1. Introduction

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Terrorist attacks since 9/11 have exposed the global nature of contemporary terrorism threats. However, they have also posed considerable challenges for democratic states on a comparable worldwide basis about how to devise measures which prevent and respond to terrorism while still safeguarding core constitutional values such as the protection of human rights. Indeed, the challenge of squaring the struggle against terrorism with the need to protect constitutionalism has increasingly acquired a transnational dimension, as national governments cooperate bilaterally, or exercise powers multilaterally, within the framework of supranational regimes like the European Union (EU), or through international organizations such as the United Nations (UN). In an era in which terrorism threats have spread around the globe, public authorities have had to develop instruments to fight terrorism both domestically and overseas, acting both on their own and in concert. Yet, these developments have raised crucial questions about the extent to which constitutional protections existing within the state apply outside it, or are replicated beyond it, and above it.

The purpose of this edited collection is to explore the topic of constitutionalism across borders in the struggle against terrorism. To achieve this objective, the book analyzes the ways in which constitutional rules and principles relevant in the field of counter-terrorism move across borders, developing a number of threads in a multidimensional fashion. To begin with, the book underlines how constitution-like norms consolidate at the level of international and supranational organizations as a limit to the exercise of public power in the field of counter-terrorism policy, especially in the effort to block terrorism financing: in this regard, the book emphasizes what many in the EU would call the vertical emergence of constitutionalism beyond the state. Moreover, the book examines how the application of constitutional rights, including due process and free speech, extends extraterritorially, to state anti-terrorism action overseas, and how constitutional norms – or anti-constitutional practices – migrate from one state to another: in this sense, the book

examines the horizontal expansion (or contraction) of constitutionalism. Finally, the book underlines (as it were) a ‘diagonal’ development, considering how transnational cooperation between states in areas such as intelligence gathering and data sharing calls for updating domestic constitutional law rules or for adopting new international law compacts that would entrench rights across borders. As the book’s chapters suggest, these threads are interwoven in an interplay between constitutional law, international law, criminal law and the law of war, creating complex webs of norms and regulations that apply in the struggle against terrorism conducted across borders that appear increasingly more porous.

Collections like this one offer the possibility of deeper insights, in a number of ways. One kind of benefit is to see the implicit agreement on an important phenomenon – here, the significantly transnational, multi-layered setting for the development of constitutionalist responses to terrorism. Many of the chapters focus on the ways in which transnational forces influence legal development, as in Cian Murphy’s chapter ‘mapping’ the different forms of transnational law-making that he has identified. Kim Lane Scheppele describes the creation of an ‘intelligence soup’ of secret evidence from multiple sources, some of which evade rights protections, in ways arguably reminiscent of the since-overruled ‘silver platter’ doctrine in the United States (US), when federal investigators and prosecutors operated under one set of rules for gathering evidence that did not apply to state investigators: under this doctrine, federal prosecutors could avoid constitutional limits on their evidence gathering techniques by using evidence gathered by their state counterparts (presented to them, as it were on a ‘silver platter’).¹ David Cole and Federico Fabbrini detail the perverse incentives that may exist for the US and EU countries to circumvent the domestic privacy protections of their systems through foreign intelligence exchanges. Still others consider the influence of particular countries on legal change, as in the chapter on Japan’s secrecy law by Akiko Ejima, or the possibility of engagement with foreign approaches to similar problems, as in Vicki Jackson’s chapter on the evolutionary potential of US Fourth Amendment law. Another set of chapters are concerned with the interactions and gaps between the law emanating from the UN and the documents protecting human rights which apply in the European constitutional order, including the EU Charter of Fundamental Rights and the European Convention on Human

¹ See *Byars v. United States*, 273 U.S. 28 (1927); *Gambino v. United States*, 2745 U.S. 310 (1927). In *Elkins v. United States*, 364 U.S. 206 (1960), this doctrine was overruled.

Rights (ECHR),² as in the contributions by Martin Scheinin, Erika de Wet, and Karen Cooper and Clive Walker.

