

Security and Human Rights

Second Edition

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Security and Human Rights: Finding a Language of Resilience and Inclusion

LIORA LAZARUS AND BENJAMIN J GOOLD

SECURITY AND *HUMAN Rights* was first published in 2007, six years after the events of 9/11. We argued then that liberal democracies, if they were to withstand growing calls for exceptionalism, needed to find a way to reconcile the demands of security with a respect for fundamental human rights. With the benefit of hindsight, and having witnessed the steady rise of populism over the last ten years, this call now appears both prophetic and increasingly urgent. Today there is little doubt that populism constitutes a central challenge to liberal democratic norms, preying as it does on existential fear while promoting nationalist paranoia and stoking racial and religious division.¹ In this ‘politics of fear’, the threat of insecurity has been hyper-inflated and exploited to justify a pernicious authoritarianism.² It is against this backdrop that many academics, policy actors, and human rights activists have found themselves vilified as out-of-touch elitists or naïve experts and their calls for a thoughtful balance between security and rights dismissed as mere ‘virtue-signalling’ rhetoric.

The threat of this security populism is now so profound that core values of human rights, constitutionalism, and tolerance are under acute pressure in democracies throughout the world. At the time of writing, the signs of this pressure are all around us. The withdrawal of the United States from the

¹D Runciman, *How Democracy Ends* (London, Profile Books, 2018); Y Mounk, *The People vs Democracy: Why Our Freedom is in Danger and How to Save it* (Cambridge, MA, Harvard University Press, 2018); WA Galston, *Anti-Pluralism: The Populist Threat to Liberal Democracy* (New Haven, Yale University Press, 2018); T Snyder, *The Road to Unfreedom: Russia, Europe, America* (London, Bodley Head, 2018); S Levitsky and D Ziblatt, *How Democracies Die: What History Reveals about Our Future* (London, Penguin Random House, 2018).

²K Roth, ‘Twin Threats: How the Politics of Fear and the Crushing of Civil Society Imperil Global Rights’ in Human Rights Watch (ed), *Human Rights Watch World Report 2016*, available at <https://www.hrw.org/world-report/2016> (accessed 15 March 2019).

UN Human Rights Council, the support of the US Supreme Court for President Donald Trump's travel ban, the separation of children from their parents at the US border, the purging of the Polish Constitutional Court, the undermining of the rule of law and academic freedom in Hungary, Russia's constitutional amendment undermining the status of decisions from the European Court of Human Rights (ECtHR), the consolidation of emergency power in Turkey, the continuing rejection by the Right in the United Kingdom of the legitimacy of the European human rights regime, and the increasing political strength globally of anti-immigrant and racist right-wing populism are only a few examples of this dramatic and disturbing trend. Almost every day we hear news of another executive action aimed at rolling back the human rights advances of the last half century. As David Rieff has argued, 'the global balance of power has tilted away from governments committed to human rights norms and toward those indifferent or actively hostile to them.'³

There is no denying, however, that the erosion of fundamental rights and the consolidation of executive power in pursuit of security took (and takes) place under the watch of self-identified 'liberal' leaders. While the state of emergency in France was initiated in 2015 after attacks in Paris, it continued for six months after Emmanuel Macron came to power in 2017, and the issues of emergency powers and lethal force have recently arisen again in response to the *gilets jaunes* protests.⁴ Austria, France, Belgium, and Denmark have all banned religious dress covering the face,⁵ while the US targeted killing programme expanded significantly during the presidency of Barack Obama. The contradictions within 'liberalism', whether expressed through the pursuit of security at the expense of rights or as a blunt ideological commitment to secularism, have served only to exacerbate a pre-existing scepticism towards the liberal project in countries across Europe and in the United States. These contradictions are nothing new: the counternarratives of slavery and colonialism have long been sublimated alongside celebrations of so-called liberal values.⁶ Defending

³D Rieff, 'The End of Human Rights? Learning from the Failure of the Responsibility to Protect and the International Criminal Court', *Foreign Policy* (9 April 2018), <https://foreignpolicy.com/2018/04/09/the-end-of-human-rights-genocide-united-nations-r2p-terrorism/>. For discussion of the effects of populism on liberal constitutional norms and democratic institutions, see a recent special double issue of the *German Law Journal* (2019) 20(2&3); and T Ginsburg and AZ Huq, *How to Save a Constitutional Democracy* (Chicago, University of Chicago Press, 2019).

⁴G Koenig, 'Emmanuel Macron is on a Slippery Slope towards "Democratic Despotism"', *Financial Times* (10 March 2019). See also News Wires, 'UN Calls for Probe into "Excessive" Force by French Police at Yellow Vests Protests', *France 24* (6 March 2019), <https://www.france24.com/en/20190306-un-france-investigate-excessive-force-yellow-vests>. Regarding Europe more broadly, see Amnesty International, 'Dangerously Disproportionate: The Ever-Expanding National Security State in Europe', EUR 01/5342/2017 (17 January 2017).

⁵See the further discussion below, as well as the chapter in this volume by Rumea Ahmed and Ayesha S Chaudhry.

⁶The whitewashing of European colonialism is the subject of the European Parliament Resolution of 26 March 2019 on fundamental rights of people of African descent in Europe (2018/2899 RSP). See also R Drayton, *Whose Constitution? Law, Justice and History in the Caribbean*, 6th Distinguished Jurist Lecture (Port of Spain, Judicial Education Institute of Trinidad and Tobago, 2016); C Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York, Henry Holt, 2005).

liberalism in the face of both its historical legacy and its more recent failure to balance security with rights, remains a fundamental challenge for human rights advocates.

In times of such pressure, there is a strong temptation to jettison human rights, or even constitutionalism, as a failed paradigm,⁷ on the grounds that it is little more than a liberal façade or a thin veil of legality behind which the dirty work of security is carried out.⁸ As in the months immediately following 9/11, there are increasing signs that human rights proponents are experiencing profound self-doubt.⁹ During such moments, however, it is imperative for those engaged in the promotion and protection of human rights to return to fundamental values. While critical evaluation is essential and is certainly present in this volume, it is also important to remind ourselves of what human rights stand for, as well as the achievements of human rights and the constitutional paradigm.

While many states continue to undermine human rights norms, their efforts have thankfully been met with stubborn resistance, sometimes resulting in successful appeals to justice. Recently, the UK Parliamentary Intelligence and Security Committee published a report damning British intelligence agencies and the Foreign Secretary for their involvement in the torture and kidnap of terrorist suspects after 9/11.¹⁰ This report is the most recent of a series of inquiries across jurisdictions and institutions¹¹ and key judicial decisions¹² relating to the use of CIA-led torture and kidnapping as part of extraordinary

⁷ P.J. Deneen, *Why Liberalism Failed* (New Haven, Yale University Press, 2018). By ‘constitutionalism’ we mean a belief in constitutional government, or government limited by laws. See W. Waluchow, ‘Constitutionalism’ in EN Zalta et al (eds), *Stanford Encyclopedia of Philosophy* (Stanford, Stanford Center for the Study of Language and Information, 2017), <https://plato.stanford.edu/entries/constitutionalism/>.

