. The overall message is to reverse some of the expansionary trends in the usage of 'terrorism' and to delimit which kinds of organised, violent and repeated criminal activities deserve to be described and labelled as within the boundaries of 'terrorism'.

The boundary of security and human rights makes an early appearance in Chapter 3 by Aniceto Masferrer, entitled 'The fragility of fundamental rights in the origins of modern constitutionalism: its negative impact in protecting human rights in the "war on terror" era'. The terrorist attacks on 9/11 and subsequently opened up a debate about the difficulty of properly protecting or at least 'balancing' human rights in the context of the fight against terrorism in democratic states. This enduring controversy may reflect not only the complexity of the contemporary terrorist threat but also the weakness of the fundamental rights in Western constitutionalism. In this exploration of the fragility of the Western constitutional model in protecting human rights, the existence of three levels need to be distinguished from one another: constitutional (constitutional law); governmental (executive legislation); and doctrinal (jurisprudence/legal theory and political philosophy). A historical analysis of these three areas illustrates their divergent evolution, and what might even be termed a clear opposition or contradiction amongst them, for whilst modern declarations of human rights and constitutional texts have proclaimed, and continue to proclaim, a catalogue of fundamental rights and principles, these are seldom respected by counter-terrorism legislation that typically grants governments all-embracing executive powers that are difficult to limit and control. This threat to fundamental rights has been compounded by their progressive weakening as a result of the coincidental widespread acceptance of the tenets of post-modern thought, both in jurisprudence and political philosophy. The chapter focuses on the area of constitutional law, while referencing both legislation and legal doctrine so as to make clear their diverse and sometimes even contradictory evolutions. As shall become clear, the recognition of certain human rights in declarations and constitutional texts has limited traction if the legislature of each state has the faculty to pass laws that, albeit with the aim of neutralizing social conflicts and threats to political stability, make use of violence or measures of questionable constitutional legitimacy.

The liberty versus security dichotomy is also the subject of Chapter 4 by Jon Moran, 'Myths and misunderstandings about security, rights and liberty in the United Kingdom'. In the United Kingdom, security and liberty are often depicted as being in conflict with each other, thus

allowing for their boundaries to be altered. The government itself pushes the idea that liberty must be ‘sacrificed’ for security. The debate is confused by civil liberties groups who often argue that any restriction on liberty means the UK is moving towards an authoritarian state. There are areas where security and liberty are truly connected, such as when the government takes action to protect citizens from terrorism. At that point, the action might be legitimate in order to protect the right to life. However, this one instance of a relationship means that the UK Government has increasingly after 9/11 sought to define security and liberty as not in opposition but as the same thing, so that limits on liberty are not problematical. Thus, government policy on counter-terrorism often defines security in such a wide way that the principle of proportionality is lost. Counter-terrorism law moves away from the principles of ‘normal’ criminal law. The breaking free from these establishing legal boundaries has thus created myths and misunderstandings, with uncertain gains but clear losses.

Part II of the book, ‘Crossing legal boundaries from liberty to crime’, begins to consider the ways in which concepts and threats of ‘terrorism’ impact on established boundaries within criminal law. For instance, ‘Terrorism as a criminal offence’ is the issue discussed in Chapter 5 by Manuel Cancio Meliá and Anneka Petzsche. Terrorism presents itself as a changing, multifactorial phenomenon. It poses intriguing questions from the perspective of criminal law. Terrorist acts can consist of well-established criminal offences such as murder, homicide, personal injuries or blackmailing. Equally, terrorism can involve conduct such as the association with terrorist organisations or the communication of terrorist propaganda that would not amount to established criminal offences in themselves, or even conspiracies. Therefore, criminal law theory and criminal law must point out what specific features should render terrorism into a specific criminal offence producing a specific social harm. Can terrorism cross this boundary? This chapter contains an attempt to define terrorism as a specific crime, holding that there are three main characteristics that describe its specific harm dimensions and have to be taken into account when drafting criminal statutes. First, so as to generate the specific and serious threat that terrorism poses to a democratic state, it has to be supported by an organisation. ‘Lone wolves’ might be mass murderers, but they should not be treated as terrorists in a criminal sense because of the lack of an organisational element. Second, terrorism uses the specific mechanism of mass intimidation. Individual victims are taken as a mere instrument to address the public and make political statements. Therefore, terrorism has to commit violent offences against personal legal interests in order to be considered as such. Third, terrorists wish to

