The International State of Emergency: Challenges to Constitutionalism after September 11

Kim Lane Scheppele

Laurance S. Rockefeller Professor of Public Affairs in the Woodrow Wilson School and University Center for Human Values;

Director, Law and Public Affairs Program

Princeton University

Version prepared for the Yale Legal Theory Workshop, 21 September 2006. This paper is actually a long abstract of a book I am writing by the same name. As a result, you will see many references to "the book" throughout – which is meant to be the larger work with this same general shape. In addition, because this is only a summary of a long and detailed argument, the usual dense apparatus of footnotes and references is substantially thinned here. If you want to see particular chapters or arguments in elaboration, let me know. I have published some pieces of the book already and have indicated in this narrative outline where chapters have been drawn from already published work. Comments, criticisms and questions are most welcome as the book is still under construction. Please send reactions to kimlane@princeton.edu.

Introduction:

September 11 and the Second Wave of Public Law Globalization: The New Legal Infrastructure of Anti-Constitutionalism

After September 11, pundits pronounced that "everything had changed." The Bush Administration insisted that a new war – a "global war on terror (GWOT) – was launched with the attacks. Two literal wars, in Afghanistan and Iraq, marked this new state of international conflict; metaphorical wars were launched around the world as well in response to September 11. The new state of belligerence has been invoked to justify changes in executive power, in surveillance policies, in the uses of the military, in the system of transnational cooperation of security services. This has been true not just in the US, which was the nation literally attacked, but in a growing archipelago of places, as country after country has found itself either a target of terrorists, or a producer of them, or both. September 11 was not simply an American event, but an international watershed, and the laws and policies of countries around the world have changed in response.

But how substantial are these changes? Five years on, how much have the basic underpinnings of the transnational legal world shifted? Have we witnessed temporary adjustments to take into account a transitory international emergency or are we in the midst of more structural and permanent adjustment?

In this book, I will argue that the changes we have witnessed since September 11 reach farther than we might have imagined, are structural in nature, and implicate the ability of constitutional regimes around the world to function as such. If observers have missed the extraordinary nature of the shift in the world order, it is because it has occurred on terrain that is not terribly visible to the journalists, pundits and political analysts who write the first draft of our history of the present. They have been more concerned with the personalities of specific leaders and the physical skirmishes in the conflict than with the cognitive and structural nature of the adjustments. As a result, they have failed to see what is truly radical about the post-September-11 world, which is a change in the legal bases of state action. Among lawyers who focus on either international law or domestic constitutional law, but typically not both, the extent of the changes is also largely hidden, because it occurs in the interstices between the two legal specialties.

The fundamental changes that have occurred since September 11 both articulate a new relationship between international and domestic law and also mark the declining hegemony of constitutionalist ideas among political elites. The primary marker of these changes is the increased abilities of national executives to use the cover of international law to undermine domestic constitutions at home. While this has not happened in every country, it has happened in a surprising range of states after September 11, including many states that have little or nothing to do with the front lines of the

GWOT. From once-again-powerful Russia to tiny Vanuatu, from constitutionalist Britain to anticonstitutionalist Vietnam, countries around the world have been changing their laws and practices since September 11 to fight terrorism, using a template that has been internationally forged, transnationally transmitted through international and regional associations, and locally adjusted to produce results that challenge basic constitutionalist principles at home.

While the substance of these changes is new, the use of international law as a basis for promoting domestic legal change is not. Public international law, especially since World War II, has had an immense influence on the development of domestic constitutionalism around the world. The development and spread of international human rights law is part of what we might call the "first wave of public law globalization," and it has had a substantial effect on constitutional drafters, newly empowered constitutional courts and elite opinion, particularly in the 1980s and 1990s as first Southern Europe and then Latin America and then post-communist Europe entered the field of constitutional democratic states. Political coalitions in these places rallied around principles proclaiming the importance of parliamentary power, judicial independence and respect for human rights, principles articulated through international law debates and carried through transnational networks.

Since September 11, however, we have been witnessing the development of international security law, which constitutes a *second* wave of public law globalization, modeled on the first in the way it harnesses transnational organizations as a vector of change in diverse local settings. In this new wave, national executives are empowered relative to local parliaments and courts; security services and police are linked across countries more tightly than they are linked to bodies that might supervise them within their own states; and surveillance and control of local populations are elevated above legal transparency and the individuation of suspicion as principles organizing the relationship of the state to the individual. The development of this international security law after September 11 follows a pattern of adoption we already know well from the first wave of public law globalization even though its substance is quite different.

How does this influence of international law on domestic law take place? In the *first* wave of public law globalization, starting with World War II and continuing up through September 11, international human rights law provided a major support system for the development of constitutionalism around the world. The global human rights movement had given key domestic constituencies within a variety of countries power in domestic constitution-making processes to ensure a prominent place for rights and rights protection. Particularly in countries emerging from various forms of authoritarianism, from military dictatorships and from other anti-democratic regimes, the support provided by the international human rights community, backed by the power of international human rights law, has enabled reformers (themselves often veterans of these transnational movements) to develop world-class

constitutions with deep and effective protections for rights-starved populations. The most widely ratified rights conventions – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights – often worked their way directly into the wording of new constitutions as newly liberated populations came out from under repressive governments. Understandings of international monitoring bodies and transnational courts about the meaning and reach of rights have been influential sources for new constitutionalists in animating rights within polities newly emerged from histories of abuse. Transnationally minded judges and legal scholars have developed conversations across national borders about what rights should mean and these conversations have developed into a transnational network of constitutional monitoring bodies (constitutional courts, human rights commissioners, national ombudspersons) that look beyond national borders for inspiration. This is a model animated by respect for human dignity, filled in by a dense set of rights guarantees, and presided over by an active judiciary that ensures that states do not stray from the path of effective rights protection. The new constitutionalism that the world has witnessed in the period between the end of World War II and September 11 (speeded at the end of the Cold War) would have been impossible were it not for the transnational coordination provided through the instruments, institutions and activists of public international law. Of course, the reality of this rights-respecting revolution has fallen far short of the aspiration, but there can be no doubt that the transnational human rights movement had a large effect on the new blueprints of government and has moved newly democratic governments in the direction of increased human rights protections.

The international struggle against terrorism, given additional power after September 11, has launched a *second* wave of public law globalization that pushes, substantively speaking, in the opposite direction from the first wave. The *anti-terrorism campaign* (for this is a better metaphor than war) is led from the security side of public international law through the United Nations Security Council and is potentially backed with sanctions in a way that the human rights framework has not been.¹ Since September 11, the UN Security Council has adopted a series of resolutions that have been far more legislative in character than anything the Security Council had previously passed. Operating under Chapter VII of the UN Charter, which makes resolutions binding on all member states and therefore makes noncompliance at least theoretically subject to sanctions, the UN Security Council has required states:

¹ There are also 12 international treaties that fill in the UN framework for fighting terrorism. These have the virtue of being clearly specified and the product of voluntary agreement among states. In what follows, I will be referring more specifically to the new tendency of the UN Security Council to legislate in ways that leave vague mandates for states to fill in with local content and also that impose onerous requirements to fight terrorism on countries that have not been part of the Security Council debates.

- to create a separate crime of terrorism in their national laws (along with the crimes of conspiracy to commit terrorism, aiding and abetting terrorism, providing material support for terrorism and other ancillary offenses),
- to monitor terrorist finances and to halt transfers of money to and from named parties as soon as they appear on Security Council terrorism watch lists,
- to act affirmatively to prevent terrorist plots from hatching on their territory and therefore to increase the surveillance of and ability to gather information from domestic populations, and
- to monitor the system of transnational travel, refugee claims and asylum applications to make sure that terrorists are not moving around under cover of human-rights protections.²

Following this program has meant that states have created new, vague and politically defined crimes, found ways around warrant-and-notice requirements before seizing property, launched massive new domestic surveillance programs, moved toward preventive detention and aggressive interrogation, and put up new barriers in the system of international migration. All of these program, as we will see, have implications for constitutionalism, separation of powers and the protection of human rights.

How has this happened? Obviously, the passage of resolutions by the Security Council, even under its Chapter VII powers, cannot bring such a security regime into being by itself. International law famously has compliance problems. The human rights field has certainly been plagued by uneven compliance, which is spotty at best among states prone toward mass violation and even weak in some areas among constitutionalist states. But with international security law, states have rushed to adopt new anti-terrorism laws with compliance levels that are extraordinary. Virtually all countries in the UN system have responded to the Security Council's anti-terrorism resolutions by changing their domestic laws.³ Kofi Annan himself is quoted on the UN Security Council's Counter-Terrorism Committee's website: "The work of the Counter-Terrorism Committee and the cooperation it has received from Member States have been unprecedented and exemplary."⁴

Why has there been such a rush to comply with international security law? I will argue that it is because international security law has a different domestic constituency than the constituency for human-rights-based laws characteristic of the first wave of public law globalization. This time it is national

 $^{^{2}}$ These four elements constitute the spine of the first and most sweeping resolution, Security Council Resolution 1373 (attached in the appendix to this summary).

³ Much of my book is based on reports that the 191 member states of the United Nations have submitted to the UN Security Council's Counter-Terrorism Committee. For the national reports on which I base these claims, see http://www.un.org/Docs/sc/committees/1373/submitted reports.html .

executives (sometimes with and sometimes without legislative approval) who have moved swiftly to put the new international security law into practice. Moreover, national executives adopt such policies *despite* the effects that the new policies have on domestic constitutional structures and on the realization of rights, precisely because these policies tend to bolster the power of national executives relative to everyone else in their domestic political space. In fact, in countries where national executives were chafing at the constraints imposed on their use of state power by the new human-rights-infused constitutions and by new devices for sharing power adopted in the first wave of public law globalization, the anti-terrorism campaign has been the device through which national executives have attempted to loosen such constraints. Transnational links among national executives, national militaries, national police and national security agencies have been strengthened with the anti-terrorism campaign and links between national executives and their own domestic parliaments and courts have been attenuated. In short, so many countries have complied so quickly with the new international security law because the very national executives who have pushed along these changes also have a strong interest in gaining the power that this new legal regime gives them relative to the other players in their own domestic space.

The post-September-11 world, then, has provided these national executives with a way to empower themselves relative to the judges, non-governmental organizations advocating human rights, and disadvantaged constituencies who pushed along the last wave of public law globalization. But given that judges and human rights activists in particular used the high-minded rhetoric of "following international law" as one of the bases for their prior success, it is difficult for them to challenge the same rhetoric used now toward different ends. Countries that have altered their laws and legal frameworks after September 11 have often justified the changes by pointing to the wisdom and even necessity of following international law. But the international law invoked in the post-September-11 world has entirely different content than that invoked by international human rights supporters in the period of post-World-War-II constitution building. The two realms of international law and constitutional law may therefore not continue to be mutually reinforcing and compatible, as they have generally been when the relevant international law was the human rights law that supported and protected domestic constitutional rights provisions. In the anti-terrorism campaign, the new international public law seems primarily to provide the conditions for *undermining* domestic constitutional law, particularly its concern for balanced and checked constitutional powers, for human rights and for due process. Countries that are new to the world of constitutionalized and democratically constrained political power are the most fragile of all, though established constitutional states that have remained relatively isolated in the first wave of public law globalization from the transnational constitutional movement are also vulnerable. Non-robust constitutional states are often precisely the ones most pressured to do whatever it takes to fight terrorism.

How can we understand more globally what has happened as a result of the development and spread of international security law after September 11? I advance the idea of *the international state of emergency* (ISOE) as a way to understand the package of legal changes that have swept the world after the attacks on the US. Under new transnational legal pressures, states around the world have moved toward using emergency powers domestically to fight terrorism internationally. Calling what has happened in many places a "state of emergency" may sound like fighting words to some, but in this book (see Chapter 2 below), I develop an analytic conception of a state of emergency so that it is a regime type defined by clear features and not a term of abuse. As I will argue, the fact that few states declared formal states of emergency after September 11 should not hide the fact that emergency powers that explicitly or implicitly suspend constitutional principles are being used widely to fight terrorism.

I also want to rethink the very idea of a state of emergency to allow us to place emergencies in an international context and not just in a purely national frame. In the existing legal literature, states of emergency are imagined as purely national legal states that have no parallel in international law. And, in fact, one of the main ways in which emergencies end is that the "international community" brings pressures to bear on those states whose emergencies exceed the duration and depth of their threats. But, I argue (particularly in Chapter 3), we cannot understand what has happened since September 11 until we can see both international and domestic law together in thinking about the slide into emergency powers. Given international law's complicity in this slide, it is no longer available in the same way to give resistant communities within states under emergency a hand in throwing off emergency powers. Instead, international law provides the excuse, and also some of the resources, for maintaining emergency powers longer in many states. This new development needs to be taken on board in rethinking what states of emergency are, how they function, and how they might be brought to an end.

My purpose in this book (and in this abstract of the book) is to attempt a description of a new world order that has emerged since September 11 and, by describing it, to allow us all to get our minds around the fundamental changes that the addition of international security law makes to the toolbox containing other forms of international law. In particular, international law can now be used to undermine domestic constitutional structures as well as to bolster and protect them.

Along the way, I will show that a number of commonplaces about the relationship between international and domestic law are not true, at least not in the context of the anti-terror campaign. For example, many presume that countries are either *generally* favorable or *generally* hostile to public international law. Taking one's international legal obligations seriously is something that comes with a particular legal culture. Weak legal cultures may have only hollow commitments to obligations they have undertaken. Strong legal cultures, by contrast, take law seriously and only sign on to those

obligations that they will really try to meet. In short, the general view is either that international law is taken seriously or it is not by a particular country.

As I will show in this book, however,⁵ the very states that took the first wave of public law globalization seriously and built strong, transnationally backed protections into their constitutional orders are the very states whose compliance with the second wave of public international law has been most spotty, and the states that were most resistant to the pressures from the first wave of international public law globalization have been most eager to adopt the most extreme forms of compliance with the second wave of public international law globalization. In short, countries that aligned their constitutional orders with transnational support for human rights have been the slowest to respond to international security law and vice versa. The countries most loudly proclaiming the value of international public law now are precisely the ones who sat out the first round of public law globalization.

In addition, most have assumed that strengthening regimes of international law necessarily weakens domestic law. Becoming increasingly bound by international law undercuts domestic sovereignty because it lodges the creation of norms in external bodies. But, after September 11, we can see that this, too, is not universally true. Instead, in the post-September 11 world, both transnational and national institutions have increased their powers by working together in a concerted way. As a result, many national governments (though, significantly not all) have found new powers to exercise control over their own populations, at the same time as transnational institutions have expanded their reach and power. The compliance with Security Council resolutions in the area of international security has strengthened both the Security Council in this area, and also the absolute power of national executives, who are the often the ones more fervently claiming their adherence to nationalist rationales.

How have these major changes since September 11 concretely occurred? In this new legal framework, international institutions have set mandatory but general legal parameters for combating terrorism, and national governments have tailored those international mandates to fit their local political and security situations. International and transnational organizations ranging from the UN Security Council (first and foremost) to the European Union (EU), the African Union (AU), the Organization of American States (OAS) and the Association of South-East Asian States (ASEAN) have spoken with a nearly uniform voice on what is required to eradicate terrorism; countries that are member-states of these organizations have been called upon to participate in an international struggle against terrorism by adjusting their domestic laws to comply. As a result, the anti-terrorism campaign is being waged using a series of domestic legal responses coordinated through international mechanisms.

⁵ The most serious demonstration of this assertion comes with the case studies elaborated in Part II of the book. In each chapter in Part II, a country that was a major participant in the first wave of public law globalization is paired with a similar country that was not part of the first wave, and then their post-September-11 policies are compared.

Transnational institutions have found new powers after September 11 because they have responded to requests from terrorist-target countries to use their capacities to bring other states into line, particularly those states that have been diagnosed as the producers of terrorism. As a result, more powers have been ceded by the powerful states to transnational institutions to play an active role in the anti-terrorism campaign, precisely because those institutions are doing the bidding of terrorist-target states. But then member states on the receiving end of the mandates from transnational bodies, particularly from the UN Security Council, have been able to use the very fact that they have been commanded by these transnational bodies as a justification for convincing their own reluctant domestic populations that new laws must be passed to comply with international law. As it turns out, this increases both the power of the national government currently in power (or, at least, the executives within current national governments) and also the power of the international institutions at the same time.

In short, transnational institutions are being used by powerful countries like the United States to direct other states to take particular approaches in fighting terrorism. And those downstream states often grab at the chance to "follow international law" because it empowers whomever happens to be in power at the time in each state. Domestic leaders in many countries, seeing it in their interest to "follow international law" when it would have been much harder for them either to publicly cave in to direct pressure from the United States or to take these steps on their own initiative, have then used the leverage that the international mandates give them to increase their own domestic powers to carry out what the transnational institutions have asked them to do.

For example, President Pervez Musharraf of Pakistan, on the verge of permitting national elections to replace his military government when the attacks of September 11, 2001 hit, has since engineered a series of constitutional amendments to give the military a more permanent role in the Pakistani government. He has, of course, shown no signs of stepping down, as he had originally pledged. President Alvaro Uribe of Colombia has similarly pushed through a series of emergency laws and constitutional amendments, including one that allowed him to run for more terms of office than the Constitution had originally permitted – all in the name of fighting terrorism. President Vladimir Putin of Russia has changed the structure of the Russian government so that now the president can appoint regional governors and so that now all members of the parliament must be elected on party tickets, eliminating single-member districts that had been the primary way that independent voices had gotten into the Duma. This, too, is billed as part of a campaign against terrorism. Tony Blair used a great deal of his political capital to get through the Parliament draconian anti-terrorism laws that give virtually untrammeled powers to government ministers, including a new "Civil Contingencies Act" (read: state of emergency law) that allows any minister to declare a state of emergency and then to proceed by "executive legislation." The international community, which has an interest in tough terrorism tactics,

has hardly objected to any of these policies, and the governments in question have proudly reported these changes in their laws to the Security Council to prove that they are completely on board with the antiterror campaign. But each of these changes also happens to increase the powers of the primary national executive relative to other potential domestic challengers, and one may reasonably suspect that this provides an additional motivation to "follow international law."