⁸ M. Neocleous, ‘Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics’ (2007) 6 *Contemporary Political Theory* 131–49.

⁹ Rieff (above n 3); and K. Roth, ‘The Dangerous Rise of Populism: Global Attacks on Human Rights Values’ in Human Rights Watch (ed), *Human Rights Watch World Report 2017*, available at <https://www.hrw.org/world-report/2017> (accessed 15 March 2019).

¹⁰ Intelligence and Security Committee of Parliament (UK), ‘Detainee Mistreatment and Rendition: Current Issues’ (2018, HC 1113), <https://fas.org/irp/world/uk/isc-detainee2.pdf>.

¹¹ D. Marty (Special Rapporteur), ‘Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report’, Council of Europe Parliamentary Assembly report (7 June 2007), http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf; Senate Select Committee on Intelligence (USA), ‘Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program’, Senate Report 113–288 (9 December 2014), <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf>; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (‘Arar Commission’), ‘Report of the Events Relating to Maher Arar’ (2006), available at <http://publications.gc.ca/site/eng/9.688875/publication.html>. See also the chapter in this volume by Kent Roach.

¹² *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25; *Al Nashiri and Husayn v Poland* (2015) 60 EHRR 16; *Nasr and Ghali v Italy* (2016) ECHR 2010; *Al Nashiri v Romania* (2018) App No 33234/12; *Belhaj and Rabmatullah v Straw and Ministry of Defence* [2017] UKSC 3; *Khaled El-Masri v United States*, Inter-Am CHR Case 419.08, Report No 21/16 (15 April 2016). But see *El-Masri v Tenet*, 437 F Supp 2d 530, 539; and *El-Masri v United States*, 479 F3d 296, 300 (4th Cir 2007), cert denied, 552 US 947 (2007).

rendition processes post-9/11. While exposure of these practices came far too slowly for rendition victims, and impunity in respect of those actors who committed torture remains a serious concern,¹³ there is little doubt that the absolute prohibition on torture under international and domestic human rights law played a part in this process and will continue to have ramifications for those involved in the years to come.¹⁴ Similarly, protections against arbitrary detention have enabled courts to gradually overturn laws that sought to allow for indefinite detention without trial in the United States and Britain in the wake of 9/11. In many ways, the right to *habeas corpus* has grown in stature thanks to its role in the dismantling of the early regimes at Guantanamo Bay and Belmarsh.¹⁵ Talk of a *jus cogens* status for the right against arbitrary detention is now even being acknowledged in UK courts.¹⁶

On the other hand, some human rights protections have shown a disturbing elasticity when confronted with novel security measures. Just as the right to a fair trial has ‘adapted’ to allow for the admission of certain forms of secret evidence,¹⁷ privacy jurisprudence has shown considerable flexibility in the face of steady expansions in state surveillance.¹⁸ Similarly, there has been a notable rise in the use of immigration law as a weapon of counterterrorism, with citizenship deprivation at the most extreme end of these policies.¹⁹ Set outside the procedural safeguards of the criminal law and the full jurisdictional protections of human and constitutional rights, immigration law is a fertile ground for human rights

¹³ See Joint Committee on Human Rights (UK), ‘Closing the Impunity Gap: UK Law on Genocide (and Related Crimes) and Redress for Torture Victims’ (2008–09, HL 153 HC 553); and L Lazarus and J Blackburn, ‘Intelligence and the Criminal Law in England and Wales’ in M Dyson and B Vogel (eds), *The Limits of Criminal Law* (Cambridge, Intersentia, 2018). But see recent movements toward greater accountability: O Bowcott, ‘Police Investigating Role of UK Officers in Torture of al-Qaida Suspect’, *Guardian* (31 March 2019).

¹⁴ See the chapter in this volume by Natasa Mavronicola.

¹⁵ *Rasul v Bush* 542 US 466 (2004); *Hamdi v Rumsfeld* 542 US 507 (2004); *Hamdan v Rumsfeld* 548 US 557 (2006); *Boumediene v Bush* 553 US 723 (2008); and *A v Secretary of State for the Home Department* [2004] UKHL 56.

¹⁶ *Belhaj v Straw* and *Rahmatullah v Ministry of Defence* [2017] UKSC 3, paras 270–71.

¹⁷ The accommodation process has been at its most evident within ECHR jurisprudence. See E Nanopoulos, ‘European Human Rights and the Normalisation of the “Closed Material Procedure”: Limit or Source?’ (2015) 78(6) *Modern Law Review* 913–44; *A v United Kingdom* (2009) 49 EHRR 29; *Sher v United Kingdom* (2016) 63 EHRR 24; *Al Dulimi v Switzerland* (2016) 42 BHRC 163; and *Home Secretary v AF* [2009] UKHL 28. UK common law has shown itself to be more resistant: *Al Rawi v The Security Service* [2011] UKSC 34; and *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38. For fair trial rights in the context of the Special Tribunal for Lebanon, see the chapter in this volume by Juan Pablo Pérez-León-Acevedo.

¹⁸ See S Chesterman, ‘Terrorism, Surveillance, and Privacy’ in B Saul (ed), *Research Handbook on International Law and Terrorism* (Cheltenham, Edward Elgar, 2014). For a recent account of the steady expansion in state surveillance, see D Lyon, *The Culture of Surveillance* (Cambridge, Polity Press, 2018). See also the chapter in this volume by Arianna Vedeschi.

¹⁹ The recent deprivation of Shamima Begum’s citizenship and the death of her newborn baby in a refugee camp shortly after this decision was made have raised widespread public criticism; the decision is also the subject of a pending challenge. See V Dodd, ‘Shamima Begum Family Challenge Javid’s Citizenship Decision’, *Guardian* (20 March 2019). See also the chapter in this volume by Lucia Zedner.

limitations, and courts have been alarmingly slow to intervene when individuals have been left without the ‘protections of nationality’.²⁰ Indeed, the tendency of supposed liberal democracies to ‘export’ the dirty work of counterterrorism is a major concern.²¹

Similarly concerning is the erosion of the right to life through the continued use of targeted killing programmes. Here the reach for legal justification by democratic states, most notably Israel and the United States, has stretched international law paradigms relating to armed conflict and the proportionality of lethal force.²² In this pursuit, President Obama did little to constrain the executive power awarded to the Presidency by his hawkish predecessors. Targeted killing, as with extraordinary rendition and indefinite detention, radically undermines any claim to the moral high ground by the United States and its allies purporting to uphold ‘Western’ democratic values.²³ The stain of this programme remains indelible, especially as the victims’ families have had almost no human rights recourse or vindication. Notwithstanding vocal condemnation by human rights institutions such as the Special Rapporteurs and NGOs²⁴ and the recent condemnation of the North Rhine Westphalia Higher Administrative

²⁰ L Zedner, ‘Citizenship Deprivation, Security and Human Rights’ (2016) 18(2) *European Journal of Migration and Law* 222–42, 230.