Another way in which this collection deepens insights is in understanding the differing interpretations to which legal materials are subject. In the chapters that follow scholars offer differing views on the implications, for example, that the US Supreme Court's decisions in *United States v. Verdugo-Urquidez*,³ and *Boumediene v. Bush*,⁴ hold for other constitutional rights. In Part 3, Jonathan Hafetz's chapter notes the reasoning both of Chief Justice Rehnquist, writing the majority opinion, and of the separate concurrence of Justice Kennedy, who was also part of the majority; Jennifer Daskal rejects Chief Justice Rehnquist's reasoning and treats the Kennedy concurrence in *Verdugo-Urquidez* as more significant, while Anna Su emphasizes the discussion of 'the right of the people' in Chief Justice Rehnquist's opinion and its potential application even beyond Fourth Amendment issues. Anna Su's chapter also raises concerns that the functional approach of *Boumediene* might threaten the constitutional rights of US citizens abroad, while some others assume in their descriptions that *Boumediene* is concerned only with the rights of foreign nationals, extraterritorially. Another area in which quite differing views emerge concerns the effects of law – or, rather, the effects of the 'legalization' of law in the hands of judges or lawyers. For instance, contributors to this book disagree on the effects of the *Kadi*⁵ decision of the EU Court of Justice (ECJ) in promoting respect for human rights. Moreover, Or Bassok and Stephen Ellman disagree on the effects of more involvement by lawyers and judges on reduction of rights abuses in time of war.

Notwithstanding these differences in perspective, another major theme of many of the chapters is the importance of the possibility of law in constraining human rights abuses and promoting their protection, as discussed in the concluding chapter by Lech Garlicki. The presence of

² See Case 294/83 *Les Verts* [1986] ECR 1339 (defining the EU Treaties as the constitutional charter of the EU); *Bosphorus v. Ireland* [ECHR] Application No. 45036/98, judgment of 30 June 2005 (defining ECHR as the constitutional instrument of the European public order).

³ 494 U.S. 259 (1990) (holding that the warrant requirement of the Fourth Amendment to the US Constitution did not apply to a search of a non-US person conducted in Mexico).

⁴ 553 U.S. 723 (2008) (holding that habeas corpus applied to detainees at Guantanamo notwithstanding its location in Cuba).

⁵ Joined Cases C-402/05 P and C-415/05 P. *Yassin Abdullah Kadi and Al Barakaat International Foundation. v. Council of the European Union and Commission* [2008] ECR I-6351.

legal jurisdiction, even if in particular instances law does not constrain government, or is ineffective in doing so, is a major theme. The chapters by Brice Dickson, Jennifer Daskal and Jonathan Hafetz illustrate this perhaps most vividly, in their arguments for recognizing law's scope, even if in particular applications the law is found not to constrain the challenged conduct. One might regard this as a large-scale agreement that lawless enclaves, or 'black holes' in which no law is present, are an anathema. Law may be present in various ways, and in various degrees of specificity; responsibility for assuring compliance with law may rest in different places. But to say no law constrains at all is to invite tyranny and abuse, a conclusion – or assumption – widely shared in most of these chapters.

Finally, collections like these may deepen insights into already recognized problems, as many of these chapters do. But they may also through their silences illuminate unnoticed connections. One of those unnoticed connections here is the importance of effective government in sustaining and protecting human rights. It is sometimes assumed that effective governance is in tension with human rights; it is not uncommon to treat claims relating to effective government as on one side of a 'balance,' on the other side of which is a 'right.' But we do not speak of a general right to have an effective government. Most of the examples in this book are drawn from jurisdictions in which there are effective governments in place, with some measure of compliance with rule of law requirements. Yet, there are too many places in the world where there is no effective government, no effective law, and perfectly dreadful levels of harm to what Cooper and Walker call the 'normativity of human well-being'. Should there be recognition of a general right to effective government? Do governments have obligations to protect persons in their territory from harm by third parties? To assure access to the basic requirements for a decent life, include some degree of social order that diminishes private violence? In countries where such effective government cannot be assumed, would it change human rights strategies to conceive of a right to effective government? These are questions raised by this book's silences, for future reflection.

