Sword or shield? The influence of international organizations in counterterrorism law and policy making

Espada ou escudo? A influência de organizações internacionais no direito antiterrorismo e na formulação de políticas

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Abstract: The protections afforded citizens in human rights treaties drafted by international organisations such as the United Nations may frequently be seen as a way of protecting unpopular minorities such as offenders from the "tyranny of the majority".Yet, criminal justice policies promulgated by these same bodies can often cut, swordlike, deep into citizens' freedoms. This tension – between drives towards human rights, on the one hand, and towards criminalisation and punitive measures on the other –is particularly acute in the field of counterterrorism, where bodies such as the UN Security Council have been active since the events of 9/11. Taking the field of counterterrorism as an exemplar, it is the aim of this paper to explore the tension between the "shield" and "sword" functions of international organisations, drawing on two case studies. The first concerns the United Nations where the security of the state has secured a major advantage over the ethic of human rights, within rather than in conflict with the UN framework of international oversight. The second examines the European Union, where the

Resumo: As proteções concedidas aos cidadãos em tratados de direitos humanos elaborados por organizações internacionais como as Nações Unidas podem frequentemente ser vistas como uma forma de proteger as minorias impopulares, como os infratores, da "tirania da maioria". As políticas de justiça criminal promulgadas por esses mesmos órgãos, muitas vezes, podem cortar profundamente, como uma espada, as liberdades dos cidadãos. Essa tensão – entre impulsos para os direitos humanos, por um lado, e para a criminalização e medidas punitivas, por outro – é particularmente aguda no debate antiterrorismo, no qual órgãos como o Conselho de Segurança da ONU têm estado ativos desde os acontecimentos de 9/11. Tomando o antiterrorismo como um exemplo, o objetivo deste artigo é explorar a tensão entre as funções de "escudo" e "espada" das organizações internacionais, baseando-se em dois estudos de caso. O primeiro diz respeito às Nações Unidas, nas quais a segurança dos Estados garantiu uma grande vantagem sobre a ética dos direitos humanos, de acordo, e não entrando em conflito, com a estrutura da ONU de

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enactment of a significant body of counterterrorism legislation since 9/11 has driven radical and permanent change with significant implications for human rights.

Keywords: Human rights – Counterterrorism – International organizations.

supervisão internacional. O segundo examina a União Europeia, onde a promulgação de um corpo significativo de legislação antiterrorista desde o 11 de setembro tem provocado mudanças radicais e permanentes com implicações significativas para os direitos humanos.

Palavras-chave: Direitos humanos – Antiterrorismo – Organizações internacionais.

1. Introduction: 21st Century Challenges: globalisation, counterterrorism and criminology

One of the biggest contemporary challenges to the field of criminal law making, as in other policy arenas, is perhaps the challenge which is increasingly presented to the authority of the state itself. Within criminology, much has been written about the "hollowing out" of the state as a result of globalising (and localising) forces mirroring developments in the field of capital and business (for an overview, see: Coleman and Sim, 2005; Loader and Sparks, 2012). While the challenges are many and varied, incorporating international courts, multinational private security enterprises, cross-border policing, policy networks, and flows and technologies of global surveillance, this paper chooses to focus on the challenges to national sovereignty posed by international organisations. United Nations (UN) agencies such as the United Nations Office of Drug Control and European agencies such as Europol, circulate reports and make policy recommendations to governments and international civil society, constituting core components of the global justice policy discourse. Equally, however, other agencies affiliated with these same international organisations (UN and the European Union) promulgate and enforce human rights standards with important implications for a range of domestic criminal justice issues. Alongside the "push" towards criminalisation and punishment of "global crimes" such as terrorism, organised crime and various forms of trafficking, we may therefore identify the "pull" of human rights compliance following ratification of human rights treaties. As Muncie (2005) has observed in the youth justice field, global processes of convergence may not be as one-dimensional as they may first appear, accommodating both punitive (neoliberal) and more "progressive" impulses towards normative convergence (e.g., the UN Convention on the Rights of the Child). One area where this tension is