²¹ The recent decision of the UK High Court in *El Gizouli v Secretary of State for the Home Department* [2019] EWC 60 (Admin) is a particularly egregious example of judicial deference in this respect. The Court held that the Secretary of State was entitled to authorise mutual legal assistance to the United States to assist in a criminal investigation that was likely to lead to the death penalty upon conviction, without seeking any diplomatic assurances to the contrary.

²² See C Heyns, D Akande, L Hill-Cawthorne, and T Chengeta, ‘The International Law Framework Regulating the Use of Armed Drones’ (2016) 65(4) *International and Comparative Law Quarterly* 791–827; R Goodman, ‘Why the Laws of War Apply to Drone Strikes Outside “Areas of Active Hostilities”’: A Memo to the Human Rights Community’, *Just Security* (4 October 2017), <https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/>; M Milanovic, ‘On Whether IHL Applies to Drone Strikes Outside “Areas of Active Hostilities”’: A Response to Ryan Goodman’, *EJIL: Talk!* (5 October 2017), <https://www.ejiltalk.org/on-whether-ihl-applies-to-drone-strikes-outside-areas-of-active-hostilities-a-response-to-ryan-goodman/>; N Modirzadeh, ‘Reframing the Debate: A Response to Ryan Goodman’s Memo to the Human Rights Community’, *Lawfare* (9 October 2017), <https://www.lawfareblog.com/reframing-debate-response-ryan-goodmans-memo-human-rights-community/>; and S Bachmann, ‘Targetted Killings: Contemporary Challenges, Risks and Opportunities’ (2013) 18(2) *Journal of Conflict and Security Law* 259–88. See also the chapter in this volume by Shiri Krebs.

²³ L Lazarus, B Gould, and C Goss, ‘Control without Punishment: Understanding Coercion’ in J Simon and R Sparks (eds), *SAGE Handbook of Punishment and Society* (London, Sage, 2013).

²⁴ P Alston, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum’, Human Rights Council, UN Doc A/HRC/14/24/Add.6 (28 May 2010); B Emmerson, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’, UN General Assembly, UN Doc A/68/389 (18 September 2013); B Emmerson, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’, Human Rights Council, A/HRC/25/59 (11 March 2014); and C Heyns, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’, UN General Assembly, UN doc A/68/382 (13 September 2013).

Court on the legality of drone operations conducted in Germany,²⁵ no effective remedy is available to those communities that have lost innocent lives.²⁶

Along with the erosion of fundamental rights across the globe, there has been a corresponding movement to make security the object of human rights protections. National security concerns, once seen in tension with fundamental rights, have come to be embodied within new ‘coercive human rights’, which centre on the protective obligations of states in relation to victims or potential victims of private violence – rather than being understood as a limitation on state action.²⁷ The turn to security from within human rights discourse is indicative of a broader shift towards securitisation, whereby even the concept of the rule of law and the ambition of economic development are seen as mere preconditions to the security of individuals rather than as substantive goods in themselves.²⁸ While two decades ago we might have referred to a ‘right to food’ we now speak of ‘food security’; while the ‘rule of law’ used to refer to the absence of arbitrary state power, it is now gradually being replaced by ‘security, law, and order’ rhetoric.²⁹

This shift towards protection or coercion can be viewed in a variety of ways. On the one hand, it can be argued that this move runs counter to the ever-growing perception or caricature that human rights and the rule of law limit the pursuit of order and security; and the elision of human rights with security is an appropriate response to the increasing threat of private violence. On the other hand, it also signals the corrosive influence of security politics within international political discourse. Ultimately, what these trends signal is the capacity of human

²⁵ The Court concluded that ‘the German Federal Government’s present assumption that there are no indications of violations of German or international law by the USA through the USA’s activities in Germany is based on an insufficient investigation of the facts and is ultimately not legally sustainable.’ *Faisal bin Ali Jaber and Others v the Federal Republic of Germany*, North Rhine-Westphalia Higher Administrative Court, 4 A 1361/15 (19 March 2019), https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf (translation).

²⁶ American Civil Liberties Union (ACLU) and Amnesty International et al, ‘Joint Letter to President Obama on US Drone Strikes and Targeted Killings’ (11 April 2013), available at <https://www.hrw.org/news/2013/04/11/joint-letter-president-obama-us-drone-strikes-and-targeted-killings> (accessed 20 March 2019). See also the Human Rights Watch webpage on ‘Targeted Killings and Drones’, <https://www.hrw.org/topic/terrorism-counterterrorism/targeted-killings-and-drones> (accessed 20 March 2019).

²⁷ L Lazarus, ‘Positive Obligations and Criminal Justice: Duties to Protect or Coerce?’ in J Roberts and L Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Oxford, Oxford University Press, 2012); L Lavrysen, ‘Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights’ (Cambridge, Intersentia, 2016); and N Mavronicola, ‘Taking Life and Liberty Seriously: Reconsidering Criminal Liability under Article 2 of the ECHR’ (2017) 80(6) *Modern Law Review* 1026–51.

²⁸ L Lazarus, ‘The Right to Security: Securing Rights or Securitising Rights?’ in R Dickinson, E Katselli, C Murray, and OW Pedersen (eds), *Examining Critical Perspectives on Human Rights* (Cambridge, Cambridge University Press, 2012); and L Lazarus, ‘Doing Violence to the Rule of Law’ (April 2018), available at <https://ssrn.com/abstract=3170649> (accessed 20 March 2019).

²⁹ Lazarus, ‘Doing Violence to the Rule of Law’ (ibid).

rights to be co-opted and transformed by national and international narratives about security. The adaptability of rights discourse may be both its most significant protection and its most dangerous threat.

While human rights have shown themselves both adaptable and vulnerable to the pressures associated with the pursuit of security, the landscape of security has also evolved significantly since the first edition of this book, with many of the ‘threats’ targeted by hawkish states showing signs of persistence and intractability. There is little doubt that security interventions and rights violations have themselves helped to entrench the very threats to security that states have sought to counter: one need only look at the rise of ISIS after the illegal invasion of Iraq to find a clear example of how security overreach can undermine its stated objective. The cycle of terrorism has thus continued, with fatalities rising globally.³⁰

In the Global North, the response to recent terrorist attacks has been complex. Despite encouraging signs that the centrist public is growing tired of securitised rhetoric and instead turning to discourses of resilience,³¹ terrorism in some metropolitan cities in Europe has resulted in the application of emergency conditions³² and led to a surge in Islamophobic rhetoric and violence.³³ The uneven nature of political reactions and media treatment of different types of violence and aggression has itself become a point of contention.³⁴ Certainly, the immediate and unequivocal labelling of the Christchurch mosque massacres as ‘terrorism’ by New Zealand Prime Minister Jacinda Adern stood in sharp contrast to the denialism of President Donald Trump when he has been queried about the actions of white supremacists and other right-wing extremists. In many ways, the manner in which security threats are named and explained has now become a conscious political marker in an increasingly polarised environment.