The book – which collects several papers presented at a Conference of the Research Group on 'Constitutional Responses to Terrorism' of the International Association of Constitutional Law, held at Harvard Law School in March 2014 – is structured as follows.

Part 1 of the book considers how terrorism and counter-terrorism law have prompted the constitutionalization of the international legal order, by focusing on the case of anti-terrorism financing. In both their contributions, Martin Scheinin and Erika de Wet examine the efforts by supranational courts to constitutionalize the protection of human rights vis-à-vis global counter-terrorism sanctions, thus introducing a hierarchical order of values in international law. In his chapter, in particular, Scheinin recalls how constitutionalism entails both a formal and a substantive dimension and considers the extent to which these are reflected in the legal order established by the UN Charter. Scheinin argues that human rights constitute a foundational element of UN law, and ought to be invoked as a substantive limit to the counter-terrorism action undertaken by the executive power at global level. Hence, according to Scheinin, while so far regional courts, and international human rights bodies have undertaken the review of UN counter-terrorism sanctions (and sometimes effectively found a human rights violation) based on their specific basic documents – be it the ECHR, the International Convention on Civil and Political Rights (ICCPR) or the EU Treaties and the Charter of Fundamental Rights – it is high time for substantive constitutionalism to emerge at the UN level: The UN Charter as a constitutional document should itself serve as a benchmark to assess the legality of UN action.

Also with a view to examining the slow consolidation of an international constitutional order, de Wet's contribution focuses on recent rulings by the ECJ and the European Court of Human Rights (ECtHR) reviewing domestic sanctions implementing resolutions of the UN Security Council freezing the assets of suspected terrorists. In particular, de Wet considers judicial techniques through which these supranational judicial authorities have found ways to give preeminence to human rights over contrasting obligations to implement general international law. As de Wet points out, while the ECJ has since the beginning adopted a dualist perspective, which stressed the importance of protecting the autonomous EU fundamental rights from restrictions imposed by UN law, the ECtHR has initially relied on a (partly fictitious) presumption of human rights friendly behavior of the UN Security Council but subsequently followed the ECJ's footsteps in enforcing its own human rights charter also vis-à-vis contrasting UN law. As de Wet maintains, the bottom-up pressure generated by these courts can in the long run strengthen the respect for human rights standards by the UN Security Council itself and thereby elevate the status of human rights within the international legal order.

While de Wet's chapter welcomes the case law of the ECJ in entrenching the protection of core fair trial rights in the field of

anti-terrorism finance, Karen Cooper and Clive Walker provide a less optimistic reading of the same story. Although Cooper and Walker acknowledge the impact that the ECJ's rulings have had in improving the administrative system put in place at the UN level to list and delist individuals suspected of financing terrorism, the authors criticize the fact that applicants had to invest lots of time and resources to obtain justice before the EU courts, and claim that the EU courts have proclaimed vague and undemanding statements of rights, the articulation and application of which are far from straightforward. In fact, according to Cooper and Walker, the rulings of the ECJ have also created problems as far as the relationship between EU law and international law is concerned, and demand future steps to manage the complexities of counter-terrorism policy in the EU. In their contribution, therefore, Cooper and Walker alternatively consider what future reforms could possibly be envisioned to improve the UN anti-terrorism financing regime, and discuss options such as returning listing powers to the states or giving higher priority to domestic criminal prosecutions.

The issue of counter-terrorism finance law is also the setting of Cian Murphy's chapter, which addresses the issue from the perspective of transnational law. In his contribution, Murphy defines transnational law as a methodological approach to the study of law under globalization, and seeks to map six dynamics of norm-production, rule-making, or enforcement processes that contribute to the transnationalization of law: global governance; regional government; bilateral agreements; legal diffusion; extraterritoriality; and private rule-making and enforcement. According to Murphy, these dynamics involve the generation and application of rules in ways that are 'beyond the state', since they transcend the ordinary rule-making and enforcement processes in a legal system. Nevertheless, as Murphy maintains, each of these dynamics also lends itself to possible criticism: in his view, in fact, the process of transnationalization exacerbates the tendency towards a culture of control in counter-terrorism, challenging domestic conceptions of legitimacy and legality. Like Cooper and Walker, Murphy challenges those who regard *Kadi* as a straightforward victory for the rule of law. In conclusion, Murphy ends with a plea to examine transnational law as a normative project, also in fields beyond counter-terrorism finance law.