communicate political issues. This aim is specifically blameworthy in a democratic state, where there are individual liberties that assure every individual the right to enter public debate. Therefore, organisations that pursue no political aim cannot enter the realm of terrorism, and terrorism in its full meaning can only cross the boundary into the criminal realm when it is committed in a legitimate, democratic state governed by the rule of law.

A further aspect of this debate about the boundaries of criminal law, and taking a different view on appropriate boundaries, is taken up in Chapter 6 by Francesca Galli, who considers 'Freedom of thought or "thought-crimes"? Counter-terrorism and freedom of expression'. She observes that, after 9/11, attacks in Madrid (2004), London (2005), Norway (2011), and Toulouse (2012) show a profound change in the terrorist threat and the emergence of the parallel phenomena of home-grown terrorism and lone-wolf terrorist actors. Such change has had a tremendous impact on the criminal justice system as a whole and, in particular, on substantive criminal law. Legislatures have been active in criminalising preparatory activities (including recruitment, training and glorification for terrorist purposes) and in endorsing new offences in the 'inchoate mode'. These new inchoate offences rely upon descriptions like the 'encouragement' and 'glorification' of, or 'apology' for, terrorism (albeit in an undefined future and at undefined places) as well as the dissemination and the publication of relevant materials. In this context, the interplay between the criminal law of different jurisdictions and the impact of EU policies and legal frameworks is remarkable, so that initiatives tend to cross national legal boundaries. Glorification offences are likely to curtail the right to freedom of expression. There remains, however, a requirement that the defendant's blameworthy state of mind manifests itself by some words or conduct, and so 'glorification' offences cannot (yet) be regarded as entirely the same as George Orwell's 'thought crime'. Nevertheless, the combination of a catalyst effect of organised crime and terrorism on the incessant criminalisation of preparatory activities, of the continuous shift towards prevention in the fight against serious offences, and of the normalisation of counter-terrorism exceptional provisions all produces uncertain boundaries within the criminal law.

Taking this debate into a more international level is the task set by Jon-Mirena Landa Gorostiza, who writes in Chapter 7 about 'Terrorism and crimes against humanity: interferences and differences at the international level and their projection upon Spanish domestic law'. He argues that anti-terrorism law (and, by extension, law associated with organised crime and even an increasingly broad spectrum of serious crime) is

subject to a process of normalisation. Thus, anti-terrorism law is changing from a special body of law separate from ordinary regulations and is becoming integrated into the general criminal, procedural and penal codes. A brief historical review of the past few decades reveals a trend in legislative movements towards the so-called 'criminal law for the enemy', in other words, a gradual distancing from the parameters of normalcy in the criminal law reaction to terrorism. Not only is a gradual process of normalisation taking place but also a process of expansion of the definition of terrorism. Established boundaries are under pressure, and both national and international courts face a constant roster of cases dealing with this matter. The central aim of this chapter is to analyse the evolution of the definition of terrorism in international criminal law in light of the most recent developments in the aftermath of 9/11. Special attention will be focused on attempts to assimilate crimes against humanity into crimes of terrorism in international criminal law as an expression of the attempt to justify the growing punitive character of this kind of legal approach. The influence of the interlinking between terrorism and crimes against humanity has special significance for Spanish legal policies in general and for the victims of terrorism in particular, as will be explored.