One clear point we can draw from the last decade is that governments that suggest they can ‘end’ insecurity, ‘terminate’ threats, or ‘bring this carnage to an end today’ are unlikely ever to deliver on their promises.³⁵ Far more likely is

³⁰Data shows that after 2007, fatalities from terrorist attacks globally were in decline, but this trend was sharply reversed in 2010, after which fatalities rose from 7727 to 43,566. By far the greatest number of terrorism-related fatalities have occurred in Iraq (13,000 in 2014 and 12,187 in 2016) and Afghanistan (6,119 in 2016). M Roser, M Nagdy, and H Ritchie, ‘Terrorism’, OurWorldInData website (January 2018), <https://ourworldindata.org/terrorism>.

³¹S Jenkins, ‘Media Hype about the Westminster Attacks Will Only Encourage Others’, *Guardian* (24 March 2017); and S Jenkins, ‘How Our Politicians and Media Are Helping Terrorists Win’, *Spectator* (9 April 2016).

³²See the chapter in this volume by Marc-Antoine Granger.

³³S Marsh, ‘Record Number of Anti-Muslim Attacks Reported in UK Last Year’, *Guardian* (20 July 2018). See also chapters in this volume by Aziz Z Huq; and Rumea Ahmed and Ayesha S Chaudhry.

³⁴A Serwer, ‘The Terrorism that Doesn’t Spark a Panic’, *Atlantic* (28 January 2019); A Batrawy, ‘Is it Terrorism? Post-NZ Attack, Muslims See Double Standard’, *Washington Post* (24 March 2019). See also interview with Ayesha Chaudhry, *CTV News* (15 March 2019), available at <https://www.ctvnews.ca/video?clipId=1637407> (accessed 27 March 2019).

³⁵D Trump, ‘Inaugural Address’, White House (20 January 2017), <https://www.whitehouse.gov/briefings-statements/the-inaugural-address>.

that such governments will play the politics of security, just as they have always done, to shore up their own political power. This security populism, which is premised on the vilification of outsider groups and has increasingly relied on systemic Islamophobia, is now showing its real face. Instead of more security, right-wing terrorism has risen, with devastating effects.³⁶ While the shock of the recent attacks in Christchurch is still reverberating around the globe, right-wing terrorist violence has also occurred over the last three years in Quebec, Ajaccio, Munich, Dresden, Duma, Zurich, London, Portland, Jefferstown, and Pittsburgh. These are only a few examples of a clear trend that also encompasses increasingly open expressions of anti-semitism. As the Anti-Defamation League has reported in the context of the United States, ‘extremist-related murders in 2018 were overwhelmingly linked to right-wing extremists’.³⁷ As a consequence, there have been signs that such threats are now on the radar of counterterrorism efforts in the United States and elsewhere.³⁸

As the years since 9/11 have repeatedly shown, the claim that greater security can be achieved if we are willing to accept an erosion of rights is clearly false. Yet human rights and security continue to be placed in opposition to one another, as proponents of both rights and security are repeatedly drawn into the interstices of an intractable campaign against a permanent threat. In this complex and interrelated world, human rights are increasingly tested by populists who both grossly underplay the gains to be made by safeguarding human rights and seriously underestimate the harms to security that result from their breach. Similarly, the inevitability of risk in a free and globalised society has been downplayed in favour of unrealistic claims about achieving security in order to justify nationalism and autarchism, which in turn are inherently connected to the vilification of others.

Balancing security and human rights will thus require a compelling counternarrative that appeals to the values of inclusion, resilience, and realism, and recognises that risk is the unavoidable concomitant of freedom. The case must be made, clearly and widely, that human rights are capable of accommodating security pursuits while simultaneously requiring security pursuits to be necessary, realistic, grounded in the particularities of the local contexts in which they are placed, and sensitive to the lived realities of those whose rights are engaged. In this way, human rights can constitute a moderating framework in which resilient and tolerant societies can survive and thrive.

³⁶ J Cassidy, ‘It’s Time to Confront the Threat of Right-Wing Terrorism’, *New Yorker* (16 March 2019); and J Freedland and M Hasan, ‘Muslims and Jews Face a Common Threat from White Supremacists. We Must Fight It Together’, *Guardian* (3 April 2019).

³⁷ Anti-Defamation League (ADL), ‘Murder and Extremism in the United States in 2018’ (January 2019), <https://www.adl.org/murder-and-extremism-2018>.

³⁸ C Hawkins, ‘Counter-Terrorism Operations against Right-Wing Extremism in Western Europe Increase 191% in 24 Months’, *IHS Markit* (7 December 2018), <https://ihsmarkit.com/research-analysis/counterterrorism-operations-against-right-wing-extremism.html>; D Sandford, ‘Far-Right Terror Threat “Growing” in UK as Four Plots Foiled’, *BBC* (26 February 2018); BBC, ‘Far-Right Groups Could Exploit Brexit Tensions – Police’, *BBC News* (23 January 2019); and W Cai and S Landon, ‘Attacks by White Extremists are Growing. So Are Their Connections’, *New York Times* (3 April 2019).

I. IDENTITY, RELIGION, AND CITIZENSHIP

Shortly after 9/11, Jeremy Waldron warned that the common image of balancing rights and security sublimates a pernicious distributive bias.³⁹ His instincts that the rights of marginalised minorities would be traded off in favour of the interests of the homogenous majority have since been vindicated. In many senses, the challenge for human rights defenders today is how best to confront the asymmetrical impact of rights-limiting ‘emergency’ measures, as well as the ways in which security populism has associated human rights with the protection of vilified ‘outsider’ groups.

It is telling that in the years since the first edition of *Security and Human Rights* was published, issues of identity, religion, and citizenship have moved to the forefront of discussions about security and rights, as more and more examples of the trade-off Waldron warned of have become reality. Put simply, matters of identity – be they religious, ethnic, socioeconomic, national, sexual, or gender – have now become inexorably linked with assessments of risk, calls for increasingly intrusive state surveillance, and demands for institutional discrimination and exclusion. Perhaps even more seriously, in the ongoing rhetorical assault on human rights, the linking of identity with security has become an accepted part of mainstream debates about the future of rights, as the scapegoating and othering of key groups, most notably Muslim and migrant communities, have become increasingly normalised.

In Part I of this book, we see an effort to grapple with these issues. While some of the authors question whether individualised and supposedly ‘neutral’ human rights reasoning is capable of confronting the broader systemic inequalities in the distribution of coercive power, together the chapters make clear that the dialectic between security and rights must be expanded to include a recognition of the inextricable links with wider social and personal processes of identity formation and contestation.

In her chapter, Natasa Mavronicola identifies the moral wrong of torture in the radical othering that it entails and compounds, and situates it within the ‘othering continuum’, which poses an existential threat to human rights more broadly. Building on existing accounts for the absolute prohibition of torture as ‘the archetype of the human rights edifice’ and as an affront to human dignity, Mavronicola confronts the gap between the absolute prohibition of torture in law and moral theory and its continuing prevalence in practice. Pointing to the othering behaviour that populists such as Trump use to demarcate ‘the border of humanity’, Mavronicola argues that this practice ‘both drives and is central to the act of torture’ and in turn ‘lies on a continuum with other ways in which the essence of human rights is undermined in the name of security’. Torture, for Mavronicola, is thus an extreme case of the more ‘banal’ or ‘acceptable mechanics

³⁹J Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11(2) *Journal of Political Philosophy* 191–210.

and expressions of othering that pervade counterterrorism'. This broader othering narrative is 'not only incidental but integral to the "trade-off" underpinning the pursuit of security at the expense of human rights'. For Mavronicola, much of the crisis of faith in human rights that has consequently ensued is thus not a rejection of the merits of human rights themselves but rather a rejection of 'the human rights of others'. She concludes by arguing that rather than a pragmatic move to condone the distinction between 'deserving' and 'underserving' rights-bearers, this threat to human rights can be met only by a profound reaffirmation of human dignity and by respecting a dynamic integrity of law.