Part 2 of the book considers how the global nature of the terrorism threat has increasingly prompted states to look at each other – and learn from each other. At the same time, the chapters raise questions of how the growing transnational cooperation in intelligence sharing and data gathering can be accompanied by adequate mechanisms of human rights protection across borders. Vicki Jackson's chapter focuses on the US,

implicitly resisting categorical statements about US exceptionalism. She emphasizes the dynamic, rather than static, quality of US law, using as an initial example the US Supreme Court's shift over the course of the twentieth century in its treatment of electronic eavesdropping as beyond, and then as within, the scope of the US Constitution's Fourth Amendment protection. Similarly, she discusses what she calls the 'multi-vocal' character of US constitutional adjudication, and the role of dissents and of conflicting lower court opinions in testing and probing, and in some cases changing, the content of judicial interpretations, noting as well the role of statutory development. Finally, she argues, that considering developments in other countries has a useful role to play in the evolving constitutional law governing mass surveillance in response to terrorism.

In her chapter, Akiko Ejima examines recent legislation adopted by the Japanese government, and passed by the Japanese Parliament, which introduces in Japan a law on state secrets, and simultaneously creates a National Security Council. Although Ejima underlines how the Japanese state has never been a model of transparency, she suggests that the fact that Japan has for the first time in its history taken steps toward the codification of a state secrecy law may appear to go against the global trend: following Snowden's revelations, emphasis has been put on the importance of ensuring transparency, and protecting privacy rights in the face of counter-terrorism. Nevertheless, as she points out, Japan is a latecomer to the global struggle against terrorism. At the same time, the new Japanese legislation is largely modeled on the template provided by US law, and justified precisely on the grounds that adequate domestic legislation is required in order to allow Japan to cooperate in intelligence sharing with its international partners, notably the US. Yet, Ejima raises a number of questions about whether the checks and balances, and the human rights protection mechanisms in place, are adequate to prevent abuses of secrecy law in Japan – as has been the case elsewhere. Her contribution, therefore, concludes with a cautionary note about the migration of constitutional – or perhaps anti-constitutional – models from one legal system to another.

The question of migration – of norms and of evidence – is also at the heart of the chapter by Kim Lane Scheppele. Her contribution focuses on how information gathered by intelligence agencies in one state migrates towards other countries, and underlines the problems that this creates. As Scheppele points out, in the post-9/11 era the cooperation between intelligence agencies has given rise to what she calls 'the intelligence soup', a pot that melts all kind of information, including information gathered by the secret services of countries which do not abide by constitutional democratic rules. It is because of this 'intelligence soup'

that, according to Scheppele, in the last decade the framework for counter-terrorism law and policy has been so changed, with the introduction of measures such as: 1) a cluster of broad and vague terrorism offenses inserted in criminal codes; 2) terrorism trials that suspend normal procedures or feature unusual restrictions on the rights of defense; 3) preventive detention programs that hold terrorism suspects without charge; 4) the creation of blacklists that target individuals for sanctions with little or no process in place to ensure that the sanctions are targeting the proper people; and 5) driftnet surveillance measures that indiscriminately gather huge amounts of information about individuals regardless of whether they are connected concretely to any suspicion of terrorism. To address this state of affairs, Scheppele recommends therefore that new constitutional protection be put in place to regulate the action of intelligence agencies, so that their information gathering activities be subject to higher human rights-compatible standards, much like in the twentieth century police information gathering activities were brought under constitutional regulation.