The specific things that Musharraf, Uribe, Putin and Blair have done are not commanded by the UN Security Council, of course. But the Security Council's resolutions (backed up by similar resolutions of regional bodies) mandate general frameworks for taking aggressive steps against terrorism without giving specific instructions on tactics. The local leaders adapt these general mandates to their specific situations and design concrete strategies that will carry out the general program. Musharraf, Uribe, Putin and Blair may have adopted strategies are not the most preferred ones, in the view of the Security Council or of the Security Council staff enforcing the resolutions. But when power-hungry leaders take the hard-line strategies that they have in the name of fighting terrorism, the Security Council has not given itself much of a basis for complaining.⁶

The diversity of national responses to the requirements set by international institutions disguises the fact that the national responses are all in fact framed as responses to the same stimuli – the international framework for fighting Islamic terrorism. This mixed structure of the anti-terrorism campaign (partly international, partly domestic – and therefore diverse in specifics while general in justification and goals) has made it hard for most legal analysts to see its logic. The anti-terrorism campaign is neither a purely transnational campaign nor a purely domestic one. The shape of the threat and the nature of the program to fight it are promulgated and monitored by international organizations while the design of concrete strategies, as well as their implementation and regulation, are domestic. The end result has been an increase in the power of transnational bodies *and* an increase in the power of domestic governments at the same time.

⁶ Nor has it wanted to. The Counter-Terrorism Committee of the Security Council has explicitly disavowed that it will use international human rights law to assess the changes that member states are making. As the CTC website still says:

The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums.

<u>http://www.un.org/Docs/sc/committees/1373/human_rights.html</u> (visited 4 September 2006). None of these other forums have sanction power, however.

How does this mixed structure work? On one hand, it is obvious that the anti-terrorism campaign is global in scope. The network of terrorist organizations is clearly not limited by or contained within state boundaries and its ability to launch spectacular attacks in places ranging from New York to Bali, London to Baghdad marks it as truly global. In addition, the states that have joined together to fight this network themselves comprise a transnational network of their own, coordinating across boundaries on sharing intelligence, intercepting terror finances, even kidnapping and moving suspects around the globe where they can be squeezed for information in places that have histories of using torture. So, both sides of the fight – both terrorist networks and target-state networks – are linked across national boundaries. This makes the fight against international terrorism global for both terrorists and governments, and both sides have used their institutional resources to coordinate the global aspects of the campaign by building up their networks.

On the other hand, however, the international fight against terrorism is conducted primarily through the tools available to national governments – deploying security services under national control, changing national legal regulation, and increasing national enforcement of national laws. National governments are doing most of the work, even as the work they do contributes to an internationally coordinated campaign. So, for example, the perpetrators of the Bali bombing were tried in Indonesian courts under Indonesian law. The suspects in the Madrid bombings were investigated by Spanish investigative magistrates and will be put on trial under Spanish law. Under domestic law, Britain detains foreign nationals when it appears that those foreign nationals have been involved in transnational terrorism networks. Looked at it in this way, the responses to terrorism appear to be national because the campaign against terrorism is not conducted directly through international institutions and because national law is on the front lines of the fight. But the Indonesian and Spanish and British laws (and the anti-terrorism laws of virtually all countries in the world at the moment) were drafted in response to international legal mandates. And, in each case, the laws push the envelope of constitutionality in the country in question.⁷ The responses to terrorism may look purely domestic, but they are transnational in crucial ways.

One might reasonably ask what has become of sovereignty in this matrix of anxieties, attacks and counter-attacks, responses and counter-responses. Just as there is a mixed picture with regard to law,

⁷ A decision of the Indonesian Constitutional Court declared unconstitutional the law under which one of the Bali bombers had been tried, because it was passed after the bombings and had retroactive effect. Nonetheless, the convicted bomber is still in prison. The Spanish system of incommunicado detention of terrorism suspects has long been a subject of criticism by European human rights monitors and yet it is still in use. In December 2004, the British system of preventive detention of alien terrorism suspects was determined by the Law Lords to be in conflict with the Human Rights Act. The Parliament re-passed the law eliminating the objectionable discrimination against aliens by making both aliens and nationals subject to preventive detention on the say-so of the Home Secretary.

where international and domestic law are bolstering each other, the results for sovereignty are mixed too. As I will show in the case studies in Part II of this book, the new international security law that has developed since September 11 has as its primary domestic effects empowering national executives relative to the other branches of national governments and disabling the domestic institutions of rights enforcement and procedural protection. In powerful countries in particular, international law bolsters national presidents, prime ministers, chancellors and other top executives who themselves often use nationalist rhetoric and strategies for fighting terrorism. In that way, the transnational legal changes after September 11 support an aggressively nationalist appeal to sovereignty in general and to the power of chief executives in particular. But, if a state is weak relative to the rest of the world system and is also the object of intense interest by more powerful states, then the very same executive aggrandizement and nationalist justification going on there mean something different. National executives of these terrorimplicated weak states become hostages to the transnational terrorism campaign because they are under pressure to get on board with the international program, particularly when they are on the front lines of terrorism. The very same legal developments that give Bush, Blair, Merkel, Berlusconi (before he was ousted by the voters) and Putin more power at home as well as more power to shape the transnational terrorism strategy also make Musharraf, Karzai, Yudhoyono, and al-Maliki more susceptible to being used by more powerful states for their own purposes. But Musharraf, Karzai, Yudhoyono, and al-Maliki are also able to consolidate more control within their own states, to take on near-dictatorial powers and to appeal to national self-interest in doing so, because what they are doing is part of the transnational antiterrorism strategy to which they are yoked. Executives in terrorist-target strong countries as well as those in terror-implicated weak states are all increasing their powers in the anti-terrorism campaign, even as more powerful states use transnational institutions to further dominate weaker states.

Along the way, however, since transnational institutions like the UN and corresponding regional organizations are the ones developing and promulgating the programs that all countries are supposed to follow, transnational institutions increase their power as well. Powerful states have chosen to work through transnational institutions precisely to hide the origins of the pressures they are placing on weak states. As a result, the UN Security Council – to take the central transnational organization in this campaign – has been given a new and powerful role after 9/11. Its new powers come along with the increase in the powers of the powerful states, not at their expense. Political power is therefore not a zero-sum game, but can be increased all around in times of trouble.

In this anti-terrorism campaign, then, international and domestic law are revealed as two interdependent systems that each shape and influence the other – a marble cake of laws. While this is nothing new as a formal matter – both international human rights law and international trade law have long tied domestic and international law together in roughly the same way before – it is new as a

substantive matter because international security law implicates core issues of national sovereignty and security in ways that the other branches of law did not. International norms in this area have bolstered national power to accomplish international purposes; domestic legal structures have provided the actual sites and many of the resources for the struggle against terrorism. As a result, the apparently universal anti-terrorism strategy has come to include a variety of local peculiarities.

On the domestic law side, the anti-terrorism campaign has in many places weakened the ability of domestic constitutions to restrain state leaders, particularly those state leaders who find the mandated emergency provisions not only instrumental in achieving the desired international purposes, but also convenient for accomplishing locally controversial projects under cover of international approval. So, for example, new laws regulating states of emergency have been passed in Britain, Iraq, Pakistan and elsewhere; governmental structures have been modified in Russia and Colombia. But all of the changes point in the same direction: they give the executives of these states far more powers than they ever had before.

In the international arena, the effect has been to bring a variety of purely local struggles into the purview of international anti-terrorism policy, with a subsequent enlargement of the anti-terrorism policy to terrorist and even merely dissident groups of far less than "global reach." To get China on board, many states (the US lead among them) dutifully classified the formerly "freedom-fighting" Muslim Uighurs as terrorists, and Russia was able to get Chechen nationalists (including some who had been duly elected by the population of Chechnya) into that category as well. These previously local fights have, as a result, become part of the global anti-terrorism campaign. The anti-terrorism campaign is now a comprehensive international frame, much as the Cold War was, through which virtually all local disputes become linked in a broader calculus of interest that implicates the international community.

In some of its most worrying manifestations, the new international security law has encouraged national executives to invoke pre-existing or new-fangled domestic emergency powers in the name of fighting global terrorism. In many states around the world, for example, national executives are freezing the assets of suspected terrorists with no accompanying judicial procedure. Surveillance of domestic populations has been increased, generally without a public debate about the extent of these measures or of the need for them. And there is generally little public accountability in how the new measures are being deployed. Security services have been mobilized to "disappear" suspected terrorists or at least to look the other way while residents on their territory are disappeared by the security services of other states. Suspected terrorists are then whisked into an international gulag of interrogation centers, but with the active knowledge and participation of domestic intelligence agencies, including in states that otherwise pride themselves on their commitments to the rule of law. National parliaments and courts are being bypassed as executives deal directly with international bodies in the anti-terrorism campaign under legal

frameworks that were once designed merely for the uncontroversial implementation of Security Council resolutions in domestic law.

The use of emergency powers has been widespread enough that one can say, without exaggeration, that constitutional systems specifically and the principles of constitutionalism generally are under challenge around the world. But whereas, before September 11, there might have been pressure from the international community for states invoking emergency powers to return to normal governance, these uses of emergency powers, after September 11, are part of a transnational campaign that the international community (read: powerful states) has no interest in stopping. As a result, the persistent international criticism that once came when states went off the deep end into emergency government is no longer forthcoming.

In showing how these changes have occurred around the world, I have written a book both about what has concretely occurred since September 11, and about the ways in which different registers of law – the international and the domestic, the exceptionalist and the constitutionalist – intersect, conflict and change. But this is a book with a very particular field of vision. I am focusing here on *legal* changes, on the formal legal rationales for actions taken in the anti-terrorism campaign and on their actual legal As a result, many of the most important and dramatic events - the fall of the Towers, the effects. campaigns in Tora Bora and Fallujah, the explosions in Bali and Madrid and London and Mumbai, the horror of Beslan, the mysterious whereabouts of Osama bin Laden, the franchising of terrorist activity around the world – will fall to the edge of our analysis except insofar as they animate legal changes. The matrix of terrorist attacks and the military responses to them by the "coalitions of the willing" power the anti-terrorism campaign and create real casualties and tragedies. But my concern in this book is with the way in which states understand their strategies for fighting the anti-terrorism campaign as a legal matter off the public battlefields. So while the dramatic events that constitute the front line of terrorist attack and anti-terrorist counter attack are in a very real way at issue in this book, I will see them through the peculiar lens of the law.

Why concentrate so much on law? While those of us who have studied law empirically have always counseled that no one should ever mistake a statute for reality, it does matter a great deal how states engage formal legality when they address a crisis. The days of absolutist kings are gone, or at least so we might have thought; four hundred years of struggle have established the principle in much of the world that states should be governed by law, by separated powers, and with a concern for the rights of individuals. The rule of law can be seen, as E.P. Thompson surprisingly declared a couple of decades ago, as an "unqualified human good."⁸ While law never lives up to its own advance billing and while

⁸ E.P. THOMPSON, WHIGS AND HUNTERS (1975).

there is much unjust law in the world, states that deliberately escape from the constraints of constitutionalism are virtually always dangerous and disastrous. Since September 11, we are faced with the very real situation in which states are justifying the breakdown of constitutional frameworks to fight an enemy defined in no clear way. So law matters, even while it does not matter absolutely. I write this book with a healthy sense of skepticism about what law can do in fighting for justice – but also with a certain amount of respect for what it can do to prevent horrors as well.

PART I: FRAMEWORKS Chapter 1: Lawscapes After September 11⁹

September 11 was a political event, a traumatic event, a tragic event – and a legal event. After September 11, the US quickly enacted the USA PATRIOT Act and instituted other legal changes that involved both aggressive reinterpretation of existing law as well as extraordinary assertions of executive power. But nearly every country in the world also changed its laws in some way to respond to the new world after September 11, and most did so – at a minimum – in ways that tracked in some detail the program of the USA PATRIOT Act. Why did reactions to September 11 take such a generally uniform response in country after country? Why, for example, did Vanuatu pass a general anti-terrorism law that looked virtually identical to the one that the UK passed? And why did the UK's law so closely track the USA PATRIOT Act? Why were elements of the US anti-terrorism program after September 11 popping up in places ranging from Indonesia to Russia, from India to Italy?

What we need in order to see what has happened is a "lawscape" – a picture of the major elements of the legal terrain so that one see how political events are located against the background of law. The lawscape shown here goes beyond one country's legal changes to highlight the interdependence of legal adaptation in the anti-terrorism campaign around the world.

UN Security Council Resolution 1373 provided the framework for much post-September-11 legal activity. More legislative in character than anything that the Security Council had previously attempted, Resolution 1373 (and other resolutions like 1390 and 1456) invoked the Security Council's Chapter VII authority under the United Nations Charter, meaning that the resolution was legally binding on all 191 member states of the UN. It passed the Security Council unanimously on September 28, 2001 at UN Headquarters in New York City, while the still-smoldering ruins of the World Trade Center were only a few miles away. Resolution 1373 was apparently introduced at the behest of the US government (though this is not in the official record) and it passed unanimously without any recorded debate.¹⁰

Most UN Security Council resolutions before 1373 had not looked like general laws, but instead like one-shot orders of some specificity. For example, a Security Council resolution might forbid all UN

⁹ Parts of this chapter will appear as Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*. Forthcoming in THE MIGRATION OF CONSTITUTIONAL IDEAS (ED. SUJIT CHOUDHRY) (Oxford University Press, 2006).

¹⁰ The public session debating and adopting the resolution lasted from 9:55 pm until 10 pm on Friday, 28 September 2001. The entirety of the public record on the debate over Resolution 1373 can be found at http://daccessdds.un.org/doc/UNDOC/PRO/N01/557/31/PDF/N0155731.pdf?OpenElement.

member states from selling weapons to a particular country, or might caution a particular state not to take certain steps. A Security Council resolution might condemn a particular course of action by a member state and require that state reverse it, or it might establish trade embargoes against particular states for particular reasons.¹¹ Resolution 1373 was different. (See Appendix A for the text of Resolution 1373.)

Resolution 1373 required *all states to change their domestic laws* in very particular ways. As a result, it looked more like general legislation than like a typical Security Council resolution. As international law scholars who have followed the Security Council have noted, Resolution 1373 meant that "the Security Council starts legislating."¹² Paul Szasz observed:

With its recent resolution to counter the treat of terrorism, the United Nations Security Council broke new ground by using, for the first time, its Chapter VII powers under the Charter to order all states to take or refrain from specified actions in a context not limited to disciplining a particular country. It has long been accepted that intergovernmental organizations (IGOs) cannot legislate international law.¹³

But, as Szasz then went on to say, in this case the Security Council did just that.

What did Resolution 1373 require of states?¹⁴ The most crucial parts mandated four sorts of changes in domestic law, including laws that would:

- 1. criminalize terrorism as a separate offense (along with associated crimes of attempt, conspiracy and material support) in national criminal codes, with harsher punishments attached to terrorism-related offenses than common crimes.
- 2. disrupt terrorism financing within and between countries, demanding that states develop strategies for immediately freezing the assets of anyone suspected of terrorist activity.
- 3. detect terrorists and their plots before such plots could materialize, through the development of new strategies for uncovering information about these plots and through sharing information so acquired across agencies within a government and across national boundaries.

¹¹ See ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004) for an extensive analysis of the Security Council's resolutions passed under Chapter VII of the UN Charter.

¹² Paul Szasz, *The Security Council Starts Legislating*. 96 A.S.I.L. 901 (2002).

¹³ Id. at 901.

¹⁴ The set of requirements listed here come not just from the resolution itself, but from my analysis of questions and pressures that the Counter-Terrorism Committee of the UN Security Council put to states as they developed their reports on compliance.

4. crack down on the flow of migrants, refugees and asylum-seekers so that terrorists could not use the system of legal transnational migration to aid their plotting and to carry out their attacks.

But this framework omitted two crucial pieces that it might have been wise to include:

- 1. The Security Council provided no definition of terrorism, leaving states to define terrorism however they saw fit¹⁵ and
- 2. The Security Council explicitly disavowed any responsibility to monitor the human rights violations that might come with the enforcement of this plan.¹⁶

Along with these specific requirements, the Security Council also created a Counter-Terrorism Committee (CTC) in order to track national compliance with these directives and to intervene aggressively in responding to the national reports that countries were required to submit that indicated what they had done to fight terrorism. The CTC has been instructed to push countries toward compliance with the Security Council anti-terrorism campaign.

Regional organizations – the European Union,¹⁷ the African Union,¹⁸ the Organization of American States,¹⁹ the Association of South-East Asian Nations,²⁰ the Commonwealth of Nations²¹ and

¹⁹ The OAS adopted a regional anti-terrorism convention after September 11. Inter-American Convention Against Terrorism, adopted at the 32^{nd} regular session of the OAS General Assembly, 3 June 2002, Doc. A-66. The text of the convention can be found at <u>http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm</u>.

¹⁵ For the lack of a common definition, see the Counter-Terrorism Committee website at <u>http://www.un.org/Docs/sc/committees/1373/definition.html</u>.

¹⁶ For the disavowal of a direct responsibility to monitor human rights compliance, see the Counter-Terrorism Committee website at <u>http://www.un.org/Docs/sc/committees/1373/human rights.html</u>.

¹⁷ For the early actions of the European Union which included the development of a framework agreement for defining terrorism, the speeding up of the creation of the transnational prosecutorial service and the encouragement of cooperation among national security services, see Kim Lane Scheppele, *Other People's PATRIOT Acts: Europe's Response to September 11.* 50 LOYOLA LAW REVIEW 89-148 (2004) at 105-109.

¹⁸ The African Union adopted a Plan of Action on September 14, 2001, a plan designed to establish an anti-terrorism framework for cooperation among member states and to encourage all member states to ratify the anti-terrorism conventions. Once Security Council Resolution 1373 was adopted, the AU pledged to push the states in its region to adopt the requirements of the resolution and also to promote the principles in the Convention on the Prevention and Combating of Terrorism (Algiers Convention). For the text of the September 14 plan, see Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, 14 September 2002, Doc. Mtg./HLIG/Conv.Terror/Plan. (I)

²⁰ ASEAN expressed its support for Security Council Resolution 1373 and passed a resolution on 5 November 2001 to ensure that its member states complied with it. For the text of the resolution, see <u>http://www.aseansec.org/10591.htm</u>.

the Organization for Security and Cooperation in Europe,²² among others – jumped on the anti-terrorism bandwagon with resolutions, framework decisions and action plans of their own. They endorsed Security Council Resolution 1373 (and its successor resolutions that filled in this general system). They pledged to promote compliance among their member states with the Security Council mandate.

And member states overwhelmingly complied – or at least appeared to. All of the member states of the UN filed at least one compliance report with the Counter-Terrorism Committee of the Security Council; many countries are now on their fourth and fifth reports since September 11. Virtually all of the reports reveal that states have made changes in their laws to comply with the resolution. In this chapter, I provide an overview of some of the most common changes.²³ In Part II of the book, I provide more detailed case studies to show how precisely the anti-terror campaign was grafted onto existing law (and undermined specific constitutional protections) in particular states.

a) Defining Terrorism

Despite initial resistance on the part of a number of countries to making terrorism a separate offense in domestic criminal law, most countries have now amended their criminal codes to single out terrorism for special treatment. But such criminalization requires that the crime be defined, and this is where the UN guidance ran out and domestic discretion began. In the absence of an agreed-upon definition of terrorism, not surprisingly, states defined terrorism in ways that suited them.