particularly acute is the field of counterterrorism where various policy flows have led to the post 9/11 convergence of antiterrorist policies worldwide, arguably at the expense of respect for fundamental human rights standards (Human Rights Watch, 2017). While these trends have been the subject of penetrating analysis from legal scholars (see, for example, Roach, 2015), they have perhaps received less scrutiny from criminologists (Banks and Baker, 2016: 10), reflecting perhaps a disciplinary tendency towards domestic crime or crimes of the "inside" (Loader and Percy, 2012). It is the consequent aim of this article to examine the capacity of international organisations to construct dominant narratives in the counterterrorism sphere that can marginalise alternative discourses for nation states and indeed promote policies that are in conflict with the human rights standards they themselves espouse. In exploring these tensions and their criminological implications the article draws on the "sword vs. shield" dichotomy advanced by Dumortier *et al* (2012) in their discussion of human rights in Europe. In that analysis European institutions such as the European Court of Human Rights were scrutinised for the restraint they exerted over the rise of the "penal state" in Europe or, contrariwise, their role "as a machine that encourages penal inflation" (De Hert and Gutwirth, 2005: 752). In the instant case, counterterrorism measures adopted in the post 9/11 period are examined for the lessons they hold about the role of international organisations as a "shield" against punitiveness or indeed their ability to cut, swordlike, deep into citizens' freedoms (Hamilton, 2018).

The analysis proceeds by drawing on two case studies. The first concerns the United Nations where the security of the state has secured a major advantage over the ethic of human rights, within rather than in conflict with the UN framework of international oversight (Gearty, 2017). The second examines the European Union, where the enactment of a significant body of counterterrorism legislation since 9/11 has driven radical and permanent change in at least some areas of mainstream criminal law and procedure, with significant implications for human rights (Hamilton, 2018). It is important to note at the outset that the discussion is not intended as a comparison between these two bodies, one a supranational organisation and another an international body existing to promote cooperation between autonomous states, but rather an exploration of the global Realpolitik which has all too often subordinated human rights to the perceived imperative of security.

2. United Nations

2.1. Human rights

While human rights law represents only a small proportion of the international treaties negotiated through UN processes, we should not forget that human rights remain significant today largely because they have been translated into a

body of international law underpinned by UN institutions (Weber *et al*, 2014). Moreover, moves such as the creation of the Office of the High Commissioner for Human Rights (OHCHR) in 1993 and the establishment of the International Criminal Court in 2002, have been significant in raising the profile of human rights within the UN. The wide range of human rights issues in respect of which UN treaties are now seized should also be acknowledged. Beyond the foundational treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), (which entered into force in 1976), literally hundreds of treaties and declarations have been agreed on topics ranging from racial discrimination to the prevention of torture, women's rights, children's rights, minority rights and, most recently, indigenous rights.

Against this picture of steady progress we may place the more cynical view that the ratification of UN treaties is largely "symbolic" and most states have no intention of complying with their provisions. Certainly, it barely needs stating that the intricate web of monitoring systems that has been constructed around major treaties does not translate seamlessly into human rights compliance. Problems with enforceability of rights and the deference shown to Member State sovereignty, has meant that the effectiveness of international human rights varies considerably depending on the level of commitment and determination shown by individual governments (Lepard, 2012). In similar vein, Haas's (2008) research has found positive effects on human rights compliance following the ratification of human rights treaties, but with significant variation according to mode of governance (democratic or autocratic nature, stability of the regime, etc). Indeed, a contemporary example of local agendas dominating the international one is the proposed bill in Brazil to raise the maximum time of internment for children from 3 to 10 years which, together with a constitutional amendment to allow 16 and 17 year olds accused of serious crimes to be tried and punished as adults, constitutes a clear violation of international norms (Human Rights Watch, 2018).

2.2. Security

To these longstanding concerns about enforcement we may now add claims by governments to limit human rights in the interests of state security or combatting terrorism. The tragic events of 9/11 form an important watershed in this regard, spurring not only domestic governments into action, but also marking a major shift in the capacity of international organisations such as the UN Security Council to both make and enforce the laws for the international community (Lazarus and Goold, 2007). Indeed, Gearty (2017) identifies 9/11 as a serious "hammer blow" to the fate of human rights in the contemporary era, one which tipped

the UN balance away from human rights and towards security, and, further one which, together with the economic crisis of 2008, exposed systemic faults in the architecture of the post-war global order.