In their contribution, David Cole and Federico Fabbrini analyze instead the protections of privacy in the EU and the US, challenging a view – now widespread after the Snowden revelations – that the former is remarkably more advanced than the latter. As Cole and Fabbrini explain, in fact, neither US law nor European (EU and ECHR) law provide privacy protection to foreigners abroad, with the result that intelligence agencies on both sides of the Atlantic have limited constraints in undertaking massive surveillance overseas. According to Cole and Fabbrini, however, this state of affairs is extremely problematic: due to the intense intelligence cooperation that takes place between the EU and the US, there is a serious risk that domestic constitutional protection may be circumvented by national security agencies spying on each other's citizens and then sharing the results of their data collection. To address this state of affairs, therefore, Cole and Fabbrini claim that the EU and the US should agree on a transatlantic data privacy compact, which extends on a reciprocal basis the constitutional protection applying in each system to citizens. While such a step would be beneficial to re-establish trust between the EU and the US, and pave the way towards greater cooperation (also in the field of trade), a transatlantic compact would be the safest guarantee that privacy rights are not upended by US-EU security and intelligence cooperation.

Part 3 of the book discusses the extraterritorial implications of counter-terrorism law and policy, by considering whether and how human rights standards conceived within a domestic constitutional system, including the rights to due process, freedom from unreasonable searches and

seizures, and free speech, apply outside a state's border as when national security forces are engaged in fighting terrorism overseas. In her contribution, Jennifer Daskal focuses on the case of the US, and examines the extraterritorial application of the Fourth and Fifth Amendments to the US Constitution, which protect the right against unreasonable searches and seizures and the right to due process. Daskal begins her contribution by providing an overview of the somewhat indeterminate case law of the US Supreme Court on when the US Constitution applies overseas, and then proceeds to articulate a new approach to the extraterritoriality question. According to Daskal, the US Constitution should be interpreted to prohibit unreasonable seizures of persons, regardless of whom the person is or where they are. Daskal also argues that persons subject to such seizures ought to be entitled to basic due process protections, and a failure by public authorities to provide such protections renders a seizure unreasonable. She illustrates her argument concerning these Fourth and Fifth Amendment rights by examples from the field of targeted killings and detention operations abroad, emphasizing that this interpretation of the extraterritorial application of constitutional rights would bring the US law closer to that of its allies.

In his chapter Brice Dickson focuses instead on EU member states, and examines: a) whether a European state is obliged to grant asylum to alleged terrorists on the basis that if they were refused asylum they would suffer human rights abuses in the state of which they are a national; b) whether a European state may be obliged not to deport or extradite an alleged terrorist to another state because he or she might suffer an abuse of human rights in that state; and c) whether a European state whose security forces are engaged in counter-terrorism activities abroad is obliged to protect the human rights of the individuals serving in those forces and/or the human rights of the alleged terrorists whom the forces are confronting. As Dickson points out, the extraterritorial reach of European human rights norms set in the ECHR and in the EU Charter of Fundamental Rights has been significantly strengthened over the last few years, with states being notably obliged to protect European constitutional rights whenever they exercise effective control overseas. Nevertheless, Dickson also raises some caveats, explaining that the extraterritorial reach of European human rights law so far encompasses only a limited number of fundamental rights, thereby potentially undermining the universality of the concept of human rights.

The question of the extraterritorial application of constitutional and international rights is also at the heart of Jonathan Hafetz's chapter. In his contribution, Hafetz focuses specifically on the claim recently advanced by the US government that detention of terrorist suspects on military

vessels in international waters escapes constitutional and international human rights standards. Although international law may treat military vessels as part of the territory of the state, Hafetz points out that US courts still treat a US ship in international waters as extraterritorial for purposes of applying rights under the US Constitution. However, he criticizes this reading for circumventing important rights protections. Moreover, he argues that extending constitutional protections to detention at sea could follow from the multi-tiered test developed by the US Supreme Court in its milestone *Boumediene* ruling. In fact, according to Hafetz, the application of US constitutional provisions to military detention at sea should be even more necessary in light of the US refusal to apply extraterritorially the international human rights law guarantees in the context of the fight against terrorism.