Some states without substantial constitutional traditions defined terrorism to be virtually any politically motivated challenge to the state, which almost entirely overlapped the field of political dissent. For example, Vietnam defined a terrorist as anyone who "oppose(s) the people's administration and

²¹ The Commonwealth established a Committee on Terrorism (CCT) to assist member states of the Commonwealth to adopt all of the requirements of Security Council Resolution 1373. See also the Commonwealth Plan of Action, 29 January 2002, available at http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=35145.

²² The Organization for Security and Cooperation in Europe (OSCE) adopted a Decision and Action Plan on Combating Terrorism pledging all member states to adopt all 12 UN conventions on terrorism as well as their protocols and to implement all of their obligations under Security Council resolutions. OSCE, *Decision on Combating Terrorism and the Bucharest Plan of Action for Combating Terrorism*, 3-4 December 2001, Doc. MC(9), DEC/1.

²³ My analysis is based on country reports filed by member states of the United Nations to the UN Security Council's Counter-Terrorism Committee (CTC); I also use news accounts, human rights reports and other country-specific documents (e.g. texts of laws, parliamentary debates where available, local histories and so on). Nearly all of the 191 reporting countries in the UN changed some features of their laws to respond to September 11. Moreover, most of the changes were quite similar, reflecting a common template for such changes. And most alarmingly, many of these changes involved substantial deviations from both international and domestic norms of constitutional and democratic governance.

infringe(s) upon the lives of officials, public employees or citizens."²⁴ In Brunei, a terrorist is "any person who . . .by the use of any firearm, explosive, or ammunition acts in a manner prejudicial to public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order."²⁵ Clearly, these definitions sweep quite broadly over activities of which the state may not approve, and so anti-terrorism campaign has the potential to sweep up local political disagreement under the guise of fighting international terrorists.

In some countries, the motivation behind an allegedly terrorist act, if relevant, was to be proven as for any ordinary crime. In other countries (like the United States, for example), terrorist motivation is satisfied if the defendant "appears to be intended to" accomplish a terrorist goal.²⁶ As a result, the mental state required for determination of a criminal act is located in the mind of the observer rather than in the mind of the criminal, something highly unusual in American law. In Canada, the new post-September-11 terrorism law created an offense of terrorism that required proof that the act was carried out "in whole or in part for a political, religious or ideological purpose, objective or cause."²⁷ As Kent Roach has shown, proof of motive is not customarily required in Canadian criminal law and criminalizing motive poses a very real danger of infringing the very political, religious or ideological beliefs that would otherwise be protected as matters of individual conscience or as subjects of free expression.²⁸

Still other states criminalized terrorists while exempting freedom-fighters, tying the law to the foreign policy of the state. This was true of a number of Arab states, who were eager to distinguish acts

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50 U.S.C. §2331.

²⁷ Bill C-36, 49-50 Eliz. II Part II.1.83.01 (1) (2001).

²⁴ As translated in the CTC report submitted by Vietnam, 31 January 2003, S/2003/128.

²⁵ Brunei Darussalam, CTC Report, 14 June 2002, S/2002/682.

As used in this chapter [18 USCS §§ 2331 et seq.] --

⁽¹⁾ the term "international terrorism" means activities that--

⁽A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

⁽B) appear to be intended--

⁽i) to intimidate or coerce a civilian population;

⁽ii) to influence the policy of a government by intimidation or coercion; or

 ⁽iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
 (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. . .

²⁸ KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA (McGill-Queens University Press, 2003) at 25-28.

designed to resist Israeli occupation from other violent attacks against state interests.²⁹ Still other countries dusted off old anti-subversion or anti-communist laws, crossing out "subversion" or "communism" and substituting "terrorism" instead.³⁰

Even France, after 9/11, instituted a new offense of "pimping for terrorism" by an Act of 18 March 2003. ³¹ This offense can be charged against anyone who fails to substantiate the source of income that supports his or her lifestyle, when that person also is closely associated with others who are suspected of engaging in terrorist acts. The assumption behind the law is that those with no accountable means of support must have gotten their income from terrorist activity if they have terrorist associates. The offense does not require demonstration that the charged person him- or herself has committed or plans to commit terrorist acts. Anyone in the vicinity of a suspected terrorist with suspicious amounts of money can be swept into this net.

So far as anyone can tell from the CTC's reaction,³² it has not condemned any of these definitions. But it has tried to push countries that have not criminalized terrorism into doing so, even over resistance. Mexico, for example, indicated in its first report to the CTC in 2001 that it could clearly

Article 2 (a) All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.

Yemen CTC report 2 March 2002. Arab Convention on the Suppression of Terrorism, 1998, part 1, translated at http://www.al-bab.com/arab/docs/league/terrorism98.htm .

³⁰ See Michael Richardson, Asian Regimes Appear to Use War on Terror to Stem Dissent, INT'L HERALD TRIB., Nov. 21, 2002

³¹ France, CTC Report, 29 March 2004, S/2004/226 at 16. The phrase "pimping for terrorism" is their translation of their law.

³² We know from the CTC's statements about its own procedures that it reviews each of these reports individually and writes specific questions back to the country at issue. Sometimes it is possible to see what the CTC asked because the country organizes its next report as answers to numbered questions. But while the CTC posts country reports on its website, it does not post its own questions to that country on the website, so it is impossible to tell how harsh the CTC is with countries that use the anti-terrorism campaign for purposes which are not necessarily those of the CTC. Since some countries publish questions along with their answers, however, we can hazard a rough guess. So far, the CTC does not seem to think any state has gone too far in fighting terrorism; all of the questions I have seen push toward taking additional measures, not toward scaling back any taken thus far.

²⁹ Yemen, to take one example, borrowed its definition of terrorism in its criminal code from the regional convention, the 1998 Arab Convention on the Suppression of Terrorism:

Article 1 (2) Terrorism. Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources....

handle all crimes that might amount to terrorism within its current criminal code without explicitly calling terrorism a crime as such, especially if one took into account the provisions for conspiracy, aiding and abetting, and criminal association. But since Mexico was one of those few countries that reported the CTC questions along with its answers in its later reports, we can see that the CTC specifically pressed Mexico to criminalize "recruitment for the purposes of carrying out terrorist acts regardless of whether such acts have actually been committed or attempted."³³ Mexico responded that such people could be punished as accomplices under the current penal code. By the time of the 2003 CTC report, however, Mexico reports having criminalized the recruitment of members to terrorist groups. It also added the new offenses of threats to commit terrorism, conspiracy to commit terrorism, and the concealment of terrorist activities.³⁴ This appears to be as clear an indication as any that Mexico was pressured by the CTC to do this. We can also see in the CTC reports from Mexico that, in direct response to CTC request, Mexico changed the minimum sentence for a terrorism-related offense from 2 years to 18 years.

The worry here is that vague and politically calculated definitions of terrorism endanger ordinary political dissenters and allow the state to use the anti-terrorism campaign to go after domestic enemies who may not be connected to the transnational anti-terror plots. Terrorism, however defined, always has some irreducibly political element, and as a result, its criminalization will always pose challenges for those who are engaged merely in boisterous dissent. The constitutional and human rights objections to vague and politically defined crimes are well known, and the international anti-terrorism campaign has provided the opportunity for many more states to criminalize politically engaged actions as terrorism. And so far, the Counter-Terrorism Committee has seen no problems with overly zealous criminal anti-terrorism laws.

b) Disrupting Terrorism Financing

Perhaps the largest number of changes in the post-9/11, post-Resolution-1373 world have implicated procedures that countries have in place for being able to freeze or seize terrorist assets. Resolution 1373 requires states be able to "immediately" freeze the assets of those on the UN sanctions committee list. If there is a lengthy court process that must take place before assets can be frozen, then such processes cannot operate "immediately." As a result, there has been a press from the CTC out to the UN member states to find ways to freeze and even seize assets bypassing domestic judicial intervention. This pressure implicates two sorts of constitutional safeguards – protection for private property and the

³³ Mexico, CTC Report, 1 August, 2002, S/2002/877 at 10.

³⁴ Mexico, CTC Report, 10 September 2003, S/2003/869.

basic principle that no one shall be deprived of their rights without an opportunity to confront the evidence that is the basis for the deprivation.

How can the CTC demand that states freeze the assets of individuals immediately and without prior review by a court? The UN Security Council Sanctions Committee (another committee of the UN Security Council) creates lists of terrorist groups or individuals without disclosing the evidence on which the listing is based or even the process through which evidence is assessed. The CTC has been asking states to take these lists and immediately freeze that the assets of all those on the lists anywhere in the world. The problem, of course, is that neither the Sanctions Committee nor the CTC has anything like a procedure for individualized hearings to determine that those placed on the UN lists are in fact who the Sanctions Committee believes them to be or that the assets so frozen would actually have been available to assist any terrorist plot. There is also no process at all through which an individual or group can contest this designation and the states asked to freeze assets are not given any evidence to assess whether the request is justified.³⁵

The demand that states freeze assets immediately has been complied with (at least as noted in the CTC reports) quite widely. Most states have found a way to freeze assets of individuals while bypassing their domestic courts. Sometimes, the freezing is done through an executive order (which means that the executive is able to suspend the right of property without any semblance of judicial process) or pursuant to a statute that delegates to the executive the power to enforce Security Council resolutions. Often, there is a standing order in place for banks to "automatically" freeze assets of anyone on the Security Council lists.

In the United States, the President is generally delegated by Congress the power to act through executive order to directly enforce UN resolutions. For example, one such delegation reads:

the President may, to the extent necessary to apply such measures [authorized by the United Nations Security Council under its Chapter VII powers], through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or

³⁵ All we know publicly about these procedures is that all members of the Security Council participate in adding individuals and groups to the list and that this is done by "consensus." See the Guidelines at http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf.

any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.³⁶

Other countries have even more direct lines of enforcement for UN Security Council resolutions. For example, France reports that requests to freeze assets of terrorist suspects are handled in an "automatic" fashion.³⁷ Names pass directly from the Security Council Sanctions Committee to French banks which have a standing order without intervening command of the French government to freeze all assets of those on the UN lists. As Spain noted in its 2003 report to the CTC, a system of "automatic reception of international treaties" makes it "not necessary . . . to adopt an internal law in order for these treaties to produce a direct effect in our system."³⁸ And once Spain signed the convention on terrorism finance, which overlapped the requirements of Resolution 1373 exactly in this area, no further action of a domestic court was necessary to freeze assets of specific individuals. In Bulgaria, the list of those against whom freeze orders could be issued was passed from the Security Council's Sanctions Committee to the Bulgarian Council of Ministers which ordered the specific freezes on the proposal of the Minister of the Interior, bypassing both courts and parliament.³⁹

Some countries give those whose assets are frozen a right to judicial review after the fact. For example, Belize passed a statute in fall 2001 delegating to the foreign minister the power to freeze assets at the request of the Security Council's Sanctions Committee, but allowed an appeal to the Supreme Court to have these freeze orders set aside.⁴⁰ Brazil adopted a law that made publication of Security Council resolutions in the country's Official Gazette automatic, thereby making them domestic law.⁴¹ But all individual freeze orders are still "subject to due process" after the fact.⁴² However, by the time of Brazil's 2003 report, it noted it was working on a process to make freeze orders from the Security Council even more "automatic."⁴³

⁴² Id. at 7.

³⁶ Economic and Communication Sanctions Pursuant to United Nations Security Council Resolution, 22 USCS § 287c (2005).

³⁷ France, CTC Report, 10 July 2003, S/2003/270 at 8.

³⁸ Spain, CTC Report, 9 June 2003, S/2003/628.

³⁹ Bulgaria, CTC Report, 9 June 2003, S/2003/692 at 3.

⁴⁰ Belize, CTC Report, 27 December 2001, S/2001/1265 at 3-4.

⁴¹ Brazil, CTC Report, 19 July 2002, S/2002/796 at 6.

⁴³ Brazil, CTC Report, 21 March 2003, S/2003/356 at 17.

The demand for immediate freezes of assets of individuals and groups has produced some pushback from states like Venezuela and Mexico which claimed at first that they could not freeze assets without a judicial order and that they could not get a judicial order without evidence that could be presented to a domestic judge that the person or group whose assets are frozen had violated a law. ⁴⁴ Mexico, in particular, was pressed though direct questions from the CTC on their policy of not allowing assets of suspected terrorists to be frozen if the suspected terrorist could prove the assets were legally acquired.⁴⁵ But, after several reports attempting resistance to the CTC, both Venezuela and Mexico found a way to freeze assets without having to show any individualized proof to a domestic judge.⁴⁶

As we can see through these examples, many countries have been moving – largely because they been pushed – toward freezing assets of suspected terrorists under pressure from the UN Security Council's Sanctions Committee, without any intervening domestic judicial process that could check either whether a suspected terrorist really is the person the Sanctions Committee believes him to be or whether the assets really belong to him. This is clearly a retreat from constitutionalist principles and from procedural guarantees that ensure constitutionalist norms apply to the limitation of rights. Not surprisingly, in light of what we saw in the earlier section on definitions of terrorism, it happens that restrictions on rights are directly associated with new powers wielded by domestic executives. And this is the hallmark of emergency government – where reasons of state (now internationalized) are given for concentrating power in the executive and limiting the rights of individuals.

c) Tracking Terrorists through Increased Surveillance

Security Council Resolution 1373 required states to increase their abilities to track and apprehend terrorists within their borders, and to share information across national borders relevant to this goal. This has given new license to states to loosen the legal requirements that have to be met before surveillance can be begun and to increase the length of time that surveillance of individuals and groups can be maintained. In addition, states have used this opportunity to rearrange their internal and external security agencies, often merging the institutions of the ordinary police with intelligence agencies that once reported only through the military.

⁴⁴ Mexico, CTC Report, 27 December 2001, S/2001/1254 at 5-6.

⁴⁵ Mexico, CTC Report, 1 August 2002, S/2002/877 at 9 where the CTC is quoted as asking Mexico, "Does article 29 [of the Federal Organized Crime Act] mean that lawfully acquired assets belonging to terrorists cannot be frozen?" with the clear implication being that this was not good enough.

⁴⁶ Mexico, CTC Report, 10 September 2003, W/2003/869; Venezuela, CTC Report, 30 July 2003, S/2003/774.

For example, Argentina revised its intelligence services to remove barriers between national and provincial intelligence services in January 2002, and reported that it was doing so in compliance with Resolution 1373.⁴⁷ Yemen established a special police force for the purposes of fighting terrorism⁴⁸ and later reported that it was establishing a special National Security Agency for controlling terrorism investigations as well.⁴⁹ Spain has created a National Counter-Terrorism Coordinating Center for terrorism investigations, which brings together the national police with the Civil Guard (Spain's equivalent of the National Guard) and with the military intelligence agency, all with the purpose of sharing information across their databases.⁵⁰

Some states have openly changed their laws permitting increased surveillance and allowing new methods of terrorism detection in their domestic populations. New Zealand, for example, passed the Interception Capability Act in 2004, which requires the switching points of telecommunications hubs for phone and internet systems both to maintain a capacity to intercept communications and to comply with warrants for surveillance at these hubs.⁵¹ Canada passed a new anti-terrorism bill in fall 2001, creating the institution of the investigative hearing. In an investigative hearing, a police officer (upon approval of the Attorney General) may ask a judge to call a person in for questioning and the person so called may not refuse to answer questions or refuse to produce "any thing in their possession or control" on grounds of self-incrimination. The information obtained through investigative hearings may not be used against the person in a criminal proceeding, but may be used for national security investigations.⁵² Kyrgyzstan assured the CTC that its general prosecutor was looking into matters of religious extremism and developing measures to "prevent the politicization of Islam" in the country and that the Kyrgyz security services had established a new database in which to store information related to suspected terrorists to assist in this matter.⁵³

Information gathered by the security services about potential terrorists is now generally shared, both within and between governments, But what is not shared along with this information are the

⁴⁷ Argentina, CTC Report, 13 September 2003, S/2002/1023.

⁴⁸ Yemen, CTC Report, March 2002.

⁴⁹ Yemen, CTC Report October 2002.

⁵⁰ Spain, CTC Report, 29 June 2004, S/2004/523 at 10.

⁵¹ New Zealand: Telecommunications (Interception Capability) Act, 2004 No 19. Art. 13.

⁵² For more on the investigative hearing in Canada and its post-9/11 uses, see Kim Lane Scheppele, *North American Emergencies: The Uses of Emergency Powers in the United States and Canada.* 4 I-CON (INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW) 213-243 (2006).

⁵³ Kyrgyzstan, CTC Report, 4 March 2002, S/2002/204.

methods through which the information was initially acquired. Governments suspected of using coercion, torture and other illegal means acquire their tainted information and pass it on to other states, of course without disclosing that compromised methods have been used to acquire it. For example, as the United States has pursued a policy of using coercive interrogation to wring information from suspected terrorists it is detaining in a set of secret detention centers around the world,⁵⁴ information from these interrogations is shared with allied national security services, who are not in a position to assess whether the information was obtained using torture and therefore cannot determine whether it is really reliable or not.⁵⁵ The result has been that information probably acquired by torture and other forms of coercion is not only used as if it were reliable by state officials to detain suspected terrorists,⁵⁶ but it has also now been used in criminal cases in ordinary courts.⁵⁷ Of course, the UN Security Council has not publicly condoned torture, but the framework of Resolution 1373 encourages information acquired through whatever methods a state feels entitled to use to be passed on to others and to be used in making judgments about individuals even within states that foreswear the practice of torture.

States are now encouraged to make use of this transnational blizzard of information obtained from other states in tracking terrorists even if the methods that were used to acquire such intelligence might not be acceptable in the receiving state. It is already well-documented that people have been put into indefinite detection in constitutional democracies without charges or trial, based on information gained from detainees who have almost surely been tortured, even though these constitutional democracies' own security services would not be able to conduct such interrogations (at least not

⁵⁴ For a compilation of evidence that the US has in fact engaged in torture and cruel, inhuman and degrading treatment of detainees in its custody, see Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism"* 1 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 285-340 (2005).

⁵⁵ As I have documented, some of the information obtained through torture of high-level al Qaeda detainees has been admitted as evidence in ordinary courts in terrorism trials in the US, UK and Germany. Kim Lane Scheppele, *The Metastasis of Torture: Circulating Coerced Information in the Anti-Terror Campaign.* Paper presented at the Law and Society meetings, Baltimore, July 2006 and at the American Sociological Association meetings, Montréal, August 2006.