On 28 September 2001, with hardly any recorded debate, the Security Council passed Resolution 1373, which required all states to ensure that terrorism and terrorism financing were treated as serious crimes without offering any guidance on how to define terrorism. One of the most controversial of these measures included travel bans and the freezing of an individual's assets based on executive listing of known terrorists. Subsequent measures have included Resolution 1624 which "calls on" states to criminalise the incitement to terrorism and, most recently, Resolution 2178 which requires all states to ensure that travel to plan, prepare, provide or receive terrorist training, or participate in or perpetuate terrorist acts be treated as serious criminal offences. These actions have been accompanied by a bureaucracy in the form of a Counter-Terrorism Committee (CTC) which, in addition to monitoring and evaluating compliance with the range of obligations set out in counterterrorism resolutions, provides a list of best practices and models for domestic anti-terrorism legislation (Powell, 2007).

The critiques that have come hot on the heels of these measures can be classed as both substantive and procedural (in terms of the manner of their introduction). In a substantive sense, the practice of "blacklisting" on the basis of names suggested to the UN Sanctions Committee by Member States can be criticised for the absence of any intervening judicial process that could check whether a suspected terrorist really is the person they are believed to be (Sheppele, 2011). Given that the person concerned will not be able to work, travel, drive or support their families, (Statewatch have described it as a "financial Guantanamo" (Hayes, 2008)), this a clear retreat from the procedural guarantees that ensure constitutionalist norms apply to the limitation of rights. Indeed, there is little doubt that the anti-terrorism programme pursued by the Security Council threatens a range of internationally recognised human rights such as the right to property and the right to due process (Powell, 2007). The absence of a definition of terrorism is another point of contention given that it falls to Member States to define it by default. The clear latitude this affords states to criminalise those who simply dissent from authoritarian regimes or to carry out their own oppressive security progamme under the cover of what Gearty (2017) describes as "western-pleasing counterterrorism clothes" is obvious (Roach, 2015). Despite these concerns, the most recent Resolution (2178), passed in response to the challenges of foreign terrorist fighters going to and returning from Syria, confirms the Security Council's commitment to the practice of listing and travel and financing bans as a means to combat terror. The resolution places travel with intent to join a terrorist

group on the same plane as terrorism financing as a global threat requiring strong national laws and robust international cooperation. Moreover, it compounds the problems discussed above in relation to the definition of terrorism in two ways. First, by linking it to "violent extremism" and "radicalization" and second, by imposing new legal obligations against terrorism "in all forms and manifestations" – not just *international* terrorism or specific forms of it (Scheinin, 2014; Roach, 2015).

Procedural criticism of Security Council action in this field is equally concerning, if not more so, given suggestions that the actions of the Security Council were in fact anti-constitutional or *ultra vires*. For various commentators, Resolution 1373 marked an important break with previous practice given that it involved the Security Council arrogating to itself the power to legislate (Szasz, 2002; Powell, 2007; Sheppele, 2011; Scheinin, 2014). While the Security Council had used its mandatory Chapter VII powers in the past against specific states or entities to force compliance with international law, Resolution 1373 constituted a mandatory order with no time limit aimed at an undefined threat, namely, global terrorism. As argued by commentators such as Szasz (2002) this constitutes a far-reaching and essentially legislative resolution that, for the first time in the Security Council's history, used binding authority under Chapter VII of the UN Charter to establish new rules of international law.

In terms of impact, virtually all member states of the United Nations have changed their laws since 9/11 to comply with Resolution 1373 and subsequent Security Council edicts. Perhaps concerningly, the Security Council's legislative acts in this area, unlike its executive and administrative decisions, have largely met with Member State acquiescence or approval (Talmon, 2005). In this regard, Sheppele (2011) observes striking similarities across counterterrorism laws in North America, China, India, Argentina and Europe:

> [V]irtually all of the laws criminalize terrorism, ease restrictions on surveillance on domestic publics, increase monitoring of financial transactions, beef up the security services, make it easier to monitor and prosecute those who may be associated, however loosely, with suspicious persons and groups, and use immigration law to crack down on non-citizens. Given that this is what Resolution 1373 ordered states to do, the similarities are not coincidental.

Human Rights Watch (2018) similarly observes that the need to comply with the most recent Resolution on foreign terrorist fighters (2178) has resulted in at least 47 countries passing foreign terrorist fighter laws since 2013 – the largest wave of counterterrorism measures since the immediate aftermath of the Twin Tower attacks.

