

# Chapter One

## Introduction: Letters from the Front

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On 20 September 2001, in an address to a Joint Session of Congress and the American people, President George W Bush declared a 'war on terror'.<sup>1</sup> He did so, of course, in the immediate aftermath of the events of 9/11, when the United States and most of the world was reeling with shock and horror.

That address still reverberates for more reasons than the famous declaration of war. It was here that President Bush both characterised the parties to the 'war' and set the parameters of the combat:

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists ... From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

The concept of the 'war on terror' — a war between the white hats, the harried victims of aggression and the black hats, ideological extremists who threaten our democratic way of life — has proven to be both an attractive and a potent rhetorical device. It has been adopted and elaborated upon by political leaders around the world, particularly in the context of military action in Afghanistan and Iraq. As President Bush's ally, former British Prime Minister Tony Blair stated in a television interview on 16 September 2001: 'the fact is that we are at

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<sup>1</sup> The full text of the speech is available at <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>>.

war with terrorism ... it is a war, if you like, between the civilised world and fanaticism'.<sup>2</sup>

But use of the rhetoric has not been confined to the military context. The 'war on terror' is a domestic one, also, and the phrase has been used to account for broad criminal legislation, sweeping agency powers and potential human rights abuses throughout much of the world. Just as George W Bush declared, in his address that: '[w]e will take defensive measures against terrorism to protect Americans,' so too the 'fight against terrorism'<sup>3</sup> was invoked to justify a 'swift and firm'<sup>4</sup> legislative response to the perceived threat by the previous Australian federal Government. In the domestic 'war on terror', the competing needs of highly effective anti-terrorism laws and protection of human rights are conceived as a balancing act, with the metaphor of war and the state of emergency it engenders allowing the scales to be tipped in favour of laws that would be seen as overbroad in less turbulent times. So, whilst it is acknowledged that 'it is critical that our efforts do not come at the expense of our basic human rights'<sup>5</sup> nevertheless, the law must be used 'to its fullest effect'.<sup>6</sup>

Just as the 'war on terror' pervades the modern consciousness, so too, the academic landscape is littered with reflections upon the latest iteration of the phenomenon of terrorism. This collection of essays, however, seeks to bring fresh perspectives to the 'war on terror'.

The contributors to this book first came together as a group of experts from Australia, Canada, the United Kingdom, France and Germany at a workshop entitled 'Ensuring Accountability: Terrorist Challenges and State Responses in a Free Society' held at the Australian National University in Canberra in April 2006. (Readers should note that the law in the book is current up to June 2007.) The workshop was organised as part of a research project, 'Terrorism and the Non-State Actor After September 11: The Role of Law in the Search for Security' funded by the Australian Research Council.<sup>7</sup> The aim of the workshop was to bring together scholars researching and writing about terrorism from a variety of disciplinary perspectives including international law and international relations, public and constitutional law, criminal law and criminology, legal theory, and psychology and law.

Academics do not write from the front-line of the 'war against terror'. Rather they seek to write about it from a more detached and reflective point of view,

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<sup>2</sup> This statement is quoted and discussed in C McInnes, 'A Different Kind of War? September 11 and the United States' Afghan War' (2003) 29 *Review of International Studies* 165, 171.

<sup>3</sup> P Ruddock, Federal Attorney-General, 'International and Public Law Challenges for the Attorney-General' (Speech delivered 8 June 2004, at the ANU, Canberra) [7].

<sup>4</sup> *Ibid* [51].

<sup>5</sup> *Ibid* [79].

<sup>6</sup> *Ibid* [57].

<sup>7</sup> ARC Discovery Project DP0451473.

acknowledging that writing about what Australian war correspondent Charles Bean called the 'bare and uncoloured story'<sup>8</sup> requires many perspectives and is particularly elusive when the use of the very term 'war' is largely hyperbole. This collection seeks both to draw on and to engage critically with the metaphor of war in the context of terrorism. It does so by breaking the concept down into what could be seen as distinct phases or concerns of conflict.