⁵⁶ The Home Secretary in the UK claimed that he was not barred from using information acquired by torture in determining whether to detain suspected terrorists under his new counter-terrorism powers. Though the Law Lords eventually said that information acquired by torture could not be used by courts reviewing these detentions in order to decide whether the Home Secretary had detained these suspected terrorists reasonably (the legal standard), the very same Law Lords said that they could not prevent the executive branch from using evidence acquired by torture in its decisions to detain in the first place. For the judgment, see Opinions of the Lords of Appeal for Judgment in the Cause, A (FC) and others (FC) v. Secretary of State for the Home Department, [2005] UKHL 71 at 68-69, available at http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm For an analysis, see Kim Lane Scheppele, *Metastasis of Torture*.

⁵⁷ See *Metastasis of Torture* for a detailed analysis of the use of evidence acquired by torture in the Moussaoui case in the US and the Motassadeq case in Germany.

officially).⁵⁸ For example, the recent arrests of suspected terrorists in Britain who were said to have plotted to bomb several trans-Atlantic airliners headed to the US are now thought to have been spurred by an interrogation under torture of one of their number in Pakistan.⁵⁹ The new forms of information gathering, surveillance and information sharing since September 11 have created an international soup of information, the precise reliability of which is very difficult to assess. The fact that countries that feel no limitations on using torture and other forms of coercion are urged to share information with countries that would not engage in such practices means that the anti-terrorism campaign is full of such tainted information. Moreover, the ability of security services around the world to use this information encourages a division of labor in which some states torture on behalf of other governments who want to keep their own hands clean.

d) Disrupting Transnational Flows of People

The refugee and asylum system was singled out for special attention in the UN resolution because the Security Council seems to have believed that terrorists are abusing this system for their own advantage. But the result has been a crackdown at the borders of many states, prejudicing the claims of legitimate refugees and asylum-seekers.

One particularly pernicious device for denying what may be legitimate asylum claims comes as countries (and the UN Security Council's Sanctions Committee itself⁶⁰) add new groups and individuals to the lists of banned terrorist organizations that most states keep these days. Countries often insist on having their own domestic oppositional groups listed as international terrorist organizations by other states as the price they charge for their participation in the anti-terrorism campaign. This is how the Muslim Uighurs, Chechen nationalists and Palestinian activists (among others) have come to be added to the lists of many countries that used to think of these groups as freedom fighters. Sometimes a country

⁵⁸ For details of the cases in Britain, see Opinions of the Lords of Appeal for Judgment in the Cause, A (FC) and others (FC) v. Secretary of State for the Home Department, [2005] UKHL 71 at 68-69, available at http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm.

⁵⁹ Duncan Campbell and Randeep Ramesh, *Pakistan Says 'Ringleader' Admits Link With Al-Qaida: Arrested Briton Has Given 'Many Clues' But Campaigners Say He Was Tortured*, THE GUARDIAN, Aug.14, 2006.

⁶⁰ The Sanctions Committee under Resolution 1267 (1999) formed a subcommittee to list and delist individuals and organizations associated with terrorism who were also allied with the Taliban and al Qaeda. That list can be found at <u>http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm</u>. The Sanctions Committee has been asked to consider expanding the international list of terrorist individuals and organizations beyond those involved in the Taliban and al Qaeda, but in its most recent committee report, it failed to reach agreement on how that expansion would proceed. See Report of the Security Council Working Group Established Pursuant to Resolution 1566 (2004), 16 December 2005, S/2005/789, available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/640/18/PDF/N0564018.pdf?OpenElement.

will attempt to list its own violent domestic opposition as a terrorist group. Once a group is listed as a terrorist organization, then other countries are not supposed to allow in members of that group. Unfortunately, once a country succeeds in listing its own domestic opposition as international terrorists, then these "terrorists" cannot escape the country where they are being hunted because the international community has now been called upon to refuse entry to anyone in these listed categories.

Not only have persecuted groups found that the system of international migration has been blocked by anti-terrorism filters, but the international migration system is now working in reverse – to send terrorism suspects from countries where their human rights might be protected to countries where these rights will be violated. Since September 11, there has been an increase in the practice of deportation to torture, extraordinary rendition and other transfers of persons among states using methods that could not have been so easily or frequently deployed before September 11. Sometimes this is done unilaterally by the US, whose foreign agents have been accused of grabbing people off the streets of constitution-respecting democratic countries and disappearing them into the gulag of detention centers.⁶¹ But often it is done when states don't have enough evidence against a suspected terrorist to bring them to an ordinary court, can't deport the suspect and does not want to give him his freedom.⁶² In those cases, extraordinary rendition back to a country that tortures, imprisons without charges and otherwise violates international human rights norms has become very popular among countries that want to appear to keep their own hands clean. Doing it secretly has become the way to prevent public criticism of the practice.

Within many states, there has been a sharper separation of citizens and non-citizens in the legal protections that they are accorded, with measures now being applied to non-citizens (indefinite detention,

⁶¹ Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, 14 February 2005.

⁶² This has been flagged as a particular problem by Britain, which feels uncomfortably bound by the judgment of the European Court of Human Rights in Chahal v. the United Kingdom, (App. no. 22414/93) (1997) 23 EHRR 413, [1996] ECHR 22414/93. Britain had been on a collision course with the European Court of Human Rights for some time over the ECtHR's judgment in this case. In Chahal, a foreign national detained by the UK on national security grounds was ordered deported back to his home country where he claimed he faced the treat of torture. The ECtHR told Britain that the UK could neither deport Chahal (because it would violate Art. 3 of the European Convention on Human Rights to return him to a place where he would be tortured), nor detain him indefinitely without charges (because the only way to hold him would be to charge and convict him of a crime). For a variety of reasons, after September 11, Britain wanted to detain people whom they suspected of terrorist aspirations, but against whom criminal charges could not be brought, primarily (it appears) because the evidence against them could not be presented to a court. But the Chahal case ruled out either deportation or indefinite detention, and the only other way out (criminal prosecution) was not feasible. As a result, Britain derogated from Art. 5 of the European Convention after September 11 with a declaration of emergency and it began a policy of indefinite executive detention of suspected terrorists. An early version of this policy was struck down in Law Lords in A & Others v. Secretary of Department State for the Home [2004] UKHL available 56. at http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf on grounds that the policy impermissibly discriminated against aliens. Parliament then altered the law to permit both nationals and aliens to be indefinitely detained, with a higher bar to initial classification and greater possibilities for judicial review. Prevention of Terrorism Act 2005, c. 2, available at http://www.opsi.gov.uk/acts/acts2005/20050002.htm .

deportations without hearings or on the basis of secret evidence, loosened methods of surveillance) that could not be used against citizens. The anti-terrorism campaign has weakened protections of noncitizens within states all over the world, made it more perilous for those fleeing abusive states to seek refuge elsewhere and has even permitted the involuntary transnational relocation of persons who have been fingered as suspects.

These are the major sorts of measures that have become quite widespread since the September 11 attacks occurred and since the UN Security Council framework for fighting terrorism has gone into place. The anti-terrorism campaign, conducted by states with their own security interests under the broad rubric of the Security Council's anti-terrorism framework, has the potential to undermine constitutional protections for people and property, gives license to states to suppress dissent, and disrupts the international system of human rights protection through the movement of persecuted peoples. These measures have also shifted the balance of power within states away from judiciaries and legislatures toward executives, the security services, the police and the military.

Before going further, I should say that I don't think that most of these horrific consequences have been the Security Council's intention. Nonetheless, when the international terrorism fight takes priority over all other international considerations (like promoting constitutionalism and respecting human rights), the results are predictable. In many ways, the results are similar to what happened during the Cold War, when the superpowers supported dodgy regimes who at least had the virtue (in the eyes of the superpowers) of being predictable allies. It became hard for superpower-dependent states caught in the Cold War maw to move toward constitutionalism and human-rights protection as long as the superpowers benefited from these client regimes having compliant dictators, one-party states or rights-suppressing stability. But now that all of the great powers (or at least the powers with Security Council vetoes) are on the same side in the anti-terrorism campaign, the Security Council itself can be used as an agent for enforcement of orthodoxy in fighting terrorism. As during the Cold War, when constitutionalism and human rights took a back seat to aligning the world as a stand-off between the US and the Soviet Union, the anti-terrorism campaign has once again sacrificed the benefits of the rule of law, constitutionalism and human rights protection for the certainty of buy-in to an international program to maintain a transnational security framework.

The conclusion? The legal framework for the world anti-terrorism campaign cannot be found solely within the confines of international law, though international law is crucial in the fight. The global fight against terrorism is being fought predominantly *within* the legal systems of many states because international institutions have given these states marching orders (or license) about how to change their domestic laws to combat terrorism. But these very same international institutions have disavowed any

responsibility to ensure that the anti-terrorism campaign is conducted in accord with international human rights law or international humanitarian law, or even in compliance with countries' own constitutions. As international institutions are using their tools of lawmaking to reach into domestic politics to fight terrorism country by country, they are looking the other way when those countries take advantage of the opportunity to compromise constitutions and limit rights. States have complied with these new international mandates at a quite astonishing rate, but that is at least in part because the domestic executives who have pushed the changes often themselves have something quite directly to gain in terms of enhanced power and room to maneuver.

As we will see in Part II of the book, though, there is meaningful variation in how countries have responded to these anti-terrorism mandates. As I will show there, countries that were the most enthusiastic participants in the first wave of public law globalization, which involved tying their constitutional protections to transnational guarantees of rights, have become the most resistant participants in the second wave of public law globalization, which has involved sacrificing domestic constitutional protections to fight terror. In short, countries that used international law to entrench their constitutions and increase domestic human rights protections before September 11 have been more resistant to using international law to fight terrorism in human-rights- and constitution- violating ways after September 11. As I will argue in Part II, the first wave of public law globalization inoculated countries against the second wave.

Broadly speaking, however, the results of the international and domestic legal partnership in the anti-terrorism campaign do not bode well for local constitutional compliance. Many of the elements of the anti-terrorism campaign require states to reduce or eliminate locally guaranteed constitutional protections and locally enforceable human rights claims for those who live within their boundaries. And these legal changes implicate international human rights protection as well. Even those states that have tried to maintain constitutional fidelity have still taken steps that breach some constitutional principles. As a result, I argue that the anti-terrorism campaign is being fought as a series of internationally coordinated domestic states of emergency. We might consider this situation an "international state of emergency."

Chapter 2: The Anatomy of a State of Emergency

If I am going to claim that there is an international state of emergency after September 11, I need to specify what makes a particular state of law an "emergency." Very few states have publicly declared formal states of emergency in response to September 11. Even in the United States, the presidential declaration of a state of emergency on September 14, 2001⁶³ was limited to invoking the president's power to use war-time rules for the military. The president's invocation of the International Emergency Economic Powers Act (IEEPA) on September 21, 2001 to crack down on terrorism financing focused on 27 specific individuals and groups whose assets were to be frozen,⁶⁴ and did not even sweep as broadly as it might have under that law.⁶⁵ The UK declared a more sweeping and formal state of emergency, one that is still in force. The British emergency invoked the formal emergency powers provision of the European Convention on Human Rights and explicitly derogated from Article 5 of the Convention (the provision guaranteeing the right to liberty).⁶⁶ The derogation enables the UK to keep suspected terrorists under indefinite detention without charges or convictions.⁶⁷ From the moment Iraq has had a functioning sovereign government after the "regime change," it has been in a permanent and formally declared state of emergency. But, in general, few formal states of emergency were declared around the world as a response to September 11. How can I insist that what has followed, then, is an international state of emergency?

⁶³ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

⁶⁴ See Exec. Order No. 13,224, <u>66 Fed. Reg. 49,079</u> (Sept. 25, 2001). In the Annex to this executive order, President Bush designated twenty-seven terrorism-linked individuals and entities whose assets were to be frozen.

⁶⁵ In Kim Lane Scheppele, *Small Emergencies*, 40 GEORGIA LAW REVIEW 835-862 (2006). I show how states of emergency work in US federal law. Declared by the president, emergencies typically allow the president to use emergency provisions placed by Congress into particular laws to bypass the more stringent protections of the ordinary law. So, for example, the Stafford Act allows the US president to declare a state of emergency zone, bypassing the congressional appropriation process under an authorization from Congress in the Stafford Act itself that he can do so under conditions he deems an emergency. But by declaring an emergency, the president does not get all possible emergency powers – only those that the president explicitly invokes from a long list of statutes that give him Stafford-Act-like powers to temporarily bypass cumbersome procedures.

⁶⁶ Human Rights Act 1998 (Designated Derogation) Order, 2001, S.I. 2001/3644 (U.K), *available at* <u>http://www.uk-legislation.hmso.gov.uk/si/si2001/20013644.htm</u>.

 $^{^{67}}$ The highest court in the UK has upheld the emergency declaration and the question is now before the European Court of Human Rights. A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) , [2004] UKHL 56.

Not all actual emergencies are declared emergencies. When there are such formal declarations, they tend also to be accompanied by formal legally specified methods for regulating how long an emergency can last, what may be done in its name and how multiple political bodies have to act to keep it in place. Emergencies with a sharp legal structure of this sort I call "hard emergencies."⁶⁸ But most emergencies don't take this form. Instead, many states slide into at least some aspects of emergency governance without making a sharp distinction between what is normal and what is the emergency so that the two blur together in practice. I call these situations "soft emergencies." These are in many ways more troubling because non-declared emergencies generally have no mechanisms for checking, correcting or revoking them. If we look only at formally declared "hard" states of emergency, we will miss much of the dangerous, soft slide into non-normalcy. As a result, I will argue that "emergencies are as emergencies do." Instead of identifying states of emergency only by formal legal status or formal declaration, I will identify a state of emergency by its *symptoms* rather than by its label.

What are the general symptoms of states of emergency? In this chapter, I analyze the basic features of clear, historically documented states of emergency in order to see what their central features are. As we will see, emergencies are not all-or-nothing states of law. But they tend to share common characteristics.

The data for this chapter of the book come from a series of case studies prepared by the International Commission of Jurists on the legal features of actually existing states of emergency.⁶⁹ Jurist commissioned these case studies to provide input into an international process, then just beginning in the 1980s, to establish humanitarian standards to be guaranteed even in times of emergency. The case studies provide particularly good material to work with because their different authors were obviously instructed to take note of how various elements of emergency powers were constituted as a legal matter. Although these case studies were written to assist the effort to establish an internationally cognizable framework of permissible derogations and non-derogable protections during a time of emergency, this effort has since stalled at the level of expert recommendation and has not moved into more formal processes of international lawmaking. The empirical efforts of the case study authors to understand what

⁶⁸ These are the sorts of emergencies that Bruce Ackerman would like the US to incorporate in its federal law. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK (2006).

⁶⁹ INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (1983). The countries they report on include Argentina (after the military coup of 1976), Canada (uses of the War Measures Act in the 20th century), Colombia (long history of coups), "Eastern Europe" (characteristic features of the communist takeovers in East-Central Europe), Ghana (emergencies after independence), Greece (the coup of the generals from 1967-1974), India (the first three proclamations of emergency after independence), Malaysia (in the 1960s and 1970s), Northern Ireland (and British emergency rule there), Peru (emergencies since 1932), Syria (the 1962 coup), Thailand (declarations of emergency between 1932-1979), Turkey (states of exception from 1960-1980), Uruguay (the 14-year state of emergency that started in 1968), and Zaire (1960-1980). The final paper will have examples from these countries and these case studies throughout the text.

happens legally during emergencies, however, provide good evidence for seeing how actually existing emergencies work in practice. As I show in this chapter, emergencies do not just have a distinctive political profile, they also have a distinctive and substantive legal profile.

Reviewing these case studies on the legal side of emergencies, I show that emergencies tend to share certain common features, even when the "provocations" for the emergencies vary widely and even when legal cultures otherwise share little in common. Of course, virtually all emergencies start with the a real or imagined threat, widely publicized by the government as such. But after that, the main features of emergencies are, in what turns out to be roughly chronological order:

1. Sharp centralization of political power

- A. Power is centralized through an assault on the separation of powers, so as to favor a strong executive:
 - i) Legislatures are generally disabled in times of emergency. Specific tactics include formally dissolving parliaments, making it politically impossible for parliaments to do anything other than acquiesce in the use of executive power, pushing parliaments to delegate legislative powers to the executive. In many cases, legislatures disable themselves either through passing vague delegations of power to the executive, or failing to meet or refusing to take up the issues over which the executive is seizing power.
 - ii) Courts are generally neutralized in times of emergency. This can occur when the executive simply closes courts. Alternatively, the executive may use more subtle methods like removing particular categories of cases from the ordinary courts by setting up emergency courts, restricting the jurisdiction or bases for review available to ordinary courts so that they cannot reach emergency provisions, suspending the constitution or certain parts of it so that these provisions may not be legally used as a basis for adjudication, creating new oaths of office for judges that require their fidelity to the executive, or refusing to implement decisions of courts. Of course, the judiciary can always be overtly threatened with severe consequences if they rule against the executive in moments of crisis, or new politically compliant judges can be substituted for politically resistant ones.
- B. In federal systems, power can be centralized by limiting the autonomy and jurisdiction of the regional units. Some commonly used tactics include:
 - i) Preempting through federal law substantive matters that used to be under local control. For example, one might see the federalization of criminal law and punishment once left to the regions, the merger of local criminal investigation with investigation by the national

security services under different rules, the incorporation under federal control of previously decentralized natural resources and infrastructure – rivers, reservoirs, the electricity grid, local factories.

- ii) Commandeering local militias and state armies into national service.
- iii) Altering methods of local governance by central directive. This can include suspending local elections, appointing local executives from the center, and refusing jurisdiction of local courts in the name of emergency.
- C. Power can also be centralized by changing methods of lawmaking to allow for fewer checks on executive power. This allows the executive to create law that does not require parliamentary approval and that often also evades judicial review. As a result, one often finds the executive:
 - i) Ruling by decree, executive proclamation or other executive-only lawmaking devices.

ii) Invoking military/commander-in-chief powers given in a constitution or super-statute either to govern through military orders or to disregard civilian law.

iii) Engaging in secret lawmaking.

iv) Aggressively reinterpreting existing laws to accomplish new purposes so that functionally new laws come into effect without parliamentary approval. The laws on the books may stay the same but they are used in substantially new ways under the aggressive reinterpretation.

2. Substitution of military methods for ordinary policing

This can occur in the areas of:

A. Surveillance. In many countries, there is a distinction between methods of military intelligence gathering and methods of criminal investigation. The former often evades constitutional constraint while the latter is generally regulated within constitutional limits. In emergencies, one often finds state practice moving out of a criminal-justice framework into an intelligencegathering framework. This can involve substituting military intelligence and its associated legal rules (weaker on individual rights protection) for criminal investigation with its constitutional constraints.