The push to criminalise terrorism and associated activities relating to financing and travel has probably had the greatest impact in countries with no history of terrorism. Brazil is an interesting example of one such country where violent urban criminality, rather than terrorism, forms the main focus of public concern about crime (de Souza Costa, 2015). Given this focus, and the existence of very real social concerns about the use of terrorist laws against protestors and freedom fighters, for many years the substantive criminal law lacked a specific definition of the crime of terrorism (despite specific reference to terrorism in the Brazilian Constitution). Previous attempts by the government to establish terrorism as a separate crime had failed in the face of strong opposition from organised civil society (Oliveira de Sousa, 2014). In the end, it was pressure imposed by a US-led anti-terrorism body known as the Financial Action Task Force (FATF) that forced the government's hand on this issue. In 2010 FATF drafted a report urging the Brazilian government to create a counterterrorism criminal law framework in anticipation of the 2016 Olympics in Rio. That report, in turn, based its recommendations on the need for Brazil to honour its international commitments including implementation of Security Council Resolutions (1267 and 1373). From the instant perspective, the role of FATF in "enforcing" compliance with these resolutions is particularly interesting given its power to impose economic sanctions on governments that do not comply with its directives. Leading up to the congressional vote in 2016, government minister Ricardo Berzoini issued a strong appeal to law makers, warning them that if Brazil did not approve the measure it would face sanctions from the FATF for failing to comply with its recommendations (Telesur, 2016). In the event, the counterterrorism bill passed (Law No. 13.260 of 2016) incorporates a sweeping definition of terrorism as behaviour which "infringes upon persons, through violence or serious threat, and is motivated by political extremism, religious intolerance or racial, ethnic, gender or xenophobic prejudice, in order to cause widespread panic", sparking fears that it could criminalise acts of social protest. Prior to the March 2016 law, Brazil also enacted legislation to combat the threat from terrorist financing. In October 2015, Brazilian President Dilma Rousseff signed Law No. 13.170, allowing Brazil to meet international standards for the practice of countering terrorist financing, including by freezing assets related to UN Security Council Resolutions.

The Brazilian example discussed above in many ways epitomizes the tensions which exist between UN human rights bodies, on the one hand, and UN Security Council moves to criminalise conduct related to terrorism on the other. Thus, the 2016 counterterrorism bill was criticised by Amerigo Incalcaterra, the OHCHR Representative in South America, for its vaguely worded definition of terrorism which in his view was probably incompatible with international

human rights standards (Telesur, 2016). In an attempt to square this circle, the Security Council has increasingly incorporated in its Resolutions so-called "human rights clauses", with both Security Council Resolution 1822 (2008) and General Assembly resolution 62/272 recognising United Nations action to counter terrorism must fully comply with international law, including human rights law. While the creation of a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in 2005 marks an important step in this regard, significant difficulties remain with the translation of these human rights commitments into the practice of the Counter-Terrorism Committee, and it is no coincidence that the new Special Rapporteur, Fionnuala Ní Aoláin, has identified as one of her priorities the need for greater clarity in the legal relationship between human rights and international security regimes regulating terrorism (UN, 2010; Ní Aoláin, 2017).

The recent Resolution (2178) on foreign terrorist fighters does not give much cause for optimism in this regard with the first UN Special Rapporteur on human rights and counterterrorism, Martin Scheinin (2014), describing it as "panic" legislation which "wipes out the piecemeal progress made over 13 long years in introducing protections of human rights and the rule of law into the highly problematic manner in which the Security Council exercises its supranational powers". As with Resolution 1373 (2001) the Resolution contains no reference to human rights and there is a noticeable failure to maintain and further develop the idea first adopted in 2008 in SCR 1822 that the UN itself must comply with human rights when combatting terrorism. In respect of at least this most recent manifestation of UN Security Council law-making, it is difficult to disagree with Gearty's (2017) portrayal of human rights defenders as "supplicants", knocking on the door of a global counterterrorist bureaucracy that is largely indifferent to human rights. As the same author contends, it is precisely in this fashion that 9/11 and the subsequent attacks have afforded the security of the state a major advantage over the ethic of human rights, within rather than in conflict with the UN framework of international oversight (ibid).