The final contribution in Part II, Shlomit Wallerstein's 'Safety interviews, adverse inferences and the relationship between terrorism and ordinary criminal law' examines in Chapter 8 one aspect of the decoupling of criminal investigation from the realm of crimes. A 'safety', or 'urgent', interview is one where the suspect is interviewed for information, which might help the police protect life and prevent serious damage to property. A suspect's right to legal advice and not to be held incommunicado could be delayed by a senior officer to enable this 'safety interview' to take place in order to secure public safety in situations of immediate urgency. English law permits the conduct of such interviews under strict conditions both in investigations concerned with 'ordinary' criminal offences and those related to terrorism. In practice, however, the mechanism is mainly used in the context of terrorism. The main difficulty with safety interviews is when the trial court wishes to draw inferences, both from silence as well as anything that was said during such interviews. Its inclinations to do so seem to conflict with the defendant's rights to a fair trial, to access legal advice and against self incrimination. These difficulties arise because safety interviews cross the boundaries from traditional investigative interviewing in connection with crimes into arrangements for public safety. The aim of this chapter is to highlight these alternative arrangements, their potential difficulties and

the relationship created by the use of safety interviews between counter-terrorism legislation and 'ordinary' criminal law. The author argues that the possibility of drawing adverse inferences from either silence or admissions made during such interviews should be rejected both as a matter of public policy – since the drawing of adverse inferences seem to be counter-productive to the aims of such interviews, and in terms of its opportunistic nature – taking advantage of a vulnerable and legally-ignorant suspect who is still likely to be subjected to the criminal law.

In Part III, 'Crossing legal boundaries in criminal justice systems', the book moves from criminal law into criminal justice systems and processes. It begins with a broad issue in Chapter 9 by Simon Bronitt and Susan Donkin, who write about 'Critical perspectives on the evaluation of counter-terrorism strategies: counting costs of the "war on terror" in Australia'. The terrorism events of the past decade led to significant increases of expenditure on counter-terrorism, with the adoption of new coercive legislative powers, the reprioritising and reorganising of police and security agencies, and an expanded capability of the military to take action against terrorist threats at home and abroad. Over a decade later, governments are rarely made to justify the adoption or evaluate the effects of these counter-terrorism initiatives by reference to scientifically informed research. This chapter explores both why this policy field is reluctant to use methodologies from social science to improve policy-making and law reform, as well as how this might be done given the difficulties associated with examining the effectiveness of counter-terrorism interventions. Crossing interdisciplinary boundaries, the authors begin by outlining some of the key concerns about processes of evaluation, before providing an overview of the empirically challenged literature on measuring the effectiveness of counter-terrorism interventions. Turning to the established crime prevention literature on measuring effectiveness for guidance, the methodological conundrum of prevention is examined. Insights from that analysis are then applied to the multifaceted approach to counter-terrorism evaluation adopted in Australia. The analysis concludes with an example from Australian counter-terrorism policing, which reveals the serious and ongoing lack of commitment to any rational process of evaluation of interventions over the past decade.

Greater focus is reflected in the following Chapter 10, 'The right of access to a lawyer in terrorist cases' by Brice Dickson. This chapter seeks to highlight the need for better legal regulation of the right of terrorist suspects to consult with their lawyers, a key aspect of any criminal justice system which aspires to be fair. Basing itself on the importance of a comparative approach to this issue and stressing the need to delimit the boundaries of the right while at the same time transcending national

boundaries in a search for international consensus, it examines a variety of aspects of the problem. First, the chapter considers the standards so far adopted in this field by international human rights law, especially by the European Court of Human Rights. Second, it then looks at the steps taken by particular states to limit a terrorist suspect's consultation rights, whether at the initial arrest stage, at the subsequent interview stage, or at the final trial stage. It considers not just whether states are ever justified in delaying access but also whether they are justified in insisting that such access be watched or listened to by state officials, either overtly or covertly. It asks, too, whether lawyers should ever be security-vetted, examining in particular the use of 'special advocates' in the United Kingdom's anti-terrorism laws. In its conclusion the chapter suggests that further standards need to be agreed internationally in this area in order to ensure that an accused person's human rights, and the independence of the legal professions, are not inappropriately sacrificed on the altar of state security.