- B. Personnel. There can be a substitution of military for police in keeping civil order. National guards, interior ministry police and other militarily trained units are deployed where once civilian police operated alone.
- C. Military tactics. Military rules of engagement often allow more aggressive action than civilian rules do. These rules of engagement can be used by either ordinary police personnel or by military personnel. The military rules of engagement include deploying in military formation (e.g. deploying police as riot police), using techniques of military occupation (e.g. checkpoints, curfews), using more powerful weapons than would be used in civilian policing (e.g. mortars, rocket-launchers, tanks), lowering the bar for first use of force (e.g. instructing police to use aggressive methods preemptively), permitting killing instead of capture of targets (e.g. shoot to kill orders), permitting more civilian casualties in order to root out the targets of the action (e.g. approval of "collateral damage" or collective punishment in police sweeps).
- D. Military tribunals and military jurisdiction substitute for civilian courts. Invocation of the system of courts martial can be used for civilian prosecutions; alternatively, specially constituted tribunals may be created to try offenders whom the state deems are the targets of the emergency measures.
- E. Martial law. This is usually a specially defined legal state going beyond mere military tribunals to encompass an alternative model of law. Martial law can be declared in a specific geographical area (more typical) or pronounced over the whole national territory.

3. The displacement of procedure

The hallmark of a rule-of-law or constitutional state is often its procedural protections, designed to give power to the individual against the state. In states of emergency, normal procedures are abbreviated or even abolished through:

A. Changes in criminal procedure. For example, there may be an increase in preventive detention, a removal or abbreviation of the right to counsel, the increased use of secret evidence in adjudication, a loosening of the privilege against self-incrimination, the introduction of confessions extracted through coercive interrogation, the lowering of evidentiary requirements for determining guilt, the substitution of summary administrative procedure for more defendant-

protective criminal procedure, the elimination of forms of evidentiary privilege, the introduction of coercive methods to compel testimony and necessity-based deviations from the rights of defendants to confront evidence against them or to have access to evidence in exculpation or mitigation. In the extreme case, there can be detention or punishment without public presentation of evidence or, there might be no judicial review of administrative or military decisions made outside the normal judicial procedures.

- B. Changes in expropriation rules. Seizure of private property often accompanies emergencies through loosening standards through which the state can take possession of private property or asserting prior claims over certain forms of property (e.g. eminent domain or nationalizations). Such seizures are often accompanied by a lack of procedural safeguards. There may be no receipts for seized property, no records kept of what has been seized, no compensation, and no opportunity to challenge the seizure. The state may even deny that it is the agent of the seizure.
- C. Increased use of collective methods of detection and punishment instead of individualized methods. Liberal constitutional procedure typically requires individuated proof that a particular person did something before sanctions can be applied. In emergencies, one often finds collective measures used instead. For example, there may be police sweeps that detain everyone in the vicinity rather than requiring individualized evidence for such detention, an increase in judgments of guilt by association, the use of collective punishment where the target of the punishment may not have been shown to have done anything wrong, and the practice of threatening friends and family members so that they disclose information on targets of interest.
- D. Increased resistance of government to investigating civilian complaints or requests for explanation. For example, the police may fail to respond to missing persons claims or other politically tinged criminal complaints. Voting rights may be truncated without explanation or appeal. Institutions that permit appeal of administrative decisions or review of administrative practices may be closed. The state fails to respond to requests for information or explanation for its decisions. Offices that are designated to investigate claimed abuses of state power are closed or intimidated into failing to perform their duties.
- E. Changes in procedures associated with ordinary governance (overlap with 1-C above e.g. government by decree, secret laws or secret reinterpretation of laws).

4. Changing the legal status of speech

In emergencies, there is often a twin maneuver with respect to rights to speech: 1) what was protected speech becomes unprotected action and 2) what was protected silence becomes mandatory speech.

- A. Speech that would otherwise have been protected comes to be seen as a threat or incitement and can therefore be criminalized as action.
- B. Speech supportive of the "enemy" comes to be seen as an adjunct to enemy tactics. "Proselytizing" in favor of a cause comes to be equated with banned actions in support of that cause. For example, "material support" laws criminalize providing comfort to the enemy. Bans on political parties and dissident groups may be based solely or primarily on their stated beliefs. Cracking down on proxies for speech, like punishing membership in an organization, silences speech.
- C. Formerly protected silence becomes mandatory speech. The removal of protections for silence can be used as an emergency measure. For example, there may be adverse inferences drawn from the silence of suspects or criminalization of failure to disclose information to the authorities.
- D. Use of harsh interrogation tactics to squeeze information from suspects and their supporters. Interrogation may substitute for other methods of investigation, combining punishment of suspected targets with tactics of evidence production. Forcing subjects to speak becomes an end in itself.

What is particularly interesting about this category is the way that the two separate parts of it (criminalizing speech in some instances and compelling it in others) tend empirically to be found together even though they are generally regulated under different legal provisions.

5. The reversal of transparency

Under this rubric, the state closes itself off from outside view while simultaneously claiming greater power of surveillance over the lives of inhabitants.

- A. In an emergency, the state often becomes more opaque than it was before the emergency. For example, it fails to publicize what it is doing or gives out misinformation about its actions and intentions. It closes previously open files, archives and processes. It refuses to respond to freedom-of-information requests. It punishes leaks. The increase in government secrecy often comes in the name of state defense or national security which means assimilating the public to the enemy and excluding both.
- B. Simultaneously, its inhabitants become more visible to the state. The permissible means of surveillance may be increased. Individuals become more visible to the state through the use of electronic surveillance and other remote-sensing tools (like wiretapping, long-distance photography, night-vision equipment, heat-sensing monitors). There may be an increase in mail openings and interception of communication as well as an increase in the number and intrusiveness of physical searches. Often these are combined with reduced warrant requirements and a short-cut of the procedural protections that would normally apply to such surveillance and searches. There is increase in the use of covert surveillance of individuals, groups, meetings and public gatherings. Individuals don't know whom to trust because the use of informants is widespread.
- C. The reversal of transparency may be associated with increased use of the media for state purposes, with less individual access to the media for other purposes. The media broadcast state announcements and the state perspective on the crisis without allowing in other voices. There may be a permanent or temporary nationalization of the media. Dissenting publications may be banned or restricted and their writers and editors subject to harassment or worse.
- D. There is often an increased sharing of information on individuals and groups within and among government agencies while simultaneously making the information on individuals and groups less visible to each other. For example, the state security services may know more about who is sympathetic to a particular cause than other sympathizers do because means of communication among private parties are disrupted while means of surveillance by the state are increased. Government databases, and the increased use of data matching techniques, often give the government superior access to information about inhabitants within the state than they can have about each other.

Here, too, what is interesting about this category is the way that these two elements – increased transparency of the individual to the state and decreased accountability of the state to the individual – tend to move together as an empirical matter, even though there is no necessary link between the two as a formal legal matter.

6. The use of anticipatory violence

Given that the state has identified what is sees as an urgent threat in order to justify the use of emergency powers in the first place, it may attempt to respond to that threat before the actual threat can materialize. As a result, one finds an increase in the justification and use of anticipatory violence – where coercive measures are used in anticipation of (rather than after the fact of or concurrently with) a threatening action directed at the state. This obviously results in an increase of violence overall since not all potential threats would have materialized even if left alone. But if anticipated threats are acted upon with certainty before they evolve, then the states ups the ante on violence and often becomes the first aggressor, though the state justifies its actions by claiming that they are responses to prior provocations. The state can predictably use the power of anticipatory violence in particular key settings:

- A. Identifying precriminals. If the state expects threats to come from among particular groups and social locations, then one may expect an increase in anticipatory arrests and detentions. Sometimes there are no reasons given; other times pretextual reasons are offered for the detentions. Alleged plots are interrupted before they even form as plots. Criminal charges sometimes do not reflect what the state actually suspects someone of having done. (So, for example, failure to pay taxes is charged when conspiracy to commit a subversive act is suspected.) But the state may take someone into custody in an emergency on the basis of less evidence and earlier in the trajectory of the event than would otherwise be the case in a non-emergency. Prevention becomes more important than apprehension after the fact. As a result, criminal investigation is directed at stopping suspicious activity with extraordinary means like detention and disruption rather than waiting for an imminent threat to emerge to the point where ordinary criminal procedure would be triggered.
- B. Reframing ordinary deviance as an extraordinary threat and acting in the latter frame. Any political community contains some ordinary deviance. But if this ordinary deviance is reframed as an extraordinary threat, then extreme measures of detection and prevention may be authorized. So, a

garden-variety serial killer becomes a terrorist, a typical drug dealer becomes part of an organized crime conspiracy, a person who contributes to a political cause is laying the groundwork for revolution. In emergencies, this reframing is often done in public with little evidence to sustain it. For example, nonviolent people with leftist views become plotting communists who have revolution in their hearts. If ordinary deviance is reframed as an extraordinary threat, this justified more extreme measures on the part of the state to intercept it.

C. Changing rules of engagement. Considering itself under imminent threat, the state may act more aggressively than it would under non-emergency circumstances. This results in changing the ground rules for when suspects may be killed instead of captured, when premises may be raided without getting a warrant, when civilians may be treated as if they were military targets. It may also affect when a state launches a counter-insurgency operation (in the absence of evidence of insurgency) or a counter-terrorism operation (without much evidence of imminent terrorism).

This analysis of emergency powers is designed to highlight the key features one finds in actually existing emergencies. Not all states of emergency feature all of these elements, but most emergencies have some combination of these elements. To identify "soft emergencies" that have not been publicly declared as such, I offer the idea of the "family resemblance" method for defining terms (Wittgenstein) in which the possession of enough features to enable one to look like a member of the family is sufficient for being classified in the family. Emergencies, then, can be identified by the degree to which they possess "enough" of the relevant features, and not in an all-or-nothing fashion. Using this method, we can spot creeping or partial emergencies without relying only on the formal declaration or full-blown exercises of emergency powers.

Looking over the typical features of states of emergency, it should be obvious that many of these features require substantial adjustment of any constitutional order. Altering either separation of powers or federalism (item #1) changes the basic constitutional framework in fundamental ways. Substituting military methods for ordinary policing (item #2) also affects the constitutional balance of powers and the ability of individuals to defend themselves against state action. Procedure is often at the heart of constitutionalism (item #3) and its truncation has serious consequences for the rule of law. Protection of speech and the right to remain silent are crucial aspects of a liberal constitutional order (item #4) and their alteration will have constitutional consequences. Accountability of the state to its publics as well as the privacy of publics with regard to state intrusion (item #5) are crucial constitutional features of a democratic and limited state; the reversal of this balance threatens the possibility of authoritarian

governance. Finally, the widespread use of anticipatory violence (item #6) signals the breakdown of civil order and often the very end of the constitutional regime. Each of these six features will typically have consequences of constitutional magnitude within any state that uses emergency powers. As I will show in my later chapters, states vary widely in how extensively they use emergency powers after September 11, but a great many states have moved at least some measure in this direction.

Chapter 3: Law is the Way the State Talks to Itself: A New Theory of Emergency Powers⁷⁰

How can my "emergencies are as emergencies do" focus be squared with other available theories of emergency powers? In many ways, focusing on how actually existing states of emergency work can provide a useful corrective to the existing theories of emergency powers because actually existing emergencies behave very differently in practice than they are predicted to do by theory. Most emergency theorists have been interested in the normative side of theory-building – what justifies an emergency? how should an emergency proceed? – rather than the empirical side, which would focus on what tends to happen once countries go down the road into emergency powers. Theories of emergencies are, therefore, predominantly theories about when emergencies can be legitimately declared and what would make their invocation legally or ethically acceptable, not theories about when they are in fact declared and how they function. In this chapter, I want to move from the normative theories to create an empirically based theory that helps us to understand and explain when emergencies occur and what trajectories they actually take. This gap between existing normative theories and actually existing practices of emergencies has two main dimensions that make it hard to see the dynamics of real emergencies:

1. Some emergency theorists have imagined emergencies as spaces outside law, situations in which normal law is suspended or where normal law is silent (Carl Schmitt, Hans Kelsen, Giorgio Agamben). Others have imagined emergencies as a toggle-switch in law, where normal law is disabled and emergency law kicks in, but only until such time as the situation enables normal law to be restored (Joan Fitzpatrick, Subrata Chowdhury, Bruce Ackerman). As I will show, emergencies in practice tend to look like neither of these two models. Instead, they are enormously "jurisgenerative" periods in which a great deal of new law is created, law that was not anticipated in advance of the emergency. Much of this new law has aspirations to permanence or makes changes in the baseline against which the previous state of "normal law" was measured. Periods of emergency, then, look like other periods of rapid legal change, which often makes it difficult to correctly diagnose them as emergencies. The only thing that distinguishes emergencies from non-emergency periods of rapid change is the *content* of these changes and not their form. We therefore need the exercise I conducted in the last chapter to distinguish emergency regimes from non-emergency regimes.

⁷⁰ The section on Schmitt and emergency powers first appeared in Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11.* 6(5) UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 1001-1083 (2004).

2. Theories of emergency have been, until now, relentlessly national in their focus. All theorists of emergency have assumed that the timing and functioning of emergency governments are matters for domestic law alone. Threats that justify emergencies are threats to national sovereignty; we know where sovereignty is located by seeing who is authorized to react to existential threats (Schmitt, Agamben). The changes emergencies make are changes to domestic law and only domestic law can specify when emergencies end (Kelsen; While international norms play a role in these processes, specifying when Ackerman). domestic rights violations have exceeded international standards or laying out potential models to follow (Fitzpatrick, Chowdhury, Meron, sometimes Ackerman), the usual dynamics of emergencies have been diagnosed as purely domestic. With the development of post-September-11 international security law, however, this national focus is no longer adequate to account for the uses of emergency powers. Instead, as I will argue, we need to take on board the lessons of globalization gathered from the transnational spread of economic processes and regulation in order to understand in a robust empirical way how emergencies have become transnational.

This chapter develops a way of thinking about emergency powers that attempts to account for the actually existing emergencies we find, the constraints that states feel on their uses of emergency powers, and the situations that bring emergencies to an end.

a. Normative Theories of Emergencies and an Empirical Criticism

Perhaps the best known of modern theories of emergency powers is that forwarded by Carl Schmitt, centrally in his *Political Theology* (1922; 2d ed. 1934; translation 2005). For Schmitt, the ability to declare a "state of exception" marks the person with the power to do so as the sovereign. From Schmitt's famous opening line, "Sovereign is he who decides on the exception," it is clear that Schmitt imagines the sovereign stepping outside the constraints of normal law to enter a space in which there no rules, but only decisions. In this space of "no rules," the decisions of the sovereign are the only source of legality. Why can there be no rules? Because, according to Schmitt,

The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there

would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.⁷¹

Schmitt's state of exception is a condition in which anything can happen. The very unpredictability of the situation means that no rules can anticipate what might be necessary. The constitutional framework can only give the power to do whatever the situation requires to someone, in Schmitt's formulation. And that someone, in Schmitt's view, is the sovereign. And what makes the sovereign sovereign is precisely that he has this power.

For Schmitt, liberal constitutions fool their citizens if it appears that these constitutions could have accounted for everything. There will always be moments outside the range of legitimate constitutional expectation, and legitimate constitutional action under unanticipated and extreme threats can never be fully elucidated within a constitution's terms. This is a clear challenge to the idea that the rule of law must constrain rulers and ruled alike, for if the rule of law constrains the sovereign entirely, then the sovereign should not be able to claim exception to the rules. But an emergency makes visible the incompleteness of the constitutional design because, by its very nature (in Schmitt's view), the particulars of an emergency cannot be predicted in advance. In practice, Schmitt seems to say, a liberal constitution can therefore never be complete. The ability of the sovereign to act outside the rules in the case of emergency, however, is precisely the signature element that constitutes sovereignty for Schmitt and it is something with which liberal constitutions cannot dispense unless they are to be destroyed by the exceptional challenge.

If the sovereign can claim exception, then the sovereign must have all of the lesser-included powers—for example, the power to decide when the situation has ceased to be "normal," thereby justifying the declaration of emergency in the first place; the power to determine when the emergency is over so that the rule of law may be safely restored; and the power to specify which political actors normally protected by the rule of law in the non-emergency state lose their protection in the interim. Rather than seeing the rule of law as something that must be followed for its own sake as a way of ensuring the integrity of the state, Schmitt argues that the rule of law may *prevent* a polity from defending itself in the event of a serious political crisis. As a result, for Schmitt, the capacity of a ruler to maintain the very existence of the state may depend on that ruler *not* being bound by the rules.⁷² In fact, it is the most distinctive power of a sovereign—not simply an incidental and unusual capacity—that he has the power to suspend the law in order to save the state.

⁷¹ Carl Schmitt, POLITICAL THEOLOGY (trans. 1985) at 6–7.

 $^{^{72}}$ Id. at 12 ("The state suspends the law in the exception on the basis of its right of self-preservation, as one would say.").

Schmitt justified his view that a sovereign must possess the ability to determine the state of exception in a sociological⁷³ manner:

Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere "superficial presupposition" that a jurist can ignore; that situation belongs precisely to [the norm's] immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.

All law is "situational law."⁷⁴

According to this analysis, the juridical order itself requires for its maintenance a regular field of life, a *habitus* or a certain taken-for-granted predictability, in order for the small deviations that the juridical order controls to be noticeable. If half the population become murderers, then the law against murder is no longer a purely juridical matter. Instead, when the field of life becomes so disordered that the jurist can no longer distinguish between the normal and the abnormal, then the sovereign must act—in Schmitt's view—to restore the condition of normality necessary for any rule-of-law system to make sense. The state of exception is, as a result, the means for restoring the order necessary for legality to exist. The political moment that justifies invoking the state of exception is the moment when the possibility of restoring a field of order requires that the rules themselves do not apply to the means of restoration.

Moreover, according to Schmitt, it is the exception that gives meaning to the rule in the first place, since one cannot understand a rule except by noting the edges of its applicability. The rule gains meaning from publicizing what is *not* covered in its ambit.⁷⁵ It is therefore the exception that defines the extent and core meaning of the rule. Through exceptions—and non-exceptions—the juridical order comes to have its distinctive shape and character.

A more comprehensive "state of exception" of the sort that arises in political crises implicates not just an individual rule, but the limits of the juridical field itself. Invoking a state of exception to the

⁷⁴ Id.

⁷³ Schmitt, however, said explicitly that the exception is a juristic and not a sociological category: "It would be a distortion of the schematic disjunction between sociology and jurisprudence if one were to say that the exception has no juristic significance and is therefore 'sociology." *Id.* at 13. By this, he seems to mean that the exception is a category within jurisprudence even if recognition of its distinctive markers requires sociological judgment.