3. European Union

3.1. Human rights

Much has been written recently on the significance of European values and human rights standards in the field of punishment, particularly the opportunities they provide for "resistance" to American-style punitive policies (Snacken and Dumortier, 2012). Snacken (2010), for example, has pointed to policies such as the rejection of the death penalty, the steady evolution of the European

Court of Human Rights (ECtHR) case law on prison conditions, and the limits placed by the Court on states' ability to criminalise certain behaviours in support of her argument that "penal moderation is in accordance with some of those fundamental values cherished by many Europeans" (ibid: 287). Taking up the mantle, Daems (2013) makes the case for a "European Penology", while emphasising the common values that unite Europeans such as a liberal and cosmopolitan tradition. In the same volume Snacken and van Zyl Smit (2013) argue that an understanding of European penology is better reached by focussing on the specific European institutional context, namely, the Council of Europe but also the European Union (EU), an actor which since the creation of the area for Security, Freedom and Justice (ASFJ) in 1999 has become increasingly active in the penal field. Here too we are witnessing a deepening commitment to human rights in its activities, with the role of human rights now formally reflected in the form of the European Charter on Fundamental Rights, now in force and legally binding on Member States when implementing EU law.

3.2. Security

Despite these strong human rights credentials, the 9/11 attacks had important ramifications for criminal justice law making in the European Union, marking a significant break with previous practice. Partly, this was due to timing: the 9/11 terrorism emergency occurred precisely at the moment when the EU was beginning to assert itself in the criminal justice field (the EU had created an "area of security, justice and freedom" in 1999) resulting in counterterrorism becoming the focal point for the development of the EU's role in this area (Murphy, 2011). The sheer volume of counterterrorism measures adopted by the EU bears testament to this with a recent report by SECILE identifying 239 such measures for the period 2001-2013 (SECILE, 2013). While implementation of some of these measures has been patchy (den Boer, 2006; European Commission, 2007), many of the most significant (and controversial) instruments in terms of their impact on domestic criminal justice, for example, the European Arrest Warrant (European Council, 2002a) have now been successfully transposed and implemented by Member States (Coolaset, 2016; European Commission, 2014).

Following the attacks the European Council hastily arranged an extraordinary (emergency) meeting of the *chefs de cabinet* in Brussels on 20th-21st September. The meeting sought to address perceived deficiencies in EU action in this area, namely, the lack of a common legal definition of terrorism, the absence of a harmonised system of penalties and a basis for accelerated extradition, and set itself the deadline of December 2001 to reach agreement on several legal acts

(Monar, 2005). While the European Commission had been working on proposals in these areas for many months it is difficult to overstate the transformative effect of the 9/11 attacks in this area: as den Boer (2006: 90) has written, "All of a sudden decisions were possible on dormant dossiers" By 27th December 2001, the EU had constructed the two main pillars of its counterterrorism strategy: a common definition of terrorism (the first such definition by an international body) (European Council, 2002b) and a Framework Decision overhauling the law on extradition between Member States (European Council, 2002a).

As the trigger for a wide range of coercive powers (Amnesty International, 2005; Murphy, 2012) the definition of terrorism is obviously critical, however, in an EU context this issue assumed particular importance as so few Member States had any specific legislation criminalising terrorism prior to the adoption of the Framework Decision in 2002 (Argomaniz, 2009; Amnesty International, 2005). Indeed, the number of Member States with legislation which criminalised terrorist acts autonomously went from six prior to 9/11 to 22 by 2007 (Chaves, 2015). Roach (2013: 29) describes this as "an explosive growth" or "viral propagation of anti-terrorism laws in Europe" whose impact should not be underestimated.

In terms of reforms at Member State level, the definition of terrorist offences inevitably led to the adoption of new criminal offences in those states without anti-terrorism legislation (Chaves, 2015). Legislation was also required in those states which already had counterterrorism legislation in place given that they all had definitions of terrorism that were narrower than the EU's (ibid). In the 2002 Framework Decision on Combating Terrorism (FDCT) (European Council, 2002b) these new offences took the form of directing, creating, supporting or participating in a terrorist group and this was extended in 2008 to include offences of public provocation to commit a terrorist offence, recruitment, and training for terrorism (including via the internet). These offences have been criticised for the threat they pose to fundamental legal principles as well as the preventative or pre-emptive direction in which they take the criminal law (Bribosia and Weyembergh, 2002; Murphy, 2012a). Galli (2015, 2016) in particular has argued that they have been implemented in Member States in too vague a fashion, going beyond the limits of what criminal law normally proscribes. Indeed, such was the concern of the European Parliament about the 2008 amendments that it sought to introduce human rights safeguards into the legislation, amendments which were rejected by the Council, save for a declaratory (and arguably superfluous) statement regarding the general requirement to respect fundamental rights (European Parliament, 2008). It is worth noting that all of these offences are subject to enhanced sentencing as the Decision also provided for minimum maximum sentences (15 years for directing and eight for participatory or preparatory acts).