Chapter 11 by Dermot Walsh, 'Erasing the distinction between anti-terrorist and criminal justice measures in Ireland: past and present', returns to the broader themes of the boundaries between normal and exception within criminal justice. It takes the Republic of Ireland as an important case study, representing as it does a jurisdiction which has struggled against a significant terrorist threat since the inception of the state (and, indeed, to that very inception). Consequently, the Republic of Ireland has maintained a comprehensive body of anti-terrorist legislation. This code of laws is designed primarily to deal with domestic violence and associated subversive activities generated by the continued existence of Northern Ireland as part of the United Kingdom. Over the past decade it has also provided the basis for satisfying Ireland's European Union and international obligations on combating terrorism. Initially the measures constructed a criminal justice regime parallel to the ordinary criminal process. It was distinguishable from the latter through its emphasis on sweeping executive powers, draconian encroachments on individual rights and freedoms and severe constraints on due process. Ostensibly, these extreme measures were to be used only to deal with the terrorism/subversion threat. In this way, there was a clear boundary between that code and the ordinary criminal process which traditionally prioritised the centrality of respect for human rights, due process and the rule of law. This chapter identifies the distinctive nature of the anti-terrorist regime and explores how the boundary between it and the ordinary criminal process has proved permeable and ineffective largely due to loose legislative drafting, executive policy decisions and the failure to develop counterbalancing protections for human rights and due process. Instead

of remaining separate and parallel, the anti-terrorist and ordinary criminal justice regimes have increasingly morphed into one in which the lower standards of the former predominate.

Part IV of the book moves from criminal law and processes into 'Crossing legal boundaries in counter-terrorism organisations'. The collection begins with Chapter 12 in which Saskia Hufnagel discusses 'Cross-border law enforcement in the area of counter-terrorism: maintaining human rights in transnational policing'. In her submission, the protection of human rights and the policing of transnational crimes – and terrorism in particular – seem to be contradictions that cannot easily be reconciled. While policing bodies cooperate and exchange information internationally to prevent and investigate terrorist activities, states do not always legitimise their efforts through bilateral and/or multilateral legislation. This lack of legal coordination between states with sometimes considerably different data protection laws, individual rights to procedural fairness, and even physical integrity, could potentially infringe such rights if the police cooperate within a legal void. However, it could also be claimed that the regulation of such cooperation leads to the policing bodies from nations with high human rights standards being bound by rules that prevent cooperation with states with considerably lower human rights parameters, thereby making the cooperation close to impossible, albeit that those states are often very relevant to counter terrorism. In addition, the potential harmonisation of cooperation mechanisms and procedural requirements could sometimes result in settling for the lowest common denominator between combinations of states. It thus seems that legal regulation and legal harmonisation do not necessarily help to maintain the effective policing of terrorism at the same time as the protection of human rights. Chapter 12 addresses this contradiction from a comparative socio-legal perspective. It is assessed whether states prefer to implement binding international, regional and domestic legislation on cross-border policing, even though it might restrict trans-jurisdictional terrorism investigations by creating insurmountable human rights limits, or whether informal police cooperation strategies that occur within a legal void or with little explicit protections for individual human rights are favoured. In this way, the chapter not only crosses jurisdictional boundaries but also the boundaries of formalisation. One could claim that the crossing from formal to informal is equal to the transition from legal to illegal. However, in the cross-border policing of terrorism the distinction is not so simple. Informality is not necessarily illegal, although there is often a fine line between the two. This chapter puts a focus on the hazy distinctions between formality, legality, informality and illegality and assesses how they could be more constructively balanced.