⁷⁵ This point is particularly well-elaborated in the analysis of Schmitt in GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 15–29 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998).

juridical field as a whole indicates, as in the case of the individual exception, the defining limits of the taken-for-granted condition. The possibility of a state of exception existing outside the juridical field but still within the political field creates the condition for the separation of law and politics. It opens up the practical reality that the rule of law may cover only part of what politics may do. Consequently, some of what counts as politics must exist outside the field of law. If, in Schmitt's formulation, the distinctive capacity of the sovereign is to define the exception, then the sovereign can never be fully bound by law. The broader significance of the state of exception, then, is to define the basic qualities of the sovereign's responsibility, only some of which are legally defined.

Schmitt's analysis explores some of the same logical puzzles as does nineteenth and twentieth century legal positivism—which is not surprising since legal positivists were among his main interlocutors in the theoretical debates he entered in the 1920s and 1930s in his native Germany.⁷⁶ For legal positivists, all law is the command of the sovereign; it exists as a factual matter distinguishable from any normative argument that might be made in its favor. One of Schmitt's key interlocutors was Hans Kelsen, a legal positivist who had his own theory of emergency powers, based more on the sociological reality of the acceptance of a potential sovereign's decision to step outside the constitutional order than on the normative warrant for this action in the first place. According to Kelsen's general theory of law, legal orders are systems of rules related to each other in a hierarchical way, through a "chain of creation."⁷⁷ The basic norm of the system, the *Grundnorm*, specifies how other legal norms are created. All other legal norms must get their warrant as *legal* rules from their pedigree in procedures outlined by the *Grundnorm*. And what holds up the *Grundnorm*? According to Kelsen, the *Grundnorm* is itself based in a sociological fact: "actual behavior corresponds to the system to a certain degree."⁷⁸

Given this view, one can see how Kelsen might begin to think about emergency powers. His "theory of revolutionary legality" in fact provides a recipe for the successful overthrow of an existing system of law. All the revolutionary – or the usurper, or the current chief executive – has to do is to replace the existing *Grundnorm* with another one, and wait for the people to salute. If in fact, there is popular acquiescence in the new *Grundnorm* and the legal norms founded on it, then the new system is just as legitimate as the old one. In fact, according to Kelsen, "a national legal order begins to be valid as

⁷⁶ For more on these debates, see Ellen Kennedy, Constitutional Failure: Schmitt in Weimar (2005) and Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism (1997).

⁷⁷ HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (trans. Ronnie Litschewski Paulson and Stanley L. Paulsen) (2002 [1934]) at 56.

⁷⁸ Id. at 59.

soon as it has become -- on the whole -- efficacious; and it ceases to be valid as soon as it loses this efficacy."⁷⁹

Both Schmitt and Kelsen, then, believed that sovereigns (or those who wanted to be sovereign) could set aside existing law and substitute something else in its place, something that could be legitimate if it were indeed accepted by those subject to its command. Schmitt's sovereign temporarily moves outside of the previous law, but his actions do not make new law because new law would be rule-bound and therefore unable to cope with emergencies. Kelsen's sovereign, on the other hand, sets aside one legal system in order to create another; there is no legal government outside of rules. But while Schmitt's sovereign is guided by only his own lights in declaring the exception (and it is his judgment about what would save the state that ties his anti-legal act to the legal system in the end), Kelsen's sovereign is bound to public opinion, or at least public acquiescence, if he wants to make his revolutionary government "stick" as law.

Contemporary human-rights lawyers have been for years urging a normative conception of states of emergency different from either Kelsen's or Schmitt's.⁸⁰ They urge states to develop emergency powers as a form of governance *fully within* the constitutional-legal framework of ordinary governance. A state of emergency should be publicly declared, formally limited and exist only when there is a cause that "threatens the life of the nation."⁸¹ When an actual emergency looms, human rights lawyers say, states should explicitly use the rules of emergency governance pre-placed within their domestic constitutional orders – generally requiring explicit starting points, hard sunset provisions, overt derogations from some rights protections whose permissibility is indicated in advance, strict rules of non-derogation from fundamental rights, and maintenance of procedures of governance that are as true to the spirit of the original structure of governance as possible (e.g. requiring parliamentary approval of executive action, if not before the fact, then at least soon afterwards). Their view is that explicitly defined emergency powers provide more constraints on the arbitrary use of such power, greater protection for human rights and a clearer path back to normal governance.

The International Law Association in fact adopted the Paris Minimum Standards of Human Rights Norms in a State of Emergency in 1984.⁸² Additional proposals appear as the Queensland

⁷⁹ HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945) at 220.

⁸⁰ JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS (U of Pennsylvania Press, 1994); SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY (Pinter, 1989); THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION (Cambridge, 1987).

⁸¹ Paris Minimum Standards, quoted in Chowdhury at 11.

⁸² For an explanation of the Paris Minimum Standards by the human rights lawyer who chaired the subcommittee of the International Law Association that drafted them, see SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF

Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency⁸³ and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.⁸⁴ Many states have also adopted this strategy of bringing emergencies under constraint of law by outlining the permissible shape of emergency powers within their constitutions (e.g. South Africa, Germany, Russia). Other states have adopted super-statutes to regulate emergencies within the framework of law (e.g. Canada, Spain). Bruce Ackerman's recent contribution to this debate, *Before the Next Attack*, similarly proposes a way to bring emergencies into ordinary American public law by regulating their scope and extent in advance.⁸⁵

As a theory of emergency powers, and not just a set of rules to that prevents states from destroying their own democratic and constitutional basis, the formal theory of explicit derogation and regulation imagines that states of emergency can be contained within normal law, as an alternative mode of legality within a complex legal structure. In this view, the rules that will go into effect when the life of the nation is threatened are laid out in advance, based on legislation (or constitutional provision) enacted after full public debate and possessed of clear limits for when emergencies must end. Unlike Schmitt, who believed emergencies existed outside any possible rule-based order, or Kelsen, who believed that emergencies created a wholly new legal order, the human-rights lawyers build emergencies into existing legal systems as a sort of trap door for dire circumstances. But, to the human rights lawyers, invoking the rules of emergency does not set aside the ordinary legal order or create a new one. To them, emergencies are best conceived as extreme options governed within ordinary legal structures.

Writing after September 11, Giorgio Agamben's *State of Exception* riffs off Schmitt's work, engages international human rights lawyers a bit, but ignores Kelsen.⁸⁶ This is not surprising, for Agamben is chiefly interested in dividing emergency theorists into two camps: 1) those who, like Schmitt, think that one must set aside law to deal with the exceptional circumstances and 2) those who, like international human rights lawyers, think that the exception should be brought in from the cold and made subject to legal regulation within an existing constitutional structure. Because Kelsen believes that

EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY (Pinter, 1989).

⁸³ Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency, reprinted in 85 AM J. INT'L. L. 716 (1991).

⁸⁴ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, reprinted in 7 HUM. RTS. Q. 3 (1985).

⁸⁵ BRUCE ACKERMAN, BEFORE THE NEXT ATTACK (2006).

⁸⁶ GIORGIO AGAMBEN, STATE OF EXCEPTION (2005).

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a revolutionary who casts aside law as inadequate to the situation is moving toward a new and different legal system more adequate to the situation, this doesn't quite fit Agamben's typology of theories.

Agamben sets up this opposition between the state of exception as existing outside law (Schmitt) and inside law (modern international human rights lawyers) in order to use his own conceptualization to fill the space in the middle. For Agamben, the exception is neither inside nor outside law. It has "the force of law without law;"⁸⁷ it merely suspends the law without canceling it, and therefore the exception owes its existence to the ongoing possibility that law suspended during an emergency will be unsuspended and therefore resume normal force. The exception is, as Agamben says, "not a 'state of law,' but a space without law" or a "juridical void."⁸⁸ It is, as it were, a "time out" from law. The exception provides a link between two attributes of governance – *auctoritas* (roughly, the authority that has its source in expertise, interpretation of texts or charisma) and *potestas* (roughly, the power to get things done) – without collapsing completely into either. When law fails, the sovereign can nonetheless be effective by suspending the law in order to accomplish goals that enable the law to be restored. The space between the suspended operation of law and the accomplishment of political goals necessary for the endurance of the state, says Agamben (like Schmitt), is the space of politics.

But all four views of states of emergency (the Schmittian sense of setting aside the law; the international human rights lawyers' sense of the constitutionally regulated space inside the law; the Kelsenian sense of the newly constituted law; or the Agambenian sense of the exception as the space between power and authority or the space of no law) seem quite unable to shed light on what happens, legally speaking, during actually existing emergencies. Why is this? They seem not to have paid careful attention to the way that actually existing emergencies typically work.

Actually existing emergencies are not in fact periods of legal silence, legal absence or the general suspension of law as such. They are periods of enormous outbursts of lawmaking. New decrees fly fast and furious; proclamations, regulations, and new military orders are produced in such a mad rush that new law seems to occupy all available governmental space. Unlike the jurispathic courts described by Robert Cover, emergencies are nothing if not "jurisgenerative."⁸⁹

Why is this? If we think about law not as a purely legitimating force or as the sincerely believed normative order of a state, but simply as *the way the state talks to itself*, it is not surprising that emergencies are accompanied by a tremendous proliferation of law that pays careful attention to its own warrant, its own authority, its own pedigrees. After all, if an emergency is to be handled differently from

⁸⁷ Id. at 39.

⁸⁸ Id. at 51.

⁸⁹ Robert Cover, Nomos and Narrative, 97 HARV. L. REV. 4 (1983).

"normal times," then the various parts of the state that are going to accomplish the "different handling" need to be told what to do and they need to be told what to do in an authoritative manner. The military are given rules of engagement; the police are instructed through new rules of order; the ministries are told what their new operating rules are. Some of these new orders may well be secret, of course, but they nonetheless must have the appearance and function of law or the parts of the state to which they are directed would simply assume they were not being addressed. Redirecting the state to deal with a different enemy, a new threat, an imminent crisis requires an immense amount of law production because, in fact, large parts of the state will be instructed to behave differently in a time of trouble.

Some of this new law that addresses the declared threat will displace the preexisting law, as one might imagine from Schmitt or Agamben. But then again, outside an emergency context, any law that amends a prior law does the same. Merely changing the content of law by following the rules of the system for making new law occurs all the time without threatening the very existence of the legal system. Most emergency governments will conduct the emergency through the announcement of some new rules that displace prior rules, some rules that merely reinterpret old rules and some rules that already had in them toggle switches between emergency and non-emergency operation.⁹⁰ But even a powerful dictator cannot run an emergency through *no* law or only through pre-existing law. At some level, all of the theories of emergency powers grasp some element of this comprehensive revitalization of law that occurs during an emergency. But in actually existing emergencies, no government operates according to any of the pure theories, taken alone.

The reason why the theories of emergency seems so out of touch with the practice of actually existing emergencies is that they miss both the daily operating functions of law and also how much of law is unchanged through an emergency. Law does not just express moral positions, or public values, or the basic working structures of the state. Public law, in particular, provides direction to state officials, who need to be told what to do equally in times of normalcy and times of crisis. In fact, public officials may need *more* explicit and direct instruction during an emergency, and this is consistent with the hyper-production of law at such a time. Even with this vast production of new law in an emergency, however, most of a legal system will remain unchanged. In the paradigmatic cases of permanent emergency, Nazi Germany or Soviet Russia, much of ordinary private law and even quite a lot of criminal law showed no signs of political influence.⁹¹ Public law changed, of course, but that did not involve remaking the entire

⁹⁰ Even the regime that everyone loves to hate, Weimar Germany as it slipped into fascism, was scrupulous about following the constitutional procedures for the dissolution of the parliament and the declaration of an emergency under Article 48 of the Weimar Constitution.

⁹¹ The novels of Philip Kerr (particularly the BERLIN NOIR trilogy) make this point eloquently for Nazi Germany. Inge Markovits' IMPERFECT JUSTICE (1995) makes the point well for the GDR, one of the most restrictive of the Soviet-dominated states of Eastern Europe.

legal order. When colonial governments collapsed and were replaced by independent post-colonial ones, often the vast iceberg of private law remained unchanged. Even in the most autocratic state or dire emergency, also, much of what used to be "normal law" still persists. As a result, all of law will never be in the sort of crisis that theorists like Schmitt and Agamben suggest. And it will rarely be the case, as with Kelsen's theory of revolutionary legality, that the whole legal system is replaced at such at time. The Pakistani Supreme Court, as we will see later, realized this early on in its rulings about the legality of emergency powers and has attempted to force a long line of military dictators to specify in advance just how much of law was being temporarily changed during the emergency. The Court then held the line to prevent emergency regulation from spilling into the protected areas of law.⁹²

As we saw in Chapter 2, emergencies have a typical structure (first, centralize executive power; then, consolidate control over the military; then, authorize shortcuts in procedure; then chip away at rights etc.). Taking this seriously, we can imagine that emergencies should be defined not so much by their formal properties (e.g. a space with "no law") but instead by their substantive characteristics – executive centralization, deployment of the military, cutbacks in all other institutions that can put up resistance to the executive while curtailing accountability of that executive. A theory of emergency powers should therefore be a theory of a specific form of government – one in which separation of powers and individual rights have been limited, while the executive consolidates control over a monopoly of violence. Regardless of whether this sort of government calls itself an emergency government, and regardless of whether this book will proceed to examine states of emergency as substantively distinctive forms of government.

But reframing states of emergency in this way is not yet enough to comprehend what has happened after September 11 because there is an international dimension to the emergencies generated after that date.

b. Internationalizing the State of Emergency

The new *international* state of emergency after September 11 poses yet another new challenge to theories of emergency. The available theories of emergency powers (including the one that I just sketched as my own) either assume that there is no role for international law in these processes or presume that the pressures to move into emergency governance will come solely from inside a particular

⁹² Tayyab Mahmud, Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan, 1993 UTAH L. REV. 1225 (1993).

state. So, for example, in the human rights literature on permissible derogations in a time of emergency, international law is viewed as providing the uniform standards that, like the North Star, serve as the stable point of reference that permits navigation through troubled local waters. Human rights lawyers have attempted to develop an international humanitarian framework to regulate states of emergency the way that the Geneva Conventions regulate humanitarian issues within states of war. This effort has foundered at the moment. But it carries an implicit faith in the civilizing powers of international law to counter emergencies.⁹³ This is because the proponents of the proposed humanitarian conventions for times of emergency envision emergencies as matters entirely internal to countries, and they contend that international law can provide the standards for minimizing harm when individual countries hit rocky patches. The theories of Schmitt and Agamben do no better at imagining emergency powers as embedded within a transnational web of influence. For them, the state of exception is precisely what defines the sovereign's power; the ability to set aside law (or in Agamben's view, to stand between law and politics) is defined only relative to a particular national government. What happens when international law is an important source of the destabilization and the pressure to use emergency powers?

The present international state of emergency (the ISOE) envisions a very different relationship between international and domestic law, and, as such, requires rethinking the available models. The ISOE uses the domestic law of multiple countries in parallel to solve an international problem, and it is tied neither to traditional conceptions of national sovereignty nor to recognition by domestic populations of legitimate authority. The operation of the new international state of emergency is not based on an extralegal conception of emergency as one would guess from reading Schmitt and Agamben. For one thing, while emergency powers in use today may be outside domestic law, they are still within international security law. This new ISOE also does not take into account empirical evidence of law in action as one would imagine from reading Kelsen. The operation of international law in this conflict is often not visible to the domestic populations whose acceptance would be crucial for legitimation of it. The ISOE also does not imagine that international law works through providing a legal constraint on purely domestic tendencies, as the international human rights scholars would argue. International human rights scholars imagine that anti-constitutional problems originate within national spheres and that international law can work to restore constitutional principle. But the opposite is true here: the new international security law is one of the forces pushing countries to deviate from their own constitutional practices. As a result, we need a new theory of emergency to cope with this internationalization of emergency powers.

⁹³ See the Paris Minimum Standards, the Queensland Guidelines and the Siracusa Principles, cited above.

Many of the pressures to comply with international security law come from outside particular constitutional systems, and those who are doing the pressuring often do not even know the local constitutional norms that might constrain states in complying with what international organizations are asking. So far, for example, I have not seen a single mention in the CTC requests to states of any concern that the measures states are being urged to adopt to comply with the Security Council resolutions might conflict with domestic constitutional practices. Instead, CTC requests take limitations of local law that get in the way of enforcing resolutions as problems that have to be fixed. And in the bilateral relations that have added additional pressures to states to comply with international law (for example, as US foreign policy increasingly organizes itself around the "you're with us or you're with the terrorists" formulation) generally do not take local constitutional constraint into account.⁹⁴

At the transnational level since September 11, human rights enforcement has taken a back seat to the enforcement of international security law. For one thing, the resources to ensure compliance with international security law available to the Security Council are far greater than those available for human rights monitoring. And for another, the Security Council has shown no interest in evaluating compliance with their security law resolutions against human rights standards. As a result, international human rights law remains a vague promise of international institutions. International security law, which could be tempered by a pairing of its power with international human rights law, has so far operated alone.

How, then, should we think about states of emergency with this international dimension? I argue here for a new theory that takes on board the new internationalized context of emergencies.

My theory of the ISOE gets its inspiration from globalization theory. Globalization theory has focused on the integration of national markets into a transnational economy, with the accompanying and dizzying sense that the flow of ideas, capital, people, images and goods across national borders has greatly altered the place of national institutions in these processes. These "flows" have put pressures for change on specific sites that had configured their priorities only against a national frame. But many sites that show transnational influences are also the places where cross-pressures coming from either local history or still other distant locations are present, too. When one looks locally, one sees contradictory and conflicting tendencies that appear rooted in place. It is only when one sees the international context and the influences that transcend place that the local conflicts make sense as the product of international forces. There are in short, disjunctures created by the different speeds, routes, vectors of influence and

⁹⁴ I once had an opportunity in a public meeting to ask the then-acting General Counsel for the CIA how his agents learned about the law of the country in which they were operating, so that they would know if their actions were outside of local law. "We assume our actions are outside local law," he assured me with a broad grin, indicating that it was not part of his agency's mandate to even know local law. He added that if they were to take either local law or international law into account in planning their operations, the State Department would tell them when they had to do it.

networks of influence that move along the objects, ideas and people in a globalized world. Arjun Appadurai has helpfully provided concrete examples:

Examples of such disjunctures are phenomena such as the following: Media flows across national boundaries that produce images of well-being that cannot be satisfied by national standards of living and consumer capabilities; flows of discourses of human rights that generate demands from workforces are repressed by state violence which is itself backed up by global arms flows; ideas about gender and modernity that circulate to create large female workforces at the same time that cross-national ideologies of "culture," "authenticity" and national honor put increasing pressure on various communities to morally discipline just these working women who are vital to emerging markets and manufacturing sites. Such examples could be multiplied. What they have in common is the fact that globalization – in this perspective a cover term for a world of disjunctive flows – produces problems that manifest themselves in intensely local forms but have contents that are anything but local.⁹⁵

Globalization, in Appadurai's analysis, brings cross-pressures that appear as local problems and local conflicts, even though they originated elsewhere.