This is the case even if group offences are not applicable to an individual given the requirement for Member States to enact "effective, proportionate and dissuasive" criminal penalties for all offences linked to terrorism (Murphy, 2012).

In Europe, moreover, the problems associated with these associative and preparatory offences are compounded by the EU definition of terrorism itself. This definition is also expansive, defining terrorist acts as those committed with the aim of: "seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" (Article 1(1)). The list of offences goes beyond violence to include serious property damage "likely to result in major economic loss" (Article 1(1)(d)), a move which has been criticised, particularly when interpreted in the context of the broadly drafted "unduly compelling" a government (Douglas-Scott, 2004). While drafted more tightly than the UK provisions, it does appear broader than the definitions adopted by most of the UN conventions on terrorism and indeed the US Patriot Act (Zedner, 2013; Roach, 2011, 2013).

The European Arrest Warrant (EAW) – "the jewel in the crown of the EU's response to the terrorist attacks" (Douglas Scott, 2004: 223) – probably represents one of the most prominent yet possibly also the most controversial of the EU counterterrorism measures (Van Sliedregt, 2010). While proposals for the EAW predated the events of 9/11, negotiations between Member States on this sensitive area were so protracted that it really only became "politically palatable" (Murphy, 2012b: np) in the period after the attacks. Indeed, while the proposal had already been under preparation by officials for a period of two years, national views on the most basic features of the instrument were "very, very far apart" (Kaunert, 2007: 396) until the events of 9/11. The measure, adopted in a Framework Decision of 13 June 2002, revolutionised laws relating to extradition in the EU, effectively transforming what was once a detailed judicial procedure with strict legal requirements such as the dual criminality rule into an administrative "box ticking exercise" (MacGuill, 2012). The procedure is now a summary one whereby the merits of the request are taken on trust and the receiving Member State is obliged to execute an EAW unless one of the very limited grounds of objection is applicable. The considerable efficiencies gained by the measure (particularly the reduction in delays) have been noted by the European Commission (2011), something which, given that justice delayed is often justice denied, may well work in ease of requested persons. Yet the benefits in terms of expeditious hearings must also be considered against strong concerns voiced

about disproportionality, violations of procedural rights,[1] poor detention conditions and the imprisonment of innocent persons (Hammerberg, 2011; European Parliament, 2014). While some of these issues have been, somewhat belatedly, addressed by the European Court of Justice in recent years,[2] leading Peers (2016) to suggest a shift from "poacher to gamekeeper" of human rights in the EAW context, as he goes on to observe, there remains a considerable way to go before an appropriate balance is struck between effective prosecutions and human rights concerns in this area.

In relation to the current argument concerning the dialectic between security and human rights, two observations can be made. First, as with the FDCT discussed above, it is surprising given the ostensible respect for human rights principles proclaimed in various EU legal instruments that the prospect of serious breaches of human rights was not expressly stated as a ground on which extradition could be refused, an omission which has led to highly variable protection of rights across Member States (Magyar, 2012; Anagnostopoulos, 2014). Another significant concern is with net-widening or "function creep" (Argomaniz *et al,* 2015) which was evident from the legislation's inception: while it was presented to Member States and to the public as a key counterterrorist measure it included within its scope a long list of (32) offences, many of which, such as road traffic offences, are not even offences of specific intent. Unsurprisingly, this has resulted in the majority of requests being issued for ordinary rather than terrorist offences as well as the systematic use of the EAW procedure for minor offences (European Parliament, 2014). This is unfortunate given the severely damaging effect which the disproportionate use of the EAW can have on individuals sought by requesting states; not only may they may be taken away from their homes, families and employment for a lengthy period, perhaps for years, but they will in all likelihood be denied bail by virtue of very fact of being a resident of another country (Fennelly, 2007).

