

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

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**(Schmooze Excerpt from Book Outline)**

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 anti-constitutionalist 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.<sup>1</sup> 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

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<sup>1</sup> 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.

makes noncompliance at least theoretically subject to sanctions, the UN Security Council has required states:

- 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.<sup>2</sup>

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.<sup>3</sup> 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."<sup>4</sup>

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<sup>2</sup> These four elements constitute the spine of the first and most sweeping resolution, Security Council Resolution 1373 (attached in the appendix to this summary).

<sup>3</sup> 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](http://www.un.org/Docs/sc/committees/1373/submitted_reports.html).

<sup>4</sup> Id.

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 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,<sup>5</sup> 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

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<sup>5</sup> 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.

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.

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 untrammelled 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 anti-terror 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.<sup>6</sup>

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

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<sup>6</sup> 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.

[http://www.un.org/Docs/sc/committees/1373/human\\_rights.html](http://www.un.org/Docs/sc/committees/1373/human_rights.html) (visited 4 September 2006). None of these other forums have sanction power, however.

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.

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.<sup>7</sup> The responses to terrorism may look purely domestic, but they are transnational in crucial ways.

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<sup>7</sup> 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.

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, 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 terror-implicated 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 anti-terrorism 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 effects. As a result, many of the most important and dramatic events – the fall of the Towers, the 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.”<sup>8</sup> While law never lives up to its own advance billing and while 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.

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<sup>8</sup> E.P. THOMPSON, *WHIGS AND HUNTERS* (1975).