We can see the sorts of things that Appadurai highlights in our examination of the way domestic public law has worked even before September 11. The first wave of public law globalization brought the claims of human rights and the devices for ensuring protection of human rights to countries emerging from fascism, colonialism, communism, military government and other "regimes of horror."⁹⁶ Internationally backed conceptions of human rights were then brought into the constitutional layer of domestic law by new constitution drafters.⁹⁷ By the time that the second wave of public law

⁹⁵ Arjun Appadurai, *Grassroots Globalization and the Research Imagination*. GLOBALIZATION (ed. Arjun Appadurai Duke University Press, 2001) 1-21at 6

⁹⁶ I developed the idea of regimes of horror in Kim Lane Scheppele Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models. 1(2) I-CON (INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW) 296-324 (2003).

⁹⁷ This description may appear to leave out the United States and other countries that adopted their constitutions before the post World-War-II wave of public law globalization. But, in reading the notes on the Philadelphia Convention, one can see the preoccupation of many of the participants with concurrent developments in Poland (which was having a constitutional convention at the same time) and with historical models of constitution-making that might be used for comparison. As a result, even the American constitution bears the marks of transnational influence. See Kim Lane Scheppele *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models.* 1(2) I-CON (INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW) 296-324 (2003) for an account of the various transnational influences in the Philadelphia Convention and then later during the Cold War.

globalization – international security law -- came along, it confronted a *domestic* law that had been shaped by a different set of globalizing forces in an earlier period, but which by the 21st century had become entrenched as *local*. So the tension in domestic law between the new uses of emergency powers and older constitutional structures can be seen in part as the intersection of two different and contradictory flows of transnational influence. The conflict appears local, but the sources for both sides of the conflict are transnational.

Saskia Sasssen sees the way that the mobility of money, goods, people and ideas has the potential to create a world order, but she also sees that, at the moment, many of the symptoms of conflict in this new world appear as embedded in local law. As she noted:

Global processes are often strategically located/constituted in national spaces, where they are implemented usually with the help of legal measures taken by state institutions. The material and legal infrastructure that makes possible the global circulation of financial capital, for example, is often produced as "national" infrastructure—even though increasingly shaped by global agendas. This insertion into the national of global projects, originating both domestically and externally, begins a partial unbundling of national space. It is only partial, as the geography of economic globalization is strategic rather than diffuse, as well as for the reason that national space was never unitary or fully integrated to begin with, despite its institutional construction as such.⁹⁸

Sassen, also, provides a framework within which the idea of the international state of emergency fits as absolutely normal. The domestic legal infrastructure in any particular place allows a set of globalizing forces to link global and local agendas, in much the way that local financial markets are legally regulated by national law to enable the global flows of capital. Seen in this light, the international state of emergency is to the public law side of legal practice what transnational economic regulation has been to the private law side. It is the legal form through which purely national agendas have been shaped and regulated in light of transnational interests and also the national way in which transnational purposes are accomplished. The ISOE is, then, *completely novel* in one way, because of its specific content, while simultaneously comprehensible as a *standard form* in another way because the linking of national law and transnational agendas is already a commonplace in other areas of law.

⁹⁸ Saskia Sassen, Spatialities and Temporalities of the Global: Elements for a Theorization. GLOBALIZATION (ed. Appadurai) 260-278 at 264.

The legal side of globalization theory has focused on the roles of transnational lawyers in the making of transnational deals,⁹⁹ the legal assistance given to the transnational movement of capital while legal barriers are erected for the movement of peoples,¹⁰⁰ the way that networks of labor have countered networks of capitalists around the struggle for international law,¹⁰¹ and the way that universal legal forms have come to dominate national law as a way of making multinational capitalist institutions feel at home everywhere.¹⁰² In each of these strands of work, we can see an interaction between the local and the global. At any particular point and on any particular topic in the legal regulation of the global economy, there is a distinctively tailored mix of the global and universal on the one hand and the local and the culturally specific on the other. Globalization, even in the economic sphere where it has gone the furthest, doesn't sweep away local institutions, customs, and norms as it takes hold. It co-opts them into a larger project. Similarly the production of local norms and customs didn't take place at some romantic point in the past when all influence was local. International flows of ideas, people, prejudices and resources shaped local materials and ideas in the first place, and it is these now domestically produced condensations of previous transnational influence that confront the new transnational influences as local.

In analyzing the international state of emergency, then, I explore the relationship between the universal aspirations of globalizing law and the local adjustments made on the ground in response. International organizations have created "universal" frameworks for fighting terrorism; the local adaptations are different in each place, depending on local needs, prior residues of globalization, the configurations of local power in place. The converse process is also interesting to examine: local agendas (particularly those of powerful states) attempt to capture the resources of globalized institutions in order to lauder their home-grown needs as universal. So, for example, the United States was behind Security Council Resolution 1373, and therefore it is not surprising that Resolution 1373 tracks in its particulars the main features of the USA PATRIOT Act, which was being put before Congress at the same time. After the Beslan school massacre, Russia came to the Security Council to ask for another resolution, which it got. Resolution 1566 set up a task force to study expanding the list of terrorist groups and individuals beyond the Taliban, al Qaeda, Osama bin Laden and their associates, to which the Security Council had limited its sanctions up until that point. Resolution 1566 clearly envisioned

⁹⁹ YVES DEZALAY AND BRYANT GARTH, DEALING IN VIRTUE : INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

¹⁰⁰ BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995).

¹⁰¹ SOL PICCIOTO AND RUTH MAYNE, REGULATING INTERNATIONAL BUSINESS (1999).

¹⁰² PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (EDS. A. CLAIRE CUTLER, VIRGINIA HAUFLER AND TONY PORTER) (1999).

expanding the listed terrorist groups beyond those clearly responsible for the attacks of 9/11 to those responsible for terrorist attacks elsewhere (for example, "terrorists" among the Chechens, Basques, Uighurs, Palestinians, Tamils or other groups with separatist or nationalist aspirations). Such an expansion would, among other things, permit any state whose local conflicts could be made to fly under the banner of international terrorism to enlist the international community on the state side of that local conflict. In the Security Council resolutions that have defined the global anti-terrorism campaign, we can see clear attempts by powerful states to internationalize their own local conflicts.

As I will argue here (and show in the rest of the book), globalization of security law reveals many of the same patterns that we have seen in globalization in the economic arena, where it has been long taken for granted and is more deeply entrenched. Local elites – primarily national presidents and prime ministers who are the main actors who gain from this new security push – use the forces at their disposal to adapt international law to carry out potentially controversial local projects in the name of international mandates. Local targets of these projects (particularly those who are deemed enemies in the new security push) as well as resistant local non-targets (particularly those who object to the spread of emergency powers) push back locally and join globally with others in the same situation. The international state of emergency is, at least in some locales, then met with a counter-emergency resistance that itself spans national borders. This counter-emergency resistance consists both of networks of "enemies" (since September 11, the Islamist network itself) and networks of constitutionalists (human rights activists and trans-nationalist judges). Though of course the terrorists and the constitutionalists are massively different in every other way we can imagine, the crucial thing to note is that the security-based transnational network of executives, militaries and police is being met not just with local resistance but also with transnationally organized resistance. In short, domestic constitutional struggles may be waged by local actors each with their own transnational support systems. The domestic and the transnational are linked together in multiple networks that all engage this problem with different methods and different ideals.

What happens to law in all of this? Law frames this picture in several ways:

First, much of the dialogue between local and global occurs in legal terms. Security Council resolutions and their regional equivalents create the legal framework within which states are called upon to make responses, which are themselves first made by changing local law. The security dialogue between global and local elites is, as a result, conducted through the language of law. Reports by states to the Security Council emphasize the measures each state has taken in its local law to comply with the Security Council mandates. And the Security Council clearly wants compliance with its resolutions entrenched in domestic law to match what it has done through the creation of international law.

Second, the forms of resistance are often themselves couched in legal terms as well. In particular, local activists may deploy domestic constitutions and international human rights claims to counter the security dialogue. This places the domestic debate in a legal frame as elites engaged in the security dialogue and elites engaged in the constitutionalist dialogue jointly determine how far emergency powers are invoked. Local forces of resistance often rely on the tactics made available within domestic constitutional orders, bolstered by international human rights support and also (typically) by appeals to the memory of past horrors that have underwritten both the domestic and international human rights system. That is how the present international state of emergency has been concretely negotiated – and sometimes blunted – in particular sites.

To show how this works, we now turn to the analysis of some specific cases of states that have responded to the call of international security law to change their domestic laws after September 11. Looking at specific cases helps us to trace out the effects of global and local influences, the negotiations among different local elites, and the resulting mix of laws that reflect participation in the anti-terror campaign.

PART II: CASES

Part II of the book develops a series of case studies in which the elements outlined in Chapter 2 that comprise states of emergency are deployed to trace the uses of emergency powers before and after September 11, using the theoretical frame drawn from globalization theory that was outlined in Chapter 3. Because I am interested in understanding not only what makes states slide into emergency but also what prevents them from doing so, I have tried in each chapter to pair two states that are either similar in their long-term legal profiles or that are subject to the same set of external and internal constraints in the recent development of their domestic law. The key point of difference between the two countries in each pair, however, is that one country in each pair was an eager participant in what Lorraine Weinrib has called the "post-war constitutional model" (that is, the first wave of public law globalization that linked domestic constitutions to transnational rights regimes)¹⁰³ and the other country in each pair either sat out that wave of public law globalization or actively opposed it (having an exceptionalist view of its own law or a deeply suspicious view of international law). The first wave of public law globalization linked a variety of countries in a common constitutional project in which the domestic advocates were part of transnational networks that both spread and validated these constitutional ideas. The post-September-11 security law framework unites a different set of domestic advocates with their transnational counterparts as well.

In the chapters below, I have identified Canada and Germany as being leading participants in the first wave of public law globalization; Spain and India as being important contributors to it from a bit of a remove and in a less thorough-going way. Among countries that did not actively participate in institutionalizing in their domestic law the transnational human rights framework of this first wave of public law globalization, I look only at governments with entrenched constitutional systems, but where their domestic constitutional courts and governmental institutions did not hook themselves up to the transnational constitutionalist network. In the chapters below, I have identified the US and the UK as having firmly entrenched constitutional systems in which domestic exceptionalism is exalted and Russia and Pakistan as more recently arrived constitutionalist systems that have made some efforts to join the transnational constitutionalist movement but whose dominant legal framework shows mostly exceptionalist tendencies. The contrast I am trying to explore here is between those constitutional systems that were already deeply engaged in the transnationalist dialogue before September 11, seeing their constitutional orders as part of a global constitutional movement, and those that remained exceptionalist, seeing their constitutional histories primarily as purely national accomplishments. In this

¹⁰³ Lorraine Weinrib, Canada's Constitutional Revolution: From Legislative to Constitutional State, 33 ISR. L. REV. 13, 30 (1999).

way, I hope to see whether adoption of the transnationalist constitutional model before September 11 made any difference in the extent to which states have embraced emergency powers after September 11.

In each of these chapters, I trace the history of emergency powers as well as the connections between domestic constitutional law and transnational human rights law in each country and then explore each country's legal responses since September 11. Each of the case study chapters compares two countries facing similar legal histories and/or similar present legal constraints, except that one country in each pair was an enthusiastic participant in the first wave of public-law globalization and the other stayed outside this movement. Thus, I compare the US with Canada, the UK with Germany, Russia with Spain, Pakistan with India.

	Participated in first wave of	Did not participate in first wave;
	public law globalization; tied	exceptionalist views of domestic
	domestic law to international law	law
North American former British	Canada	US
colonies		
Core EU states	Germany	UK
Europe's edges/	Spain	Russia
post-authoritarian governments		
South Asian edges of the former	India	Pakistan
British empire		

Choice of Cases for Part II of the Book

The conclusion from these case studies overall? The more complete the acceptance of the first wave of public law globalization was before September 11, the more resistant the country has been to the counter-constitutional temptation of emergency powers. Or, put differently, the more a country participated intensely in the first wave of public law globalization dealing with human rights, the less thorough-going has been its participation in the second wave of public law globalization dealing with transnational security law. It would seem from these case studies that having a strong transnationally backed constitutionalist culture provides local resources for fighting the slide into emergency powers.

Chapter 4: North American Emergencies: The United States and Canada¹⁰⁴

The US and Canada share a legal culture descended from the British constitution and the common law. The process of the patriation of North American constitutions was obviously more rapid in the US than in Canada, but in both countries, there is a surprising similarity of methods for dealing with states of emergency through the 19th century up through the early post-WWII period. In the 19th century, states of emergency typically involved local governors declaring local instances of martial law and then calling in federal troops at the discretion of the federal executive to put down local disturbances. But by WWI, both countries tended to regulate national emergency powers by statute. In Canada, the statute (the War Measures Act) tended to be a general all-purpose emergency law (used in WWI, WWII and the October Crisis of 1970). In the United States, Congress tended to write special emergency powers into individual pieces of legislation, generally eschewing general emergency laws. In both the US and Canada, emergencies were typically easy to get into and hard to get out of. In many emergency situations, executives were reluctant to let go of emergency powers when the emergency was over. In neither place, until recently, was the state of emergency brought fully under the constraint of constitutional law.

The paths of the two countries began to diverge as Canada recoiled from the use of emergency powers in the October Crisis of 1970, when the War Measures Act was invoked and federal troops occupied Québec. In recovering from this emergency, Canada moved decisively toward tying its own constitutional law to the transnational human rights movement through the full patriation of its constitution. This occurred in 1982 with the adoption of the Constitution Act 1982, centrally featuring the Charter of Rights and Freedoms. Canada's new emergencies law, passed after the Charter went into effect, clearly contemplated that all emergencies were to be subject to constitutional order and reformed its emergency laws only in cosmetic and piecemeal ways in the 1970s as part of a general movement toward good governance after the discovery of massive abuses of civil liberties in the name of national security. The Foreign Intelligence Surveillance Act, the National Emergencies Act, the International Emergency Economic Powers Act (IEEPA), and the War Powers Resolution were intended to prevent executive abuse of emergency authority during times of trouble.

¹⁰⁴ A version of this chapter appeared as Kim Lane Scheppele, *North American Emergencies*. 4 I-CON (INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW) 213-243 (2006) and the American part of the chapter alone was elaborated in Kim Lane Scheppele, *Small Emergencies*. 40 GEORGIA LAW REVIEW 835-862 (2006).

When September 11 occurred, both Canada and the US considered sweeping anti-terrorism laws, as the UN Security Council required, but the process of civil society mobilization substantially watered down the emergency legislation being considered in Canada. In addition, constitutional constraints on government action (announced by courts and monitored by civil society) has prevented the emergency powers that were enacted from being invoked routinely in Canada. As a result, the most controversial features of the law that eventually passed have rarely been used. The investigative hearing, which gets judges involved in terrorism investigations by using them to interrogate terrorism suspects outside of the protections of the privilege against self-incrimination, has been used only once. The new system of preventive detention has never been used. As I write, the most constitutionally controversial element of Canada's counterterrorism policy – which consists of issuing security certificates against aliens suspected of terrorism, certificates that permit indefinite detention without charges or rapid deportation without procedural safeguards) is now being challenged before the Supreme Court of Canada.

By contrast, the USA PATRIOT Act was just the beginning of a variety of legal measures that raised constitutional questions. Even more extreme measures include (among those we know about at this point): the detention of even citizens as enemy combatants by executive decree, aggressive uses of the material witness statute to create a system of preventive detention, the creation of a far-reaching program of warrantless wiretapping, the failure to notify Congress (or even the whole of the relevant committees) about edgy new interpretations of law as well as secret anti-terrorism programs, the use of the Office of Legal Counsel's advice to declare laws secretly unconstitutional and therefore to give the president a reason not to follow them, the use of signing statements to create ambiguity about whether and how the president intends to enforce (or even to follow) the law, the appeal to courts to dismiss any cases challenging these policies through a state secrets privilege and of course the decision to go to war in Iraq itself. As a result, the US fell much farther into a state of emergency than did Canada after September 11.

Of course, one obvious explanation for this is that the US was attacked on September 11, but Canada wasn't. This explanation seems far less obvious when one considers both that Canada had, throughout its history, considered all threats that targeted primarily the US as its own and that other states, apart from Canada, reacted in an even more extreme way to September 11.

I argue that Canada's culture of constitutionalism, developed by hooking Canada's constitution to transnational human rights developments in the 1980s, acted as a sort of vaccine against falling too far into the use of emergency powers after September 11. Even when a conservative government more openly sympathetic to the US government came into power, there was no general invocation of tough emergency powers. By contrast, the US, which has always had an exceptionalist constitutional culture

and a sense that the government always rights itself after anti-constitutional excesses has used emergency powers in an extreme way after September 11.

Chapter 5:

Varieties of Europe and the Different Trajectories of Constitutional Constraint: The United Kingdom and Germany¹⁰⁵

While Germany and the UK are quite different in their specific legal histories before the post-WWII period, they are both now increasingly integrated into a common European legal framework. Both are bound to follow the European Convention on Human Rights, along with the decisions of the European Court of Human Rights. Both are core member states of the European Union with its increasingly thick web of common legal ideas. Both were not specifically and directly attacked in September 11 but both were used as staging grounds for the attack. Both had had traumatizing episodes of domestic terrorism in the 1960s and 1970s; both had – in current political judgment – overreacted at that time. Both had attempted to put their own emergency powers on a more rights-based footing since the last wave of terrorist attacks.

Throughout the 19th and 20th century, Britain and Germany had quite different constitutional histories. Britain's constitutional trajectory was, during this period, unbroken, and it portrays itself as increasingly rights-protective and increasingly democratic over this period. Germany's constitutional trajectory was, at the same time, full of stops and starts (the constitution of 1848 never went into effect; Bismarck's unification constitution did not include rights; the model Weimar constitution fell for lack of liberal defenders). Germany's constitutional self-conception after WWII emerged from shame, remorse, anger at the division of the country and convinced that the fall from constitutionalism would never happen again. By contrast, Britain was left with its constitutional framework intact at the end of the war. One might guess from these histories that, if there were some current difference between the two countries in their tendencies to protect constitutional frameworks after September 11, Britain would have a more robust constitution in the face of international pressures than would Germany.

But Germany has been the model of building transnational human rights into its own constitutional structures, using its own history as the leading negative example to show why strong adherence to transnational human rights norms had to stand at the core of a constitutional order. Britain,

¹⁰⁵ Parts of this chapter appeared in Kim Lane Scheppele, *Other People's PATRIOT Acts: Europe's Response to September 11*. 50 LOYOLA LAW REVIEW 89-148 (2004).