It should not be forgotten that the EU has also played a role in the implementation of UN Security Council Resolutions. EC Regulation 2580/2001 implemented UNSC Resolution 1373 (2001) and also instituted the EU's own autonomous counterterrorist restrictive measures regime (Cameron, 2003; Hoffmann, 2008).

1. See, for example, *Melloni v. Ministerio Fiscal* Case C-399/11 on trials *in asbentia* where, as Peers (2016: np) writes, 'the ECJ placed a ceiling on the application of national human rights protection to resist execution of an EAW' (Peers, 2016).
2. See, for example, the judgment in *Aranyosi and Caldaruru*, Joined Cases C404/15 and C659/15 PPU, requiring state authorities, when executing EAWs, to consider concerns about prison overcrowding in those countries.

Initially, the EU adopted a highly secretive and legally complex approach to the blacklisting process which, alarmingly, appeared to preclude judicial review (Amnesty International, 2005). This approach, described by Murphy (2012) as "counter-law" or "law against law", was subsequently amended in response to a series of judgments from the European Court of Justice, requiring procedural amendments to ensure both access to effective judicial review and the provisions of reasons for a suspect's initial listing (Guild, 2008; Lang, 2011). The most recent Directive from the EU has also incorporated the measures contained in Resolution 2178 above in relation to foreign terrorist fighters, with largely negative consequences for human rights standards in European countries (European Council, 2017). In January 2017, for example, Amnesty International, in a report focusing on Europe, expressed its concern that counterterrorism measures adopted in the aftermath of UNSC Resolution 2178 "have been steadily dismantling [the European human rights system], putting hard won rights at risk" (Amnesty International, 2017: 7), citing concerns about abuse of the definition of terrorism, the use of secret evidence and the criminalisation of various forms of expression.

4. Conclusion: rights, criminology and the siren call of security

As observed by Roach (2015: 2) it is impossible to understand counterterrorism law without understanding the demands supranational laws and institutions place on states. These demands have clearly intensified since the tragic events of 9/11, which not only served to underline the urgency of effective cooperation in this field, but have perhaps also presented a "window of opportunity" for regional and international bodies to assert their authority in the justice field (EU) and/or expand their law-making powers (UN). As illustrated by the discussion above, these laws and policies have largely had negative implications for fundamental human rights with strong drives towards pre-emptive action (blacklisting) and the proliferation of pre-cursor crimes (e.g., financing, travel, support). Rather than a "shield" against the expansion of the penal state, therefore, this legislation better fits with the concept of supranational and international bodies as a "sword" (Dumortier *et al*, 2012), advancing the reach of the criminal law, particularly for those protestors and opposition groups who may be caught up in the ambiguities of the broad definition of terrorism.

The above observations raise two important points with relevance to criminology. The first concerns accountability and law-making in the international sphere. If Powell (2007) is correct in her contention that a "culture of authority" has replaced the "culture of justification" more commonly associated with

international human rights law, the question may be posed as to how appropriate limits may be placed on actions taken by executive bodies such as the UN Security Council. In a European context institutional dynamics have assumed a new relevance since the entry into force of the Lisbon Treaty in 2009 and the increased capacity of the Parliament in decision-making in sensitive areas such as counterterrorism. In this context, there may well be greater opportunities for the European Parliament to "de-securitise", particularly given its previous criticisms of legislative overreaching in the 2008 Framework Decision and its recent report calling for EAW reform (European Parliament, 2014). Questions regarding legitimacy and accountability apply with even more force to the more indirect means of enforcing UN Security Council Resolutions adopted by intergovernmental institutions such as the Financial Action Task Force. The strong pressure applied by this body to countries such as Brazil to enact counterterrorism laws illustrates the synergy between counterterrorism laws and the "global good governance agenda" (Hayes, 2012: 9). As argued in a recent report published by the Transnational Institute and Statewatch, a lack of democratic control, oversight and accountability of the FATF has allowed for a global proliferation of laws that circumvent concerns about human rights, proportionality and effectiveness. Focussing specifically on the consequences of FATF's "Special Recommendation VIII" on countering the threat of terrorist financing said to be posed by non-profit organisations (NPOs), they argue that "the rewards for FATF compliance are being seen as a safe place to do business; the sanctions for non-cooperation are designation as a 'non-cooperating territory' and international finance capital steering clear" (Hayes, 2012: 9). More broadly, the role of the FATF points up the complexity of the governance field in this area and the difficulty in rendering all of the institutional actors involved democratically transparent and legitimate. This is all the more so when there is little public or media scrutiny of their activities. As Bowling and Sheptycki (2012: 1) have remarked in their recent study of international policing bodies more broadly, discussions around these global shifts in governance have largely taken place "behind the closed doors of international bureaucracies".