This concern with the implications of 'othering' for the protection of minority rights also lies at the heart of the next two chapters. Taking the burkini and efforts to ban it in parts of Austria, France, and Germany as their starting point, Rumea Ahmed and Ayesha S Chaudhry examine the ways in which rights and security narratives have been deployed in relation to Muslim women. Depicted in both religious and secular contexts as 'non-ideal females', Muslim women are frequently portrayed as a threat to the security of 'ideal citizens' – in Western democratic states as well as in religious autocracies like Afghanistan, Iran, and Saudi Arabia. As such, the regulation of their appearance and dress is a focal point not just for religious extremists. As Ahmed and Chaudhry demonstrate, it has also become a flashpoint for likewise extremist secular discourses that 'weaponise' the language of human rights. This unwillingness to see Islam in anything other than reductive terms, coupled with a denial of the fact that Muslim women can maintain multiple identities that cut across religious and secular boundaries, has led to efforts to ban the burkini and thus to criminalise the choices of an already marginalised group. More significantly, Ahmed and Chaudhry argue, rather than being recognised as holders of rights that should protect them, Muslim women are constructed as a threat to other citizens, becoming the object of state policing instead.

Echoing some of the themes explored by Ahmed and Chaudhry, Aziz Huq in his chapter looks at how conceptions of Islam and the Muslim influence the development and application of counterterrorism laws and policies. While Islam and Muslim identity are frequently used as 'criteria of suspicion' in the context of counterterrorism, Huq argues that these concepts are mobilised in variety of other, often less obvious ways. In particular, aspects of Islam and Muslim identity are deliberately singled out in public debates with a view to juxtaposing 'the moral legitimacy of the liberal state with the perceived normative bankruptcy of Islam'. As Huq rightly notes, counterterrorism policies that target Muslims not only have consequences for the promotion and protection of individual rights but also raise questions of distributive justice. Observing that 'the costs of security are borne by Muslims' – not only in the form of stigma and private violence but also in terms of 'economic exclusion' – Huq draws our attention to the ways in which the pursuit of security has exacerbated and entrenched existing forms of anti-Muslim discrimination. Although he notes in his conclusion that Muslim civil society organisations have begun to resist the steady securitisation

of Islam, given the law's inability to curb the worst excesses of security, Huq is pessimistic about the future, especially if the political landscapes of Europe and the United States continue to be dominated by right-wing populists.

In the next chapter, Lucia Zedner turns to another aspect of identity that has been transformed in the years since 9/11, namely citizenship. She focuses in particular on the mobility rights that citizenship entails and the ways they have been transformed by terrorism and the pursuit of security. Harking back to her chapter in the first edition of *Security and Human Rights*, which explored how preventive measures implemented in the wake of 9/11 had eroded fundamental rights and due process protections, Zedner argues here that efforts to limit the citizenship rights of individuals held to be 'enemies of the state' represent an even greater challenge to our commitment to fundamental rights. Noting that in some cases these measures have the potential to leave individuals stateless, Zedner contends that 'the rights enjoyed by all citizens are today more precarious and their protection less secure'. In this regard, she echoes the concerns of many of the other contributors to this volume: namely, that the relentless drive towards ever-more restrictive security measures has transformed the way we think about what were once stable ideas of national identity and citizenship, with the result that we now live in a world that in which human rights are increasingly denied to those deemed to be a threat by the state.

Changing conceptions of citizenship, particularly at the border, are also the focus of Benjamin Goold's chapter. Using 'trusted traveller' schemes such as the UK Registered Traveller Service and the US–Canada NEXUS programme as a point of focus, Goold invites us to think about the ways in which we are encouraged by the state to accept and internalise new forms of identity that do not rely merely on the traditional citizen/noncitizen binary. Under the aegis of 'security' but also in exchange for convenience and privilege at the border, many states have induced travellers to hand over large amounts of personal information in order to join the ranks of a new class that is deemed 'safe' or 'trusted'. Drawing on research that sees borders as sites of social sorting, Goold highlights how the proliferation of such programmes enables 'trusted travellers' to maintain a range of existing privileges that centre around race, ethnicity, language, education, and socioeconomic status and mirror those that perpetuate inequalities well beyond the border. The foil of these 'trusted travellers' is simultaneously constructed as groups of 'undesirable' or 'high-risk' travellers, whose plight is more easily dismissed by those who can take advantage of (and pay for) streamlined security and 'fast-track' immigration procedures. As Goold points out, this process of social sorting has been swept up into a wider neoliberal narrative that casts 'trusted travellers' as good consumer-citizens but downplays the lack of status and mobility of others. Goold therefore concludes that the emergence of 'trusted traveller' schemes does not simply pose a danger to individual privacy; such programmes also risk exacerbating existing forms of discrimination and contributing to a fractured politics that sees questions of security and immigration only in terms of 'us' and 'them'.

II. RIGHTS, ACCOUNTABILITY, AND THE STATE

Rights are traditionally understood to be held by individuals to protect them from the overweening power of the state. Yet the covertness surrounding most national security endeavours makes it difficult for courts, lawyers, legal academics, and journalists to access even basic information about the surveillance and counterterrorism activities of governments, and even more difficult to determine whether such activities are being carried out in a manner that is consistent with domestic and international law. Given the scope that modern states have for intruding into the lives of their citizens and the insulation from critical scrutiny that can result from state secrecy doctrines, the question of what it means to hold a state accountable for transgressions inevitably animates many of the chapters in this collection.

In the face of consistent efforts by states to keep their activities secret, Liora Lazarus argues in her chapter for a principle of retrospective accountability. Noting that academics must recognise the critical role they play in holding knowledge accountable, she contends that legal academics in particular have responsibilities to the rule of law that are fundamentally challenged by state secrecy. Drawing on David Pozen's categories of 'shallow' and 'deep' secrets, Lazarus points out the ways that both kinds of secrecy undermine the capacity of legal scholars to evaluate legal proceedings and state activities, thus preventing them from fulfilling one of their core functions as dialogic participants in the creation of law. According to Lazarus, the solution lies in part with a consideration of the temporality of both academic scrutiny and legal accountability. While it may take many years to unravel the secrets surrounding sensitive government activities such as counterterrorism operations, it is essential that academics impose a degree of retrospective accountability. Drawing on the right to truth and the principle of open justice in developing principles of retrospective accountability, Lazarus argues that academics have a role to play in ensuring that governments are subject to scrutiny in the future. By making it clear to state officials and judges that secret decisions can and will be scrutinised later, a system of future scrutiny would thus serve both scholarship and the rule of law.