In Part One, entitled 'Identifying the Threat and Choosing the Weapons', the three authors address topics as diverse and provocative as the British experience of Islam and the politics of terrorism (John Strawson); a critique of the proponents of torture as a weapon in the 'war on terror' (Desmond Manderson); and a critical perspective on the utility of rights language in countering the excesses of counter-terrorism laws (Wesley Pue). Each of these chapters seeks to make a point that is often overlooked in the mainstream debates about terrorism. Strawson's chapter concerns the construction of a monolithic 'Islam' by outsiders and insiders that leads to Islam's conflation with terrorism. He discusses ways of stimulating more inclusive and sophisticated conversations within and about the many forms of Islam. Manderson defends the prohibition on torture against those who argue that torture is a necessary and moral tool in the fight against terrorism. He attacks the hypothetical presented by proponents of torture in the name of counter-terrorism, which assumes that intelligence that saves lives will result, and reasserts the need to regard torture as an unthinkable, insupportable practice. Finally, Pue runs against the grain of most contemporary arguments concerning counter-terrorism, and, indeed, much of this volume, by looking at the limitations of legislated rights in preserving freedom. He argues, using the example of Canada, that bills of rights can be co-opted in support of draconian counter-terrorism measures. All three of these chapters therefore zero in on language and ideas, rather than the power of force or violence, as being at the core of terrorism and responses to it.

Part Two, 'Preparing the Ground: Balance, Proportionality, and Public Perceptions', contains three chapters that examine common perceptions of terrorism and efforts to combat it. Simon Bronitt critiques the common motif that liberty must be 'balanced' against security. He demonstrates that there is no 'balance': rather, liberties are lost in a chimerical pursuit of security. Christopher Michaelsen turns our attention to whether the courts, particularly domestic courts, should limit themselves to examining the 'proportionality' of counter-terrorist measures in human rights terms without taking on the role of judging the seriousness of the threat to which the measures seek to respond. He exposes the logical gap left by the courts that the political arms of government are then free to exploit when the courts stop short of examining the seriousness

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<sup>8</sup> Charles Bean, quoted in K S Ingles, 'Bean, Charles Edwin Woodrow (1879-1968)', *Australian Dictionary of Biography* vol 7 (1979) 227.

of the 'terrorist threat'. Mark Nolan's chapter presents data obtained through an empirical study of lay perceptions of terrorism and legislative responses to it. He demonstrates that the seriousness of particular actions are coloured by the perception that the action has a terrorist 'motive.' All three chapters assist in explaining why there is such a strong tendency to knee-jerk reactions in counter-terrorism.

Part Three is entitled 'Rules of Engagement: Beyond the Limits of the Law'. The chapters collected in this Part deal with the complex relationships between law and politics set in motion by counter-terrorist measures. Andrew Byrnes examines ways in which law may be enlisted in, or excluded from, responses to terrorism, and the capacity of human rights law and institutions to resist both co-option and irrelevance. Penelope Mathew's chapter takes a detailed look at so-called preventative detention in three jurisdictions. She provides a case study of Byrnes' themes, exploring the ways in which detention is justified as beyond the law, an exception to the law or as permitted by the law. Finally, Ben Saul discusses the complexities of one political solution to terrorism — the amnesty.

Part Four of the book, 'Reports from Two Theatres of War: Legislation, Sanctions and Prosecutions in Europe and Australia' incorporates chapters examining: the response to terrorism of the European Union as a collective actor (Jörg Monar); the role of the European Court of Human Rights in protection of human rights when dealing with sanctions imposed by the political organs of the European Union (Gabriele Porretto); the complexities of Australian terrorism offences as they have emerged through the handful of terrorist prosecutions in Australia (Miriam Gani); and the shifting border between crime and politics exemplified by executive proscription of terrorist organisations in that country (Russell Hogg).

Finally, Part Five, 'Calling a Halt: the Role of Bills of Rights' brings together two chapters that analyse the role of human rights protection in the United Kingdom and the Australian Capital Territory (Colm O'Conneide, and Andrew Byrnes and Gabrielle McKinnon respectively). These two chapters provide evidence that bills of rights can be useful tools to mitigate the harms of counter-terrorist measures. They provide a counterpoint to the earlier chapter by Pue.

Throughout the book, major themes emerge: the precipitous and reflexive passage of anti-terrorism laws in the wake of 9/11 in multiple jurisdictions; the over-breadth, over-severity and over-inclusiveness of the resulting laws; the inexorable legislation-creep as temporary measures become permanent and the political pressure to be hard on terror leads to more and more law; the real nature of the threat, its psychology and the role of the structures of government both in assessing and responding to it; the role of rhetoric and hypotheticals; the dangers inherent in human rights discourse and the very real possibility of radicalisation of targeted communities.

These common themes unite the chapters of the book, but each chapter has something different and important to say. The publication of them as an e-book is designed to allow readers to choose to read any particular chapter that interests them, or, alternatively, to engage with the volume as a whole.