The second point concerns the prioritisation of security concerns over core human rights values in the decade or so since the attacks of 9/11. While both the EU and the UN may strongly endorse human rights values and standards in their respective charters and recommendations, these are less in evidence in the counterterrorism sphere. The failure of the European Council to include formal safeguards protecting fundamental rights in the 2008 amendments to the Framework Decision on Counter-terrorism, even in the face of objections from the European Parliament (2008), is a case in point (see further Hamilton, 2018).

Similarly revealing is the absence of any reference to human rights in the Framework Document on the EAW and the recent Security Council Resolution (2178) on foreign terrorist fighters. With human rights emissaries such as the Special Rapporteur on counterterrorism and human rights perenially part of the rearguard action in the security field, progress is delayed, incremental and, oftentimes, overtaken by events (witness Martin Scheinin's (2014) disappointment at Resolution 2178).

The failure of human rights to act as an effective bulwark against excessive securitisation recalls earlier work by Zedner (2007) and others (Krasmann, 2012) regarding the limits of the human rights idiom as a means of resisting the siren call of "security" and the emerging paradigm of preventive justice. One of the most substantial of these criticisms is the concern that the discourse on human rights "presupposes what has yet to arise, namely a common concern about governmental encroachment in the name of security and a willingness of all parties to join in that discourse" (Krasmann, 2012: 381-2). On the above analysis this appears highly plausible, even in relation to international organisations from which the international protection of human rights originated and which still advance their protection as one of their fundamental goals. From a criminological perspective, one potential way forward from the seemingly intractable problem of securitisation and its relation to human rights regimes is perhaps to acknowledge a role for critically oriented criminological inquiries such as governmental criminology in the analysis of *how* international bodies work against recognition of rights and human rights violations in this area. Specifically, this could involve the application of a Foucault-inspired governmentality analytic to identify: the process and context in which departures from human rights standards are made; the "rationalities" and "knowledges" which facilitate them; and the practices and devices ("technologies") that translate political reasoning into programmes of government (Hunt, 2013; Rose *et al*, 2006), with a view to identifying sites for progressive intervention (Lippert, 2016). In addition, examining human rights discourses from this perspective casts a more critical eye on law and rights, including *governance through rights* or the way rights can potentially extend governance even as they claim to emancipate. Discussing the right to privacy, for example, Lippert and Walby (2016) have argued that the embedding of privacy protocols in surveillance technologies actually provides the conditions in which authoritarian practices can occur and expand. Examining counterterrorism law and rights via Foucault therefore opens up a debate about "the limits, possibilities and in-built constraints of rights as a modality of politics" (Golder, 2013: 8) which is important because of the paradoxical mobilisation of human rights discourses in lockstep with security discourses (Hamilton, 2018; Snacken and Dumortier, 2012).

Within criminology, the governmentality analytic has played an important role in understanding and conceptualising important features of the "punitive turn" and the growing centrality of "law and order" as a political and public concern (Lippert and Stenson, 2010). In the current context, therefore, the unique province of governmental criminology is its ability to reconcile policies aimed at 21st-century "super-terrorism" (Lazarus and Goold, 2007) with the longer term pursuit of security of a more anodyne kind. If law since 9/11 appears highly receptive to security concerns, it is the "logic of populist reason" (Laclau, 2005) or, in Garland's (2001) words, "culture of control" around the crime problem more generally that has created the conditions in which such appeals to security are so successfully made. It is therefore only by examining discourses on counterterrorism through the lens of governmental *criminology* (Garland, 1997, 2001) that affinities (and differences) between contemporary security discourse and previous discourse on the "punitive turn" (Hamilton, 2014a, b; Pratt *et al*, 2005) can be better illuminated. Indeed, it is perhaps only in this more sociologically informed analysis that the beginnings of a process of social contestation of securitisation and its associated effects may be found (Hamilton and Berlusconi, 2018).

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