For Kent Roach, a challenge arises from a lack of agreement about what exactly it means to hold states and governments to account. As Roach notes, if we take a narrow view of the meaning of accountability and confine ourselves to a focus on 'control, sanction, and redress', it is hard not to be disheartened by the failure of courts and legislative bodies to punish state actors for human rights abuses arising from extraordinary rendition, detention and torture at secret prisons, and other transnational counterterrorism measures. If, however, we take a broader view of accountability – one that encompasses the various efforts of the media, civil society, and academics to expose rights violations arising from the pursuit of security – then the picture is less bleak. While Roach acknowledges that much of what we have learned about the security activities of states since 9/11 has come from whistleblowers and investigative journalists – and

that the flow of such information is precarious and unsteady – the combined efforts of state and non-state actors have ensured at least a limited degree of accountability over the last fifteen years.

Notwithstanding these opportunities for optimism, it is increasingly apparent that rights as a limit on state power are under attack. Both Victor Ramraj and Robert Diab observe in their respective chapters that there are reasons to worry that the collective commitment to rights – both in terms of the interests they seek to protect and their legal status – has been significantly eroded in recent years. For Ramraj, human rights have come under particular assault from the rising tide of nationalism in many liberal democratic states. He points out the ways that this nationalism both privileges national security over the interests of vulnerable groups such as refugees and asylum seekers and is hostile to the role played by international institutions such as the ECtHR, the Court of Justice of the European Union (CJEU), and the UN Security Council.

In contrast, Diab argues that one of the challenges for rights comes from the fact that their status has come to be widely questioned in an era when the threat of mass terrorism looms large in the public and political imagination. He traces the evolution of the notion of rights as trumps since Ronald Dworkin first formulated it in 1970's and notes especially the changes that occurred in the security and human rights debate after 9/11. According to Diab, that watershed event not only led many to question the value of rights but also prompted a reimagining of the idea of (in)security. While rights may have, in principle at least, retained their status as trumps in most liberal democracies, security has also acquired something akin to a trump status. While Roach and Ramraj suggest that there are reasons to be optimistic about the future of rights, in large part due to the growing role of non-state actors in the promotion and protection of such rights, Diab is less positive. We have, he argues, reached a critical impasse in the history of human rights, during which fears of mass terror dominate news cycles and political debates, and the currency of rights has been significantly devalued.

If we are to find our way out of the crisis identified by Diab, one possible approach may lie with a re-examination of our idea of rights and their relationship to notions of the political. As Chetan Bhatt notes, at the heart of liberal conceptions of the relationship between security and rights are assumptions about the distinction between legitimate and illegitimate violence. Although Hobbes is rarely evoked in contemporary discussions of security, his ideas about the state of nature, sovereign power, and the economy of fear continue to inform the ways in which we talk about the limits of the state. For Bhatt, it is important to remember that threats to sovereign power – and to the life of the state – are forbidden in the Hobbesian conception of the state because they raise the prospect of a descent into civil war and chaos. Looked at in this way, it becomes clear that the challenge of reconciling a commitment to rights with the reality of state violence (against its own citizens as well as against those on the ‘outside’) is hardly new. Indeed, Bhatt suggests that far from being oppositional, security and rights are deeply intertwined: their relationship reflects ‘a deeper relationship

between politics and violence’ that lies at the heart of the liberal state. While Locke and his successors may have succeeded in expanding the liberal conception of rights – and at the same time helped to define the boundaries of the state – the Hobbesian-inspired fear of the state of nature continues to underpin many of the arguments that privilege security over rights.

III. PRIVACY, ANONYMITY, AND DISSENT

Since the publication of the first edition of *Security and Human Rights*, where Goold warned about the potential of surveillance to reconstitute the relationship between individuals and the state, there has been an exponential increase in the use of sophisticated and (often secret) surveillance technologies by (and between) governments around the world. Although the steady expansion of mass surveillance, communications monitoring, and data collection since 9/11 has long worried privacy activists, academics, and journalists, recent disclosures of secret surveillance mechanisms operating transnationally have also resulted in more widespread public outcries about the intrusiveness of state surveillance.

What do we risk each time we hand new surveillance powers to the state in the name of security? For Arianna Vidaschi, the key to answering these questions lies with our understanding of privacy and the legal structures that exist to protect it. In her chapter, she reflects on how the CJEU has approached the difficult task of balancing a commitment to privacy with the ongoing efforts of EU Member States to expand their electronic surveillance and data collection capacities. As she points out, the Court clearly accepts that national governments have a legitimate interest in collecting and retaining certain types of electronic data for the purposes of combatting terrorism, but it has affirmed that such activity must also be proportionate and subject to meaningful procedural safeguards. By both invalidating the former Data Retention Directive and declaring the US Safe Harbour Agreement inconsistent with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, the Court sent a clear message to Member States that privacy rights must be taken seriously.⁴⁰ Yet as Vidaschi notes, recent efforts by the United Kingdom and France suggest that some states have continued to try to minimise their obligations under the Convention by

⁴⁰ These developments led to the abandonment of the US Safe Harbour Agreement and the establishment of the EU–US Privacy Shield Framework in July 2016, which the European Commission subsequently declared was sufficient under EU law to enable data transfers to the United States. See European Commission, ‘EU Commission and United States Agree on New Framework for Transatlantic Data Flows’, EU-US Privacy Shield press release (2 February 2016), http://europa.eu/rapid/press-release_IP-16-216_en.htm; and Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield (notified under document C(2016) 4176) (Text with EEA relevance), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urisrv%3A0J.L_.2016.207.01.0001.01.ENG.

developing increasingly intrusive mechanisms of data collection and retention. While Vidaschi suggests that national courts and legislatures should commit themselves to the privacy principles that underlie the recent decisions of the CJEU, it remains to be seen whether EU states will continue to collect, process, and share large amounts of personal data in the name of security.⁴¹

While Vidaschi focuses on judicial efforts to protect the privacy of citizens from state surveillance, in his chapter, Juan Pablo Pérez-León-Acevedo considers the ways in which anonymity has been used by courts to protect the identity of victims and witnesses. Focusing on the proceedings for *Ayyash et al* at the Special Tribunal for Lebanon (STL),⁴² he develops a framework for the reconciliation of the right to anonymity of victims/witnesses and the rights of defendants within international criminal processes based on ‘contextual and particular personal circumstances’, human rights standards, national and international criminal law standards, and ‘practical considerations’. Emphasising the importance within international criminal justice of the determination of truth and the establishment of historical record, he questions the complete and pre-emptive exclusion of anonymous victim participants (as opposed to witnesses) at the STL. While recognising the inadmissibility of ‘anonymous witnesses’ as a necessary safeguard of fair trial rights of the accused, Pérez-León-Acevedo further suggests that additional and alternative measures may be introduced to reconcile the opposing interests of fair trial rights and witness security. As he demonstrates, the unique status of the STL, means that the Tribunal’s ongoing attempts in *Ayyash et al* to achieve this balance between the security rights of victim/witnesses and the fair trial rights of defendants may become an influential source for national and international courts when dealing with terrorism-related cases.