The war and crime boundary forms the background to Chapter 13, 'Detention *in extremis*: transferring lessons from counter-terrorism policing to military detentions', by Clive Walker. As mentioned earlier, one of the most acute legal controversies since 9/11 has concerned the framing of terrorism as either a war or a crime. Leaving aside the special case of the United States, which seems to possess a unique appetite for militarisation alongside the military capabilities to satisfy it, most Western states have preferred a model of adaptation within criminal justice. Yet, this domestic policy should not obscure the military actions in Afghanistan and Iraq which have been undertaken by many European countries in pursuance of counter-terrorism, actions which, in the light of events in Mali, seem set to continue long into the future. Since military involvement in counter-terrorism has become more or less a permanent fixture in contemporary times, this chapter seeks to investigate whether the boundaries between war and crime can be turned to the advantage of the organisation of the military who must take up these duties. After all, one of the most acute problems which ensue from this form of deployment is the treatment of military detainees as suspected terrorists. Rather than seeking to apply the laws of war *simpliciter* or some special regime applicable to the 'new' terrorism, an examination is undertaken of whether counter-terrorism policing experiences and blueprints may be relevant to the shaping of military practices. These practices have themselves come under repeated scrutiny in the United Kingdom because of repeated and severe abuses, highlighted by the death in British military custody of Baha Mousa.<sup>17</sup> One response might be to apply suitable lessons from analogous situations of 'detention *in extremis*', such as the substantial experience of governance over the police handling of terrorist suspects.

Finally, in Chapter 14, Clive Walker and Andrew Staniforth offer some reflections on the organization boundary between policing and security in 'The amplification and melding of counter-terrorism agencies: from security services to police and back again'. Using the UK as a case study, they note that the police service in the UK has responded to threats from terrorism throughout its history, but then ask what have been the operational challenges in managing the contemporary threat from Al Qa'ida terrorism? And how has the operational understanding of previous threats been harnessed to counter this new global phenomenon? The

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<sup>17</sup> See *Mousa v Secretary of State for Defence* [2010] EWHC 1823 (Admin); <http://www.bahamousainquiry.org/>; Baha Mousa Inquiry, *Report* (2010-12 HC 1452).

chapter explains why and how responding to terrorism in the UK has affected the security services and policing agencies since the catastrophic events of 9/11. Now those bodies have repositioned and reoriented themselves to take up the challenges of countering international terrorism. The analysis will be shaped around two principal trends: 'Amplification' and 'Melding' which can be explored in structural and operational terms in relation to both the police and security agencies. Melding in particular is suggestive of the idea that intelligence and policing are no longer categorically distinct activities and that there is overlap and confusion in roles, powers and accountability. In considering these trends, it is vital to consider whether terrorism has been more effectively countered and what problems emanate from the changes. The changes should be further set in the emergent context of international cooperation, which is both bilateral (traditionally with countries like the USA) and now increasingly multilateral (through Europol and other European Union instruments). This aspect again illustrates the crossing of boundaries, physical in this case, and the detected impacts include a loss of local control and threats to individual autonomy from remote and secretive syndicates of security.

## CONCLUSION

In offering our collection, we seek to provide a detailed and original study of an important and fast-developing field by adopting an innovative perspective which will be accessible for researchers in law and public policy. The decade of counter-terrorism experiences which sought to provide a risk-averse protective state has constantly and severely challenged traditional legal concepts and categories. Our approach to the questions raised by counter-terrorism is to relate the interaction of law with politics, history, and ethics and by drawing comparisons between civil law and common law traditions. Our remit is thereby much wider and more deeply analytical and critical than most existing commentaries on counter-terrorism. We shall consider as a recurrent theme the implications of counter-terrorism for a wide range of traditional legal responses, strategies of governance and modes of accountability. Its core refrain is that these developments in counter-terrorism have resulted in pressures to cross important ethical, organisational and legal boundaries with the result that new problems and tensions are reflexively created and that unexpected and often unwanted outcomes are thereby generated.