Part 3 of the book is concluded by the contribution of Anna Su, who also analyzes the extraterritorial application of constitutional norms in the fight against terrorism – but looking specifically at the issue of free speech, as protected in the First Amendment of the US Constitution. As comparative constitutional lawyers know well, the broad, categorical protection that free speech enjoys in the US constitutional system contrasts with the restrictions that are permitted in most other liberal-democratic countries. And yet, as Su points out, little if no reflection has been devoted to the question whether free speech under the US Constitution has any reach outside that nation's border. In her chapter, therefore, Su seeks to develop a legal argument that both citizens and non-citizens should be able to invoke the protections of the First Amendment even beyond US borders – as long as free speech is seen here as a shield, that is as a defense against government regulation, rather than as a sword. Su offers a distinctive view and critique of the case law of the US Supreme Court and sets aside a number of possible criticisms against her argument, concluding that the progressive extension of constitutional protections beyond borders will not produce negative effects on the ability of the US to fight terrorism.

Part 4 of the book, finally, considers another dimension of the global struggle against terrorism, by focusing on the interrelations between international human rights law and international humanitarian law, and the impact that counter-terrorism law has had on them. Or Bassok takes a distinctive stand concerning the application of international humanitarian law to the fight against terrorism: he considers how the growing involvement of lawyers in approving military operations, coupled with the disappearance of the soldier's 'unmediated gaze' from the battlefield, increase the probability for the execution of a certain kind of manifestly unlawful orders. By focusing specifically on the case of Israel, Bassok

unveils how lawyers are increasingly drawn into decisions about the use of force, and claims that – although the involvement of lawyers was initially motivated by the willingness to prevent abuses – the net result may actually be the opposite. In fact, according to Bassok, giving jurists the authority to approve military operations has great potential to absolve the combatant of the responsibility to consider the legality and morality of the order, relying instead on the legal authorities to make such judgments. Yet, in his view, at times, the eyesight and emotions of the combatant are the best metrics for determining that an order is manifestly unlawful. In this light, Bassok articulates a strong criticism of the use of drones, which allow for targeted killings at distance, subject to a lawyer's approval, thus shedding light on the limitations of experts generally and legal reasoning specifically, and opening an important transnational debate on these questions.

Unlike Bassok, Stephen Ellmann's chapter pushes for ratcheting up legal protection within the framework of the law of war. His contribution focuses specifically on how the law of war has substantially evolved as it has encountered the conflict with terrorism. As Ellmann points out, because of the scale of force involved, the struggle against terrorism ought to qualify as an armed conflict, and thus fall under the scope of application of international humanitarian law. And yet, as Ellmann argues, because of the differences between the struggle against terrorism and previous wars, the body of law governing this conflict ought to be updated, notably by expanding rights' protections, and the oversight reach of ordinary courts. According to Ellman, much of the reason that many observers have resisted calling the struggle against terrorism a war is that they fear the war paradigm will undercut the human rights of those caught up within it. In his view, there is a great deal of justification for that fear: but the best way to respond to it is not by denying that the ferocious acts of terrorists are part of an armed conflict. Rather, the best way to protect the rights that this conflict may jeopardize is to address, head-on, the question of what rights the law of this new kind of war must protect.

The book is concluded by the contribution of Lech Garlicki, who provides a *rapport de synthèse* of many of the ideas presented in this book. By combining his expertise as a constitutional law scholar with his experience for a decade as a judge of the ECtHR, Garlicki examines how the struggle against global terrorism has increasingly led to the globalization of constitutional law, or at least to the transnationalization of the constitutional problems that legal systems face in balancing liberty and security in uncertain times. In his chapter, Garlicki surveys the migration of constitutional solutions to fight terrorism from one legal system to the

other, and the emergence of a global counter-terrorism regime around the legislative activity of the UN Security Council, to then focus on the leading case law of the ECJ and the ECtHR in reaffirming the central importance that human rights standards should play even in the transnational struggle against terrorism. Garlicki argues that the approach of the two European courts in protecting due process rights even in the face of contrasting obligations stemming from UN Security Council anti-terrorism resolutions should be welcomed: while the need for inter-governmental cooperation puts under increasing pressure constitutional standards within the nation state, there is room to re-establish constitutional protection on a transnational scale. Garlicki's assessment leads us to conclude with a note of optimism. While terrorism threats and counter-terrorism responses have increasingly become global, so, too, can constitutionalism move across borders, promoting respect for human rights outside, above and beyond the state.