Criminal law is also the subject of analysis for the next two chapters, but the authors shift focus by highlighting some of the ways that states have employed the authority of the criminal law as a means of indirectly suppressing public debate and political dissent while ostensibly aiming to combat terrorism. Ben Saul details the ways in which overly broad and vague counterterrorism laws have been used to criminalise political resistance and substantially reduce the possibility of even nonviolent protest in many countries. Central to Saul’s analysis is the observation that some states, despite warnings from international

⁴¹ Despite the apparent advances recently introduced by the General Data Protection Regulation (Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) the courts have yet to provide definitive and specific guidance on more permissive EU instruments that deal with data protection in the context of law enforcement and security, including, for example, the Police Directive (Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA).

⁴² *Prosecutor v Ayyash et al* (STL-11-01) See the STL webpage for details about the ongoing case: <https://www.stl-tsl.org/en/the-cases/stl-11-01>.

bodies such as the International Committee of the Red Cross (ICRC), have substantially expanded their domestic definitions of terrorism. Saul is especially concerned by the use of International Humanitarian Law (IHL) as a means of justifying these increasingly restrictive counterterrorism laws and legitimising efforts to apply such laws extraterritorially. He notes that while the diminishment of unregulated space for political resistance is unevenly experienced across jurisdictions, it in many cases leads to stigmatisation and criminalisation of all forms of resistance as ‘terrorism’ and, more fundamentally, can be seen as part of a ‘mutual transnational consolidation of state authority’.

Echoing some of the themes that are central to Saul’s chapter, Helen Duffy and Kate Pitcher likewise raise an alarm regarding what they describe as a ‘global trend’ towards the criminalisation of the expression of ideas. They survey a proliferation of ‘expansive offences’ that are enforced across a range of international, regional, and national jurisdictions, against individuals who share or make available ideas and opinions deemed ‘dangerous to society’. As Duffy and Pitcher point out, it is not only direct incitement, instigation, and inducement to violence offences that have been criminalised; recent prosecutions have employed indirect incitement offences that include even speech acts which have no aim of supporting acts of violence. Such moves run counter to the well-established criminal law principles of harm and remoteness, as well as the basic rule-of-law requirements of necessity, proportionality, and foreseeability. While a turn to criminal law might be welcomed as an antidote to the exceptionalist tendency to ‘define out’ terrorism and hence as a means of bringing state counterterrorism into the fold of criminal law restraints on state overreach, Duffy and Pitcher rightly ask how far the criminal law can stretch in pursuit of terrorism prevention. Drawing together criminal principles and international human rights standards, the authors advocate for coherent and consistent guidance from international courts on the issue of freedom of expression and the *ultima ratio* basis of the criminal law as a preventive tool.

IV. EXCEPTIONALISM, RISK, AND PREVENTION

In the first edition of *Security and Human Rights*, we pointed to the rise of a global culture of exceptionalism, most notably in jurisdictions with avowed commitments to human rights and constitutionalism. Many of the scholars in that volume sought to grapple with the question of how the rule of law could be reconciled with claims to exceptional powers within a state of emergency.⁴³

⁴³ See in particular D Dyzenhaus and M Hunt, ‘Deference, Security and Human Rights’ in BJ Goold and L Lazarus (eds), *Security and Human Rights*, 1st edn (Oxford, Hart Publishing, 2007); and VV Ramraj, ‘Between Idealism and Pragmatism: Legal and Political Constraints on State Power in Times of Crisis’ in BJ Goold and L Lazarus (eds) (above).

At the time, a key issue was whether courts could oversee the use of derogations or states of emergency and whether these powers could be reconciled with a culture of justification rather than simply lending extraordinary powers a 'veneer of legality'.

Twelve years later, the debate surrounding the role of the judiciary in emergency conditions continues, evolving through richer, and often contradictory, experience. Some senior members of the judiciary showed themselves to be capable of facing down the most extreme emergency measures of the early years post-9/11, with the UK *Belmarsh* case and US *Boumediene* case becoming yardsticks for upholding a basic minimum of rights guarantees in the face of state claims to exceptionalism. In many ways, however, these decisions sit in stark contrast with a number of other judgments that have allowed for the accommodation of counterterrorism measures within the normal frameworks of human right law.⁴⁴

Amidst the global intensification of security challenges, the judicialisation of emergencies has proven to be a crucial development. No jurisdiction is more central to this discussion than France, which returned to the use of emergency powers for two years after Paris suffered terrorist attacks in November 2015. The chapter by Marc Antoine Granger is a granular analysis of the judicial and non-judicial oversight frameworks which applied during that time. Granger explains that while administrative courts have some attenuated powers to review declarations and extensions of the state of emergency, their 'actual capacity to rule on these highly political decisions is questionable'. Far more powerful are the extensive judicial powers to review and control administrative measures adopted as part of the state of emergency, which included powers to order home searches and raids anywhere and at any time, powers to limit freedom of movement of people and vehicles, powers of house arrest, and powers of temporary closure of theatres pubs and meeting places. Alongside judicial mechanisms, Granger points to the success of parliamentary controls through the activity of Parliamentary Law Commissions and the Rights Defender which has proved to be a strong 'counter-power' to executive overreach during the state of emergency. The web of controls surveyed by Granger lead him to the conclusion that while 'ultimately the state of emergency does not operate outside the rule of law', its continuation over two years requires serious interrogation and has wide effect on the French legal system even after its termination, resulting in a 'lite' state of emergency that is restrictive of freedoms within the normal law.

In the first edition, we argued that any engagement with the question of security and human rights would necessitate an engagement with the language of risk. The modalities of security prevention over the past twelve years have vindicated the predictions of authors in the first edition, most notably

⁴⁴For examples in the context of secret intelligence material, see above n 17. See also the chapter in this volume by Liora Lazarus.

Lucia Zedner and Bernard Harcourt, who drew urgent attention to the capacity for sophisticated risk technologies to legitimate pre-emptive intervention. Undoubtedly, the relationship between human rights and security is integrally bound up with what Shiri Krebs refers to in her chapter as ‘the epistemology of risk’. There are few more iconic examples of the dominance of the technology and discourse of risk over the counterterrorism terrain than targeted killing, and Krebs’s chapter is a critical engagement with the modalities of risk-based decision-making used in evaluating the potential collateral damage of targeted killing operations.

Focusing on the Israeli Special Investigatory Commission Report on the collateral damage caused by the killing of Salah Shehadeh in 2002, Krebs highlights the fundamental vulnerabilities of the decision-making process regarding such risks, as well as the challenges to public scrutiny of these decisions. Using the concept of ‘bounded factuality’, Krebs shows how biases occur in the assessment of facts when applying international law safeguards (such as the principle of precaution) to the use of lethal force. Through her analysis of the Shehadeh Commission Report and associated primary documentation, Krebs concludes that political oversight mechanisms are susceptible to the simplifications that are inherent to national security narratives and therefore unlikely to bring such complex biases to light. The Commission’s failure to explore whether intelligence errors constituted a violation of the IHL principles of proportionality and precaution prompts her to formulate a set of proposals for going forward, based on an acknowledgment of the limitations on legal fact-finding during conditions of armed conflict.