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like the US believing itself to have a historic self-correcting constitutional culture that needed no modification, stayed outside these developments and has generally developed in an exceptionalist way.

As a result, it was Britain rather than Germany that fell into extraordinary uses of emergency powers after September 11. Britain's response was, if anything, more extreme than that of the United States on the domestic front¹⁰⁶ and certainly far more extreme than that of Germany. The UK declared a formal state of emergency and derogated from the European Convention on Human Rights with respect to powers of indefinite detention. The government also seized new powers to bypass normal warrants, limit the right to counsel, and engage in unlimited detention of both aliens and nationals without charge. A sweeping new terrorism law was passed in the UK in fall 2001, with the explicit justification that the UK was following Resolution 1373. This 2001 anti-terrorism law added to the rather draconian anti-terrorism law that had gone into effect shortly before September 11. Since that time, the government has pushed through radical new civil emergencies bill that lowers the bar for declaring emergencies and allows ministers to make binding law without parliamentary participation. Police aggressively used their new military-like powers to harass political dissenters through the creation of the newly authorized "cordon zones"; the Blair government went to war in Iraq against massive popular opposition. The government claimed the right to use evidence acquired by torture in locking up suspected terrorists, and the Law Lords told the government that the courts could not consider this evidence in determining whether the detentions had been properly authorized. But, the Law Lords said in smaller print, it was ok for the executive branch to use evidence acquired by torture in its initial judgment to detain potential terrorists.¹⁰⁷

Germany, by contrast, passed the laws that the Security Council required of it, but civil society mobilization trimmed the harsher edges from the law, as had occurred in Canada as well. The role of the Office for the Protection of the Constitution (the domestic intelligence service) has been expanded and this office is now permitted to coordinate its activities in unprecedented ways with the federal police. New identity cards with biometric data were authorized; Germany's famously strict protection of personal data was loosened. But civil liberties complaints have been few in Germany, despite the fact that Germany has caught more people directly involved in the planning of the September 11 attacks than any other country. Germany has insisted on using public evidence in regular courts to convict al Qaeda members and has shown substantial success in fighting terrorism while not derogating from its

¹⁰⁶ As we add up all of the programs that the US engaged in secretly after September 11, this may not continue to be true. But in the public programs that the governments rolled out after September 11, those in Britain were more extreme in their compromises of civil liberties and (such as it were) separation of powers than were those of the US, and certainly far more than Germany.

¹⁰⁷ Opinions of the Lords of Appeal for Judgment in the Cause, A (FC) and others (FC) v. Secretary of State for the Home Department, [2005] UKHL 71 at 68-69, available at <u>http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm</u>.

constitutional norms. The Constitutional Court has indicated that it would not change its constitutional standards in view of the anti-terrorism campaign and has in fact struck some laws that, in the view of the Court, exceeded constitutional limits. So, for example, the law that enabled the government to shoot down civilian aircraft that had been hijacked was deemed unconstitutional in its failure to protect the lives of civilians.¹⁰⁸ And the law that enabled the government to use electronic eavesdropping in houses was also deemed unconstitutional because it had no way to exempt legally privileged communications from being overheard.¹⁰⁹ The European Arrest Warrant, rushed into existence after September 11, also ran afoul of the Federal Constitutional Court's understanding of proper rights protections.¹¹⁰ In general, Germany has not departed from its normal constitutional procedures nor derogated from the European Convention, as the UK has.¹¹¹

As with the comparison of the US and Canada, in the comparison of the UK and Germany, it is the country that had most firmly linked its domestic constitution to transnational practices and had firmly entrenched international human rights in domestic law that resisted the slide into the use of emergency powers. All four countries changed their laws to comply with Resolution 1373, but the transnational constitutionalist countries (Germany and Canada) kept within constitutional bounds more clearly than those countries whose constitutions were the product of purely domestic influences (the US and the UK).

Chapter 6: Varieties of Europe and the Wounds of Authoritarianism: Spain and Russia¹¹²

Spain and Russia are worlds apart in many ways, but they share some crucial features that allow a comparison of their counter-terrorism policies to be meaningful. First, both have always been at the

¹⁰⁸ For an official English-language summary of the case, see <u>http://www.bundesverfassungsgericht.de/en/press/bvg06-011en.html</u>. For the German judgment, see Judgment of 15. February 2006 – 1 BvR 357/05,

http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705.html .

¹⁰⁹ Judgment of 15 March 2004.

¹¹⁰ For the official English-language summary of the case, see <u>http://www.bundesverfassungsgericht.de/en/press/bvg05-064en.html</u>.

¹¹¹ This was written before the election in which Angela Merkel became Chancellor and needs to be revisited in light of the new anti-terror policies passed since she came to power.

¹¹² The Russian part of this chapter was published as Kim Lane Scheppele, 'We Forgot About the Ditches:' Russian Constitutional Impatience and the Challenge of Terrorism. 53 DRAKE LAW REVIEW 963-1027 (2005).

edges of Europe, with strong independent political traditions overtaken at crucial periods by non-European empires. Both are complex federations of different peoples that speak different languages and have different senses of their political histories and futures. In the 20th century, both went through periods of strong authoritarianism – Spain for about 40 years and Russia for about 70. While Spain emerged from authoritarianism in the 1970s, however, Russia emerged only in the 1990s. Spain's economic transition and development have been far smoother and more successful than Russia's. Since the political transition, however, both Russia and Spain have developed independent and sometimes outspoken Constitutional Courts. Both have submitted themselves to the human rights discipline of the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. But Spain is in the EU and no one thinks that Russia will ever join.

With respect to terrorism, Russia and Spain have had similar problems in their recent histories. Both have fought off domestic terrorism from breakaway regions since they emerged as post-authoritarian states. In fact, both Spain's and Russia's current secessionist movements were incubated during the authoritarian time by severe and targeted repression of both Basques and Catalans in Spain and Chechens, Ingush and others in Russia. As international terrorism has grown, both Spain and Russia have been targets of Islamist-driven terrorist attacks. Still, both have faced significant daily threats from domestic terrorist groups whose secessionist ambitions date from the severe repression under the prior authoritarian regimes. With threats coming from two distinct directions (domestic and international), both Spain and Russia entered the international anti-terrorism campaign with a great deal of prior experience and with legal frameworks for combating terrorism already in place before September 11. Since September 11, however, both have suffered serious campaigns of terrorist attack in which the government has been called upon to distinguish which attacks are caused by domestic groups and which by the international ones.

Before September 11, Spain entered the world of transnational human rights protection, with a strong Constitutional Court taking account of and elaborating the new transnational constitutional jurisprudence. But Spain had also already aggressively fought terrorism, within a legal framework that included special investigative magistrates to handle terrorism, a national court with unique jurisdiction over terrorism and a strong tendency to bring terrorism suspects to trial in open court. Some of Spain's policies – for example the legal practice of incommunicado detention of terrorists – had come in for international human rights criticism even before September 11. And some of the policies particularly of Spain's then-prime-minister Aznar were very tough on domestic terrorism, rounding up suspected domestic terrorists in giant sweeps as well as banning the political parties and newspapers sympathetic to Basque independence. Immediately after September 11, there were only a few changes in Spanish law

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(and then, mostly in the area of terrorism finance) because their counter-terrorism policies already addressed many of the matters that the Security Council resolution called upon all states to address.

Before September 11, Russia had partially tied its domestic institutions to the first wave of public law globalization. A new and aggressive Constitutional Court tried to keep the president within legal bounds. As the world witnessed, however, President Yeltsin resisted such constraint and engineered a limited civil war in which the parliament was bombed, the Constitutional Court was closed and a new constitution giving the president extraordinary powers was pushed through in a suspicious referendum.¹¹³ Before September 11, the Russian state had used military methods to suppress drives for Chechen independence and had not generally used the courts to address the matter. Nonetheless, some judicial independence was able to emerge, along with striking revisions of constitutional criminal procedure and general increases in the reach and reality of law, trends that accelerated quickly when President Putin came to power. Before September 11, Russia showed serious signs of becoming a constitutional rule-oflaw state in ways that it had not been for much of its history.

Since September 11, however, both Spain and Russia have been hit with serious suicide bombings in their core cities. The Madrid train bombing in March 2004 was traumatic and dramatic; Russia has had multiple bombings of the Moscow metro system and a series of suicide bombers who exploded themselves and caused casualties in central Moscow in 2003 and 2004. Plus Russia has had mass hostage-takings in two hospitals in Southern Russia in the late 1990s, in a Moscow theater in 2002 and a school in the Caucasus in 2004, with heavy casualties of innocent civilians in all cases. The reactions to these attacks in the two countries was quite different.

Spain, a country that embraced the first wave of public law globalization, had an election immediately after the Madrid attack in which the population voted for a peaceful change of both government and government policy in response to the terrorist attacks. The new government softened its policy against domestic separatist groups and has attempted to find a wider variety of methods for dealing with the international terrorist threat. The Spanish government now finances the building of mosques and the training of moderate religious leaders for these mosques, an approach to the anti-terrorism campaign that eschews emergency powers in a particularly strong way. The new government even offered a cease fire and negotiations with the ETA Basque terrorist group.

In Russia, reaction of the state to its domestic terrorist attacks was primarily military, at first cracking down in Chechnya while leaving the rest of domestic law relatively untouched. But after the shocking siege of the school in Beslan in the Northern Caucacus, President Putin proposed to radically

¹¹³ For a detailed account of the events of 1993 leading up to Yeltsin's declaration of emergency powers, see Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757 (2006).

change the structure of government to increase the "vertical of power" (which is to say, the ability of the executive to control all levels of the state). He pushed through the Parliament laws that eliminated the popular election of regional governors and changed the procedures for national election of representatives to the lower house of the Russian parliament to eliminate single-member districts. There are also serious discussions about authorizing state kidnappings of family members of terrorists to use as bargaining chips in hostage negotiations.¹¹⁴ These moves are being justified as part of the anti-terrorism campaign. In October 2004, Russia sought and got a resolution from the UN Security Council setting up a review committee within the Security Council framework to consider expanding the set of internationally listed terrorists to include those who may not be affiliated with either the Taliban or al Qaeda. But it is clear that participation in the anti-terrorism campaign has given President Putin more room for maneuver in his own domestic space, centralizing power and using the threat of terrorism as a reason for curtaining individual rights.

In the Russian/Spain comparison then, the state (Spain) that had tied its domestic constitutional changes to transnational human rights models reacted in a much less extreme way than did the state (Russia) that has always had an exceptionalist view of its own law. In both cases, the states experienced direct terrorist attacks after September 11 that could be tied to the international Islamist terrorist network. But only in Russia's case did it change its constitutional structure and general legal framework to crack down on terrorists.

Chapter 7: Traces of Empire: India and Pakistan

India and Pakistan were both, of course, part of the British Empire, governed through the same Government of India acts and the same British colonial emergency laws until independence of both states in 1948. From the start of their lives as independent states, however, India and Pakistan took different constitutional trajectories. India quickly adopted a constitution that has largely remained in force ever since (with only one major long-term suspension for a national emergency, though it has had perennial shorter and more local emergencies). Pakistan, however, ran into constitutional troubles almost immediately because repeated military coups and extensive constitutional revision has weakened the constitutional order. Both India and Pakistan have similar legal systems and similar frames of legal reference (with the high courts citing British and American precedent but not each other's), but different

¹¹⁴ At the time of the Beslan siege in 2004, the Russian media reported that family members of the hostage-takers had been detained in Chechyna in order to be used in the bargaining and negotiations over the release of hostages.

experiences of emergency governance. In fact, the Pakistani Supreme Court has developed the most sophisticated judicial theory of emergency powers that I am aware of – based on a Kelsenian theory of revolutionary legality. It is a jurisprudence of necessity; Pakistan has also had more military governments and states of emergency than other most other still-constitutional regimes have had. The Indian Supreme Court, though also faced with a state of emergency in the 1970s, changed its jurisprudence afterwards to more firmly accept the first wave of public law globalization, something that the Pakistani court has not been able to do.

After September 11, both Pakistan and India adopted draconian new anti-terrorism laws. With anti-Muslim agitation promoted by India's then Hindu-nationalist government, the new Prevention of Terrorism Act (POTA) was ripe for abuse. But then India, after an initial period of harsh treatment of Muslims and of threatening to go to war with Pakistan over Kashmir, changed government in a surprising election, and the new government has repealed the anti-terrorism law, reverting back to normal governance. India's period of domestic exceptionalism in the name of terrorism was quite short after September 11. As in Spain, peaceful elections in India changed the government's direction in the post-September-11 anti-terrorism campaign. Of course, major attacks on commuter trains in Mumbai in summer 2006 may cause the government to change course. But so far, at least, there is no talk of bringing back a new and harsh emergency law to handle terrorism.

Of course, the fact that September 11 occurred when Pakistan was being ruled by a military governor in a state of exception didn't help entrench constitutional governance at that point. But Musharraf had seized power in a popularly approved coup, and he had been in the midst of turning back power in democratic elections when he got caught up in the global anti-terror campaign. Local elections in fact took place after September 11. The reaction to the declaration of the Global War on Terror, largely seen locally as the Global War against Muslims, could be seen as Islamist extremist governments were elected for the first time in two of Pakistan's four regions, something that had never come close to occurring before. In previous elections, the Islamist share of the vote in national elections had never before topped 10%. But September 11 – and the anti-terrorism campaign that followed – radicalized part of the Muslim population, making it clear that national elections might not keep a secular constitutionalist government in power. This may have been part of the reason why President Musharraf stopped talking at that point about elections to the position of president.

For these domestic reasons, Pakistan has seen far greater changes in its constitutional order than has India after September 11 and it appears to be falling more and more deeply into emergency as time goes on. In addition to enacting draconian new anti-terrorism laws since September 11, President Musharraf has pushed through a series of constitutional amendments consolidating his power and bringing the military overtly into the normal decision-making of the government for the first time. These

changes go well beyond the anti-terrorism campaign and have changed the basic structure of Pakistani constitutional governance. Under international (particularly American) pressure, Musharraf has used harsh measures to bring the tribal lands under federal control, has set the security services loose to engage in domestic surveillance and has used harsh tactics to apprehend and interrogate terrorism suspects.¹¹⁵ The democratic elections that Musharraf had promised before September 11 to bring the government out of emergency into normal governance are nowhere in sight.

Here, too, in considering two countries with similar histories until the post-war period, we find that the country that joined the international constitutional order resisted outsided emergency powers, even when clearly provoked by domestic terrorist attacks. India has managed to resist panic and maintain normal criminal investigation methods for fighting terrorism, with some success. Pakistan, by contrast, fell more completely into dictatorial rule, outsized emergency measures and flaunting of the rule of law.

¹¹⁵ As I write (September 2006), an agreement has apparently been reached between the center and the tribal lands in which remnants of the Taliban have apparently been regrouping and where Osama bin Laden is, by general agreement of international security services, hiding. The Pakistani government agreed to withdraw the national military if the tribal lands agree that they will police against fundamentalist foreigners putting down roots in their midst. Whether the US or the Security Council will tolerate this agreement remains to be seen.

Part III: Conclusions

(This is the part that is least developed, because it will come last in the writing. I am torn between trying to develop a normative theory of emergency powers that specifies a proper relationship between international and domestic law [see the sketchy attempt below] and a more empirically based concluding chapter that summarizes the argument and evidence developed in the book to this point. All advice appreciated on which way to go.)

Chapter 8: A Normative Theory of the International State of Emergency (ISOE)

Given that we now know that international law can undermine both human rights protection and constitutional structures, we need to return to the field of normative theory, where theories of emergency powers have largely been based. But rather than provide a domestic-law-only theory that indicates when the use of emergency powers is justifiable, we need to identify instead a proper relationship between international and domestic law. What parts of international law *should* countries absorb and what parts of international law *should* countries be wary of accepting without controls? More particularly, when should domestic constitutions trump international law and when should international law trump domestic constitutions?

In this chapter, I develop a normative theory of the relationship between domestic and transnational law that enables states to resist transnational pressures to use emergency powers. I argue that the development of a particular and strong form of constitutionalism since World War II has provided (and should provide) a set of domestically enforceable constraints on what states (or more precisely, their executives) can do to comply with international mandates. Rather than seeing international law as always superior or always inferior to domestic law, then, I argue that this new constitutionalism can act as a screening mechanism for determining when transnational norms can be domestically deployed. One does not then have to mechanically choose between monism (the view that international law is automatically part of domestic law) and dualism (the view that international law needs a separate domestic law. In fact, that is probably the wrong dimension altogether along which to think the proper links.

If the domestic constitutional framework provides a legal basis for the realization of certain normative criteria (roughly speaking, entrenching the post-war constitutional model that values separation of powers, due process and human rights), then it should be the relevant normative standard for assessing

when international norms should be locally adopted. In short, I argue that certain forms of domestic constitutionalism can and should provide a normative check on the applicability of this new form of international public law. Of course, this particularly strong form of domestic constitutionalism has international roots and a transnational support network, so I am not advocating localism against internationalism. Instead, I am advocating that a particular kind of transnationally infused local constitutionalism can serve as the normative baseline against which international security campaigns can be evaluated.

In many ways, my argument generalizes from the experience of Germany within the European Union. The Federal Constitutional Court of Germany has tried to provide locally invariant standards for the absorption of transnational European legal norms. So, for example, the Constitutional Court has provided guidelines that transnational European law would have to follow in order for it to be consistent with the German constitutional order, which itself still provides the ultimate check. This sort of relationship – where local constitutionalist norms provide a filter through which transnational norms pass before they can be absorbed domestically – might serve as a model for what constitutionalist domestic legal systems can do when confronted with the challenge of international security law. Strong domestic constitutional can absorb the best of international law while being wary of its dark side. But not just any constitutionalist order can do this.

I argue, based on the case studies in Part II of this book, that simply having a relatively strong constitutional order is not alone enough. The constitutional orders that place human dignity at their core and that develop a system of rights and protections emanating out from this core are both empirically more likely to withstand the challenges and normatively more likely to produce better results. Exceptionalist constitutionalist orders, those that find their norms and values only within their own histories, are much more vulnerable to the lure of emergency powers and much less likely to notice their own slides into practices unworthy of their imagined histories.

Appendix A:

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Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, *Reaffirming also* its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), *Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons and or controlled, directly or indirectly, by such persons and of persons and of persons and entities owned or controlled, directly or indirectly, by such persons and of persons and entities owned or controlled, directly or indirectly, by such persons and of persons and entities owned or controlled, directly or indirectly, by such persons and of persons and entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. Decides also that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. Calls upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. Directs the Committee to delineate its tasks, submit a work programme within 30 days of the adoption

of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.