The epistemology of risk is certainly not confined to the extreme case of lethal force, as it can now be said to have transformed the criminal law and criminal justice system.⁴⁵ In his chapter, Andreas Armbrorst explores the recent rise of programmes aimed at countering violent extremism within broader civil society, arguing that these have been implemented to ‘creatively circumvent’ the structural limitations of the criminal justice system. Situating these prevention programmes alongside similar moves in a range of jurisdictions, Armbrorst points to the European Programme Preventing Terrorism and Countering Violent Extremism and Radicalization and the UN Plan of Action to Prevent Violent Extremism as examples of a shift at the international level.⁴⁶ He raises concerns about the potential of the turn to ‘pre-prevention’ or ‘hyperpreventionalism’ to ‘securitise everything’, especially where programmes engage actors within civil society beyond the traditional boundaries of the criminal justice

⁴⁵ A Ashworth and L Zedner, *Preventive Justice* (Oxford, Oxford University Press, 2014).

⁴⁶ Organization for Security and Co-operation in Europe (OSCE), ‘Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach’ (March 2014), available at <https://www.osce.org/atu/111438>; and UN General Assembly, ‘Plan of Action to Prevent Violent Extremism’, A/70/674 (24 December 2015), available at <https://www.un.org/counterterrorism/ctitf/en/plan-action-prevent-violent-extremism>.

and security sector. The German ‘Strategy to Prevent Extremism and Promote Democracy’⁴⁷ operates under the aegis of the Ministry for Family Affairs, and like the UK Prevent programme, it engages NGOs, communities, and the education sector. Although these measures appear less coercive than those often employed by criminal law and the police, they are not necessarily less intrusive and indeed risk reifying the divisions they seek to address. Armbrorst concludes by asking whether programmes aimed at countering violent extremism will be moderated by the ‘approaches, mentalities, and professional skills’ of civic society actors tasked with their implementation, or whether such programmes will result in a securitisation of these sectors.

Over-securitisation is also at the heart of the chapter by David Irvine and Travers McLeod. Taking forced migration as their focus, Irvine and McLeod argue that many of the problems associated with mass human displacement are the result of insufficient resources being devoted to the processing and resettlement of refugees, poor co-ordination between countries, and inadequate systems of identification. On this last point, Travers and McLeod argue that while a ‘necessary condition for governments to attend effectively to these issues is the ability to determine who is in their country’, existing approaches to the identification and registration of forced migrants are in desperate need of reform. Going further, they suggest that the problems of forced migration are not the product of some irreconcilable conflict between security and human right but rather a failure on the part of governments to take the challenges of resettlement sufficiently seriously. Community cohesion, the maintenance of security, and the protection of individual rights can all be achieved simultaneously, provided we are willing to provide refugees with sufficient opportunities on arrival and devote adequate resources to ensuring their ‘successful absorption into the national fabric of settlement countries’.

V. CONCLUSION

When the first edition of this collection was published in 2007, many scholars were struggling with the question of whether it is possible to reconcile a commitment to human rights with the demands of security in a post-9/11 world. More than a decade later, this fundamental tension remains at the heart of many discussions about the relationship between security and human rights. But in the

⁴⁷Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (Germany), ‘Strategy to Prevent Extremism and Promote Democracy’ (adopted July 2016), available in English at <https://www.bmfsfj.de/blob/115448/cc142d640b37b7dd76e48b8fd9178cc5/strategie-der-bundesregierung-zur-extremismuspraevention-und-demokratiefoerderung-englisch-data.pdf>. See also BT Said and H Fouad, ‘Countering Islamist Radicalisation in Germany: A Guide to Germany’s Growing Prevention Infrastructure’, International Centre for Counter-terrorism (ICCT) Policy Brief (September 2018), <https://icct.nl/publication/countering-islamist-radicalization-in-germany-a-guide-to-germanys-growing-prevention-infrastructure>.

twelve years that have passed since the first edition, we have also seen the re-emergence of nationalism and xenophobia, a hardening of attitudes towards migrants, and a dramatic increase in Islamophobia in populist security discourse. Combined, these trends mean that the liberal order underpinning the international human rights framework since World War II is now under threat. For those who seek to defend human rights and the idea that states must always, no matter how serious the emergency, be committed to the rule of law, the challenge is to make sense of these interconnected trends and to speak to the concerns of those who see rights as nothing more than a hurdle to addressing real and perceived problems of immigration, crime, and terrorism.

This will not be an easy task. While some of the most egregious attacks on rights and the rule of law have either been repelled or rolled back by courts in recent years, as many of the authors included in this collection note, politicians around the world continue to play on insecurity and demand that fundamental freedoms give way in the face of security threats. Moreover, the rise of right-wing populism and the revival of nationalistic rhetoric in democratic countries suggest that the assault on human rights is becoming even more aggressive and divisive.

There are, however, reasons to be optimistic about the future of rights and the capacity of liberal constitutionalism to provide a brake on the worst excesses of security populism. As many of the contributions in this volume demonstrate, in the years since the first edition of *Security and Human Rights* was published, both the academy and civil society have come to recognise that falling back on conventional arguments and assumptions about rights will only take us so far. Two shifts may be necessary in order to reinvigorate an effective defence of rights in the face of security mandates. First, defenders of human rights must directly and critically engage with emotive claims of insecurity and unrealistic promises of security. Rather than reacting with similarly reductive narratives, we should seek to develop a discourse of sober resilience – one that provides a serious account of the risks to security while acknowledging both the inherent constraints on democratic states in achieving security and the wider security benefits to be gained from protecting rights. Ultimately, this narrative will need to build on a recognition, even a celebration, of the risk that comes with a free society.

The second, related shift involves meaningful acknowledgment of the role that liberalism has played in the historical and continued oppression of vulnerable groups. By addressing the ways in which the law in supposedly liberal democracies has been co-opted in the name of security, we help to lay bare flaws in the individualistic liberal vision of rights and the disconnect between abstract claims of universality and lived experiences on the ground. This process of exposure should not be seen as a step towards the abandonment of the liberal human rights project but rather as part of an attempt to revive it and make it relevant to those who have, in Huq's words, borne the 'costs of security'.

The scope and variety of the chapters in this volume serve as a reminder that though they are writ large, law and security are iterative – socially, politically,

and even personally. If security populism (like terrorism) seeks to annihilate difference,⁴⁸ then to combat it we must recommit ourselves at every level to the values that lie at the heart of human rights. As a touchstone for engaging with difference, these values provide not only a means to bridge the divides that security populists so often seek to exploit but also a set of shared personal and political commitments that will help us to navigate the challenges to democracy that the pursuit of security inevitably presents.

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⁴⁸This thought is inspired by Suzanne Moore's insight: 'Terrorism sees difference and wants to annihilate it. Arden sees difference and wants to respect it, embrace it, and connect with it.' S Moore, 'Jacinda Adern Is Showing the World What Real Leadership Is: Sympathy, Love and Integrity', *Guardian* (18 March 